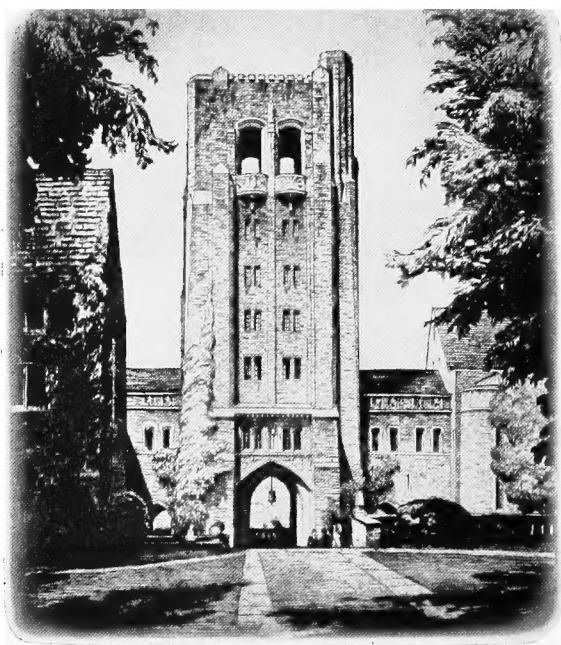


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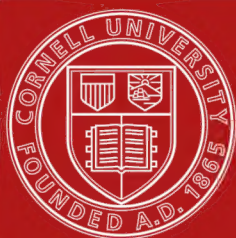
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THE  
ENCYCLOPÆDIA  
OF  
EVIDENCE .

EDITED BY  
EDGAR W. CAMP

VOL. XIV

LOS ANGELES, CAL.  
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# WASTE.

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### CROSS-REFERENCES:

Damages;  
Executors and Administrators;  
Guardian and Ward;  
Landlord and Tenant;  
Trespass;  
Value.

## I. DEFINITION.

Waste may be defined as the doing or permitting to be done by the holder of a particular estate of those acts which cause lasting damage to the freeholder or inheritance, or the neglect or failure to do those things required to be done to prevent lasting damage.<sup>1</sup>

1. **Waste Defined.**—*Alabama*.—McDaniel *v.* Callan, 75 Ala. 327; Alexander *v.* Fisher, 7 Ala. 514.

*Indiana*.—Brugh *v.* Denman, 38 Ind. App. 486, 78 N. E. 349.

*Missouri*.—Childs *v.* Kansas City, etc. R. Co., 17 S. W. 954; Proffitt *v.* Henderson, 29 Mo. 325.

*Nevada*.—Price *v.* Ward, 25 Nev. 203, 58 Pac. 849, 46 L. R. A. 459.

*New York*.—Beekman *v.* Van Dolsen, 63 Hun 487, 18 N. Y. Supp. 376; Hamilton *v.* Austin, 36 Hun 138; McGregor *v.* Brown, 10 N. Y. 114.

*North Carolina*.—Sherrill *v.* Connor, 107 N. C. 630, 12 S. E. 588; Smith *v.* Sharpe, 44 N. C. 91, 57 Am. Dec. 574; King *v.* Miller, 99 N. C. 583, 6 S. E. 660.

## II. PRESUMPTIONS AND BURDEN OF PROOF.

When a tenant for life or for years is charged with waste, the presumptions are in his favor until the contrary appears.<sup>2</sup> It is incumbent on the remainderman to affirmatively show such facts as will sustain the charge.<sup>3</sup> The plaintiff in an action of this character must establish to the satisfaction of the jury by a preponderance of the evidence not only that the life tenant committed the acts complained of,<sup>4</sup> but that such acts have been injurious to the inheritance.<sup>5</sup>

The Burden of Proving an affirmative defense in an action of waste is upon the defendant.<sup>6</sup>

## III. ADMISSIBILITY OF EVIDENCE.

### 1. In General. — The general rules as to competency and rele-

*Oregon.* — *Davenport v. Magoon*, 13 Or. 3, 4 Pac. 299.

*Pennsylvania.* — *Woodman v. Good*, 6 Watts & S. 169; *McCullough v. Irvine*, 13 Pa. St. 438.

*Rhode Island.* — *Chapman v. Cooney*, 25 R. I. 657, 57 Atl. 928; *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621.

*Utah.* — *Dooly v. Stringham*, 4 Utah 107, 7 Pac. 405.

*Wisconsin.* — *Bandlow v. Thieme*, 53 Wis. 57, 9 N. W. 920; *Melms v. Pabst Brewing Co.*, 104 Wis. 7, 79 N. W. 738, 46 L. R. A. 478.

2. *Glass v. Glass*, 6 Pa. Co. Ct. 408; *Morris v. Knight*, 14 Pa. Super. 324; *In re Lynn's Appeal*, 31 Pa. St. 44, 72 Am. Dec. 721.

3. *In re Lynn's Appeal*, 31 Pa. St. 44, 72 Am. Dec. 721; *Glass v. Glass*, 6 Pa. Co. Ct. 408.

4. *Morris v. Knight*, 14 Pa. Super. 324.

In *Learned v. Ogden*, 80 Miss. 769, 32 So. 278, 92 Am. St. Rep. 621, it was held that in an action for waste in cutting timber it was incumbent on plaintiff to show with reasonable certainty what trees were severed from the soil by defendants. Testimony as to the number of stumps counted did not tend to fix the number of trees cut by the defendant.

5. It is imposing a burden not warranted by law, however, when the trial judge instructs the jury that the plaintiff's evidence must be "clear

and certain" that the life tenant had violated her duty. *Morris v. Knight*, 14 Pa. Super. 324.

6. *Moses Bros. v. Johnson*, 88 Ala. 517, 7 So. 146, 16 Am. St. Rep. 58. See also *Cocke v. Minor*, 25 Gratt. (Va.) 246.

In *Davis v. Clark*, 40 Mo. App. 515, it was held that under a statute providing that if a tenant for life or for years shall commit waste "without special license in writing so to do, he shall be subject to civil action," it is incumbent on defendant to establish such license as a matter of defense.

In *Olsen v. Webb*, 41 Neb. 147, 59 N. W. 520, a landowner sued his tenant for damages for injuries inflicted by her on his property during her occupancy thereof. The tenant answered that whatever injury she had done to the property was by the direction and permission of the landowner. To this the landowner replied by a general denial. The jury was instructed as follows: "The burden of proof is upon the plaintiff to make out his case. He must satisfy you by a preponderance of the evidence that the things complained of were done by the defendant without authority from him and the amount of damage done." *Held*, error; that the defense was an affirmative one, and the burden of proof was on the defendant to prove it.

vancy apply. In the note hereto will be found cases in which it was held that the evidence was incompetent.<sup>7</sup>

**2. Opinion Evidence.** — In an action for waste, the opinions of witnesses that certain acts were not injurious to the inheritance, and therefore not waste, are inadmissible.<sup>8</sup> And likewise opinion evidence is incompetent to prove damages to an inheritance.<sup>9</sup> But a witness may give his opinion as to the value of property upon which waste was alleged to have been committed and as to what would have been the value thereof if it had been kept in good repair and carefully cultivated.<sup>10</sup>

**3. Defensive Evidence.** — Ordinarily, evidence is admissible on defendant's behalf which tends in any manner to repel a charge of waste.<sup>11</sup>

7. *Mayo v. Feaster*, 2 McCord Eq. (S. C.) 137. See *Governor v. Carter*, 25 N. C. 338.

If the owner of a farm sell it in fee, and take back a conveyance for his life, his former practice in the matter of taking wood for fuel is not competent evidence on the question as to whether he has committed waste in cutting wood and timber. His rights depend on his deed and cannot be extended or restrained by showing how he had used the land when he was the owner in fee simple. *Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705.

In an action by an owner of a fee in a farm, against the lessee of a tenant for life for waste, a judgment in a former action for waste upon the same premises, between the same parties, but not for the acts alleged in the action at bar, was offered in evidence. The question at issue was whether the acts complained of in the action at bar was waste. *Held*, that the judgment was inadmissible. *Rutherford v. Aiken*, 2 Thomp. & C. (N. Y.) 281.

**Sawmill Books.** — In *Learned v. Ogden*, 80 Miss. 769, 32 So. 278, 92 Am. St. Rep. 621, it was held that in an action for waste in cutting timber the sawmill books of defendant were not admissible in evidence to show defendant's liability.

8. *McGregor v. Brown*, 10 N. Y. 114.

9. *Van Deusen v. Young*, 29 N. Y. 9.

10. See *Harder v. Harder*, 26 Barb. (N. Y.) 409.

In *Ferguson v. Stafford*, 33 Ind. 162, which was an action for waste against one holding under a will till the youngest of the plaintiffs should become of age, a witness testified that he knew the premises, a farm, its improvements and condition, when the defendant took possession, and also the condition at the commencement of this suit, and described its condition at each of these periods. *Held*, that there was no error in permitting said witness, over the defendant's objection, to give his opinion as to the value of the farm at the time this action was commenced, and also as to what it would then have been worth if it had been kept in ordinarily good repair and cultivated in a husbandlike manner, or in permitting him to give his opinion as to the cost, in detail, of putting the farm in good condition and repair.

11. In an action against a life tenant by remaindermen for waste in cutting timber, evidence is properly admissible to show the character of the trees cut and sold and that they were in a dying condition. *Morris v. Knight*, 14 Pa. Super. 324.

In an action of waste, it is not error to permit the defendant, a life tenant, to prove that the usage in that part of the country where the premises were situate, was to treat and manage lands of the character of that in controversy in the manner in which defendant had treated the *locus in quo*. Nor was it error to permit a farmer of the vicinity to testify that, in his opinion, the de-

#### IV. WEIGHT AND SUFFICIENCY OF EVIDENCE.

**1. In General.** — In actions to recover damages for waste, actual damage to the property in question must be shown,<sup>12</sup> and in suits to enjoin waste plaintiff must introduce satisfactory evidence of damage<sup>13</sup> or of impending danger.<sup>14</sup>

**2. Irreparable Injury.** — A. WHERE PRIVITY OF TITLE EXISTS. Where there is a privity of title between litigants, such as that of tenants for life or for years, and reversioner, irreparable injury need not be shown to authorize an injunction restraining waste.<sup>15</sup>

B. WHERE PRIVITY OF TITLE DOES NOT EXIST. — Where the parties to a suit for waste are strangers or claim adversely, the rule is the same as in actions of trespass. Irreparable injury must be shown before an injunction will be granted.<sup>16</sup>

defendant had done no more in the nature of waste than was necessary to make a living out of the land. Such evidence was competent to repel a charge of reckless and wanton misuse of the premises. *King v. Miller*, 99 N. C. 583, 6 S. E. 660.

In an action for waste, plaintiff alleging that defendant maliciously cut certain timber, and seeking a forfeiture and eviction, it was held that the defendant was entitled to testify that he cut the wood in good faith, believing that he had a right to do so. *Rutherford v. Aiken*, 2 *Thomp. & C.* (N. Y.) 281.

**Parol Evidence Not Admissible Where Written Evidence Is Required by Law.** — In *McGregor v. Brown*, 10 N. Y. 114, which was an action by a landlord against a tenant for waste in cutting trees, it was held that evidence of a parol consent by the landlord to the cutting of the trees, on the condition that the tenant would clear and seed down the land where the trees were cut, was inadmissible; such consent being a mere license, which is required by statute to be in writing to be valid.

**12.** *Smith v. Frio Co.* (Tex. Civ. App.), 50 S. W. 958.

The spread of noxious weeds from natural causes or by the action of cattle depasturing or eating hay or straw coming from fields where the weeds were, and the failure to stop the growth thereof is no evidence of waste, but only of ill husbandry. *Patterson v. Central Canada L. etc. Co.*, 29 Ont. (Can.) 134.

**Personal Knowledge of Plaintiff Necessary.** — In all cases of waste, it must appear clearly that the party has personal knowledge of the material facts charged, or he must produce supplemental proof. *Perkins v. Collins*, 3 N. J. Eq. 482.

**13.** *Livingston v. Reynolds*, 26 *Wend.* (N. Y.) 115; *Doherty v. Allman*, 3 App. Cas. 709, 39 L. T. 129, 26 *W. R.* 513.

**Single Instance of Waste Sufficient.** — In a bill for waste, proof of a single clear instance of waste committed intentionally is sufficient to entitle the complainant to a continuance of an injunction and to a decree for an accounting. *Sarles v. Sarles*, 3 *Sandf. Ch.* (N. Y.) 601.

**14.** *Livingston v. Reynolds*, 26 *Wend.* (N. Y.) 115. See also *Rodgers v. Rodgers*, 11 *Barb.* (N. Y.) 595.

A mortgagor in possession may be enjoined from cutting timber on the land, in the absence of an express stipulation in the mortgage, when the evidence shows that the value of the security is thereby impaired, or endangered; and the same principle applies as between vendor and purchaser, when the former has retained the legal title, and has no security but the land. *Moses Bros. v. Johnson*, 88 Ala. 517, 7 So. 146, 16 Am. *St. Rep.* 58.

**15.** *George's Creek C. & I. Co. v. Detmold*, 1 *Md. Ch.* 371.

**16.** *Poindexter v. Henderson*, *Walk.* (Miss.) 176, 12 Am. *Dec.* 550; *Baughner v. Crane*, 27 *Md.* 36;

Thompson v. Williams, 54 N. C. 176; Spear v. Cutter, 5 Barb. (N. Y.) 486. See also Dunn v. Bryan, Ir. Rep. 7 Eq. 143; Cutting v. Carter, 4 Hen. & M. (Va.) 424; Van Wyck v. Alliger, 6 Barb. (N. Y.) 507; Atkins v. Chilson, 7 Met. (Mass.) 398; Chapel v. Hull, 60 Mich. 167, 26 N. W. 874.

In Green v. Keen, 4 Md. 98, it was held that to warrant an injunction for committing waste upon lands by

cutting timber and other trees it must appear from the evidence that the trees have a peculiar value, or are of great importance to the estate; as, for example, that they are fruit or ornamental trees, or, if timber and wood, that the enjoyment of the estate will be so affected by their destruction as to make the alleged damage irreparable.

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## CROSS-REFERENCES:

Abandonment;  
Adverse Possession;  
Expert and Opinion Evidence;  
Judicial Notice.

## I. OWNERSHIP OF SOIL.

1. **Presumptions.** — A. SEASHORE AND TIDAL WATERS. — a. *In General.* — Where land borders upon the seashore or other tidal water, there is a presumption that the owner of the uplands owns only to high-water mark, and that the title to the land between low and high-water mark is in the state, and the burden of proof is upon him who claims beyond it.<sup>1</sup>

1. *England.* — *LeStrange v. Rowe*, 4 Fost. & F. 1048; *Pearce v. Bunting*, (1896) 2 Q. B. 360; *Attorney-General v. Richards*, 2 Anst. 603, 3 R. R. 63.

*Canada.* — *Attorney-General v. Perry*, 15 U. C. C. P. 329.

*United States.* — *Case v. Toftus*, 39 Fed. 730, 5 L. R. A. 684; *McCready v. Virginia*, 94 U. S. 391; *Pollard's Lessee v. Hagan*, 3 How. 212, 230.

*Alabama.* — *Boulo v. New Orleans*, etc. R. Co., 55 Ala. 480.

*California.* — *Long Beach Land & Water Co. v. Richardson*, 70 Cal. 206, 11 Pac. 295; *People v. Kerber*, 152 Cal. 731, 93 Pac. 878.

*Connecticut.* — *Hollister v. Union Co.*, 9 Conn. 436, 25 Am. Dec. 36.

*Maryland.* — *Hess v. Muir*, 65 Md. 586, 607, 5 Atl. 540, 6 Atl. 673.

*Oregon.* — *Hinman v. Warren*, 6 Or. 409.

*Texas.* — *Rosborough v. Picton*, 12 Tex. Civ. App. 113, 34 S. W. 791, 43 S. W. 1033.

*Washington.* — *Harbor Line Comrs. v. State*, 2 Wash. 530, 27 Pac. 550, 12 L. R. A. 632. And see 1 Farnham, *Waters and Water Rights*, p. 207.

"**Navigable Rivers or Arms of the Sea** belong to the Crown, and not,

like private rivers to the landowners on each side; and therefore the presumption lies to the contrary way in the one case, from what it does in the other. Here, indeed, it lies *prima facie* on the side of the King and the public." *Carter v. Murcat*, 4 Burr. (Eng.) 2162.

"It was shown that Little Bay was tidewater. Therefore the title and domain of it is presumed to rest in the state of Alabama in the absence of proof to the contrary." *Cain v. Simonson* (Ala.), 39 So. 571.

**Rule Stated.** — "Grants of land, bounded by the sea or by navigable rivers, where the tide ebbs and flows, extend to the high-water mark, that is, to the margin of the periodical flow of the tide, unaffected by extraordinary causes, and the shores below high-water mark belong to the state in which they are situated. But grants of land bounded on rivers above tide-water, or where the tide does not ebb and flow, carry the grantee to the middle of the river, unless there are expressions in the terms of the grant or something in the terms taken in connection with the situation and condition of the land granted, that clearly indicate an intention to stop at the edge or margin of the river. There must be a

b. *Rebuttal*. — This presumption has merely created a rule of evidence,<sup>2</sup> and it may be rebutted by any evidence which shows that the shore has been actually granted by the sovereign power.<sup>3</sup>

B. STREAMS. — a. *Streams Navigable in Fact*. — (1.) General Rule. At common law and in most of the courts of the United States the

reservation or restriction, express or implied, which controls the operation of the general presumption, and makes the particular grant an exception." Howard v. Ingersoll, 13 How. (U. S.) 381, 421; City of Mobile v. Hallett, 16 Pet. (U. S.) 261; United States v. Pacheco, 2 Wall. (U. S.) 587.

No Presumption of a grant by the state to the land under tidal waters, since this would be contrary to the best interests of the state. State v. Pacific Guano Co., 22 S. C. 50, 84.

By Force of the Massachusetts Colonial Ordinance of 1641, it is held that "the owner of upland adjoining tide-water *prima facie* owns to low-water mark, and does so in fact, unless the presumption is rebutted by proof to the contrary." Whitmore v. Brown, 100 Me. 410, 61 Atl. 985; Proctor v. Maine Cent. R. Co., 96 Me. 453, 52 Atl. 933; Butler v. Attorney-General, 195 Mass. 79, 80 N. E. 688, 8 L. R. A. (N. S.) 1047; Watuppa R. Co. v. Fall River, 154 Mass. 305, 28 N. E. 257, 13 L. R. A. 255; Snow v. Mt. Desert Isl. Real Est. Co., 84 Me. 14, 24 Atl. 429, 17 L. R. A. 280; Doane v. Willcutt, 5 Gray (Mass.) 328, 66 Am. Dec. 369; Barrows v. McDermott, 73 Me. 441. But this rule does not apply in New Hampshire. Concord Mfg. Co. v. Robertson, 66 N. H. 1, 25, 25 Atl. 718, 18 L. R. A. 679.

"This ordinance was annulled with the charter by the authority of which it was made; but from that time to the present a usage has prevailed which now has force as our common law, that the owner of lands bounded on the sea or salt water shall hold to low-water mark, so that he does not hold more than one hundred rods below high-water mark." Storer v. Freeman, 6 Mass. 435, 4 Am. Dec. 155.

No Subsequent Recognition or confirmation of a grant of land under navigable waters, made by a minis-

terial officer, will be presumed. Rosborough v. Picton, 12 Tex. Civ. App. 113, 34 S. W. 791, 43 S. W. 1033.

2. "The Only Case which squarely adopted the doctrine in England has never been regarded as authority, and the controversy then has resulted merely in a rule of evidence. As said by Moore, the true presumption with regard to the ownership of the foreshore, is and should be, as it clearly was before the time of Queen Elizabeth in England and down to 1849 in Scotland, that *prima facie*, the manors and estates of the subjects extend to low-water mark and include the foreshore." Farnham, Waters and Watercourses, p. 210.

3. "Lord Hale says (Hale De Juris Maris, ch. 7) that the evidence to prove that the shore is parcel of a manor are commonly these: Constant and usual fetching gravel and seaweed and sea sand between the high and low-water mark, and licensing others so to do; inclosing and embanking against the sea, and enjoyment of what is so inned; enjoyment of wrecks happening upon the sand; presentment and punishment of purprestures there in the court of a manor, and such like. And as it may be parcel of a manor so it may be parcel of a vill or parish, and the evidence for that will be usual perambulations, common reputation, known metes and divisions, and the like." Gould on Waters, p. 48.

Modern Usage is competent evidence of an ancient grant of the shore. In Beaufort v. Mayor of Swansea, 3 Exch. (Eng.) 413, all of the learned judges agreed in holding that evidence of modern usage and acts of ownership was admissible to explain a royal grant and to show that the seashore was included in the lands of a manor. And see Attorney-General v. Jones, 2 H. & C. 347, 33 L. J. Ex. 249, 6 L. T. N. S. 655; Hastings Corporation v. Ivall, L. R.

riparian owner on a stream is *prima facie* owner of the soil to its center, although the stream is used for purposes of navigation and commerce.<sup>4</sup>

19 Eq. (Eng.) 558, 22 W. R. 724; Mulholland v. Killen, Ir. Rep. 9 Eq. 471; Lord Advocate v. Lord Blantyre, 4 App. Cas. (Eng.) 770.

"Unless, therefore, the usage of forty years ago can be proved to have originated in usurpation, it is evidence whence usage anterior to that time may be presumed, and such a length of modern usage, connected with the ancient usage, affords the strongest exposition of the meaning of the original grant." Chad v. Tilsed, 5 Moore 185, 2 Brod. & B. 403, 23 R. R. 477.

"It is beyond dispute that the Crown is *prima facie* entitled to every part of the foreshore between high and low-water mark, and that a subject can only establish a title to any part of that foreshore, either by proving an express grant thereof from the Crown or by giving evidence from which such a grant, though not capable of being produced, will be presumed." Attorney-General v. Emerson, (1801) App. Cas. 649.

**Acts of Ownership May Be Shown.** Hastings Corporation v. Ivall, L. R. 19 Eq. 558, 22 W. R. 724 (taking of stone from a beach); Chad v. Tilsed, 5 Moore 185, 2 Brod. & B. 403, 23 R. R. 477 (enclosing the shore with an embankment).

**Prescriptive Right to Wreck** is not of itself proof as against the Crown. See Chad v. Tilsed, 5 Moore 185, 197, 2 Brod. & B. 403, 23 R. R. 477; Constable's Case, 5 Co. Rep. (Eng.) 106.

**Taking Shell Fish.**—Long continued use of shore for taking shell fish and gravel will prove title in the owner of the upland. LeStrange v. Rowe, 4 F. & F. (Eng.) 1048.

**Ownership of a Several Fishery** raises a presumption against the crown that owner of the uplands also owns the shore. "It must be taken as now settled that if the right to a several fishery is proved to exist, the owner of the fishery is to be presumed to be also the owner of the soil over

which his fishery extends, unless there is evidence to the contrary. Hindson v. Ashby, (1896) 2 Ch. 1, 10; Holford v. Bailey, 13 Q. B. 426, 18 L. J., 2 B. 109, 13 Jur. 278; Attorney-General v. Emerson, (1891) App. Cas. 649.

**4. England.**—Lord v. Sydney, 12 Moo. P. C. 473, 14 Eng. Reprint 991; Hindson v. Ashby, (1896) 2 Ch. 1.

**United States.**—Grand Rapids & I. R. Co. v. Butter, 159 U. S. 87; Avery v. Fox, 1 Abb. 246, 2 Fed. Cas. No. 674.

**Connecticut.**—Welles v. Bailey, 55 Conn. 292, 10 Atl. 565, 3 Am. St. Rep. 48.

**Delaware.**—Delaney v. Boston, 2 Har. 489.

**Georgia.**—Young v. Harrison, 6 Ga. 130.

**Idaho.**—Johnson v. Johnson, 14 Idaho 561, 95 Pac. 499.

**Illinois.**—Middleton v. Pritchard, 4 Ill. 510, 38 Am. Dec. 112; Brooklyn v. Smith, 104 Ill. 429, 44 Am. Rep. 90; Griffin v. Johnson, 161 Ill. 377, 44 N. E. 206.

**Kentucky.**—Cruikshanks v. Wilmer, 93 Ky. 20, 18 S. W. 1018; Strange v. Spalding, 17 Ky. L. Rep. 305, 29 S. W. 137; Berry v. Snyder, 3 Bush 266, 96 Am. Dec. 219.

**Maine.**—Brown v. Chadbourne, 31 Me. 9, 50 Am. Dec. 641.

**Maryland.**—Browne v. Kennedy, 5 Har. & J. 195, 9 Am. Dec. 503.

**Massachusetts.**—Bardwell v. Ames, 22 Pick. 333; Deerfield v. Arms, 17 Pick. 41, 28 Am. Dec. 276; Hatch v. Dwight, 17 Mass. 289, 9 Am. Dec. 145.

**Michigan.**—Attorney-General v. Ewart B. Co., 34 Mich. 462; Watson v. Peters, 26 Mich. 508; City of Grand Rapids v. Powers, 89 Mich. 94, 50 N. W. 661, 28 Am. St. Rep. 276, 14 L. R. A. 498.

**Mississippi.**—The Magnolia v. Marshall, 39 Miss. 109.

**New Hampshire.**—Connecticut River Lumb. Co. v. Olcott Falls Co., 65 N. H. 290, 21 Atl. 1090, 13 L. R. A. 826.

*New Jersey*.—Cobb v. Davenport, 32 N. J. L. 369.

*New York*.—Child v. Starr, 4 Hill 369; Palmer v. Mulligan, 3 Caines 308, 2 Am. Dec. 270; Buffalo Pipe Line Co. v. New York, etc. R. Co., 10 Abb. N. C. 107; Morgan v. King, 35 N. Y. 454, 91 Am. Dec. 58; Chenango Bridge Co. v. Paige, 83 N. Y. 178, 38 Am. Rep. 407.

*Ohio*.—Gavit v. Chambers, 3 Ohio 496; Day v. Pittsburg, etc. R. Co., 44 Ohio St. 406, 7 N. E. 528.

*South Carolina*.—McCullough v. Wall, 4 Rich. L. 68, 53 Am. Dec. 175.

*Utah*.—Poynter v. Chipman, 8 Utah 442, 32 Pac. 690.

*Wisconsin*.—Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905; Willow River Club v. Wade, 100 Wis. 86, 76 N. W. 273, 42 L. R. A. 305.

**Common Law Rule.**—"They (their Lordships) think that there can be no doubt that by the law of England the owner of the soil on both sides of a running stream, whether it be navigable or not, is *prima facie* at least, owner of the soil which forms the bed of the stream." Caldwell v. McLaren, 9 App. Cas. (D. C.) 392, 404.

"Where a grant of land is made bordering on a river, if a tidal river, the title to the bed is presumed to remain in the Crown, unless otherwise expressed in the grant; whereas if non-tidal, whether navigable or not, the title in the bed *ad medium filum aquae* is presumed *prima facie* to be in the riparian owner." Kee-watin Power Co. v. Town of Kenora, 16 Ont. L. R. 184; Williams v. Pickard, 15 Ont. L. R. 655.

**Weight of the Presumption.**—"In this state (Wisconsin) the owner of the bank of a navigable stream by purchase from the United States, is conclusively presumed to be the owner of the bed of the stream in front of his premises to the middle or thread thereof; and . . . the same presumption arises in favor of the owner of such bank in all cases, however such owner acquires his title; but the presumption in the case of owners not deriving their title directly from the government is not

conclusive." Norcross v. Griffiths, 65 Wis. 599, 608, 27 N. W. 606, 56 Am. Dec. 642.

**Clear Proof** required to overthrow it, after the lapse of thirty years. Norcross v. Griffiths, 65 Wis. 599, 608, 27 N. W. 606, 56 Am. Dec. 642.

**Construction of Grants.**—The question often arises over the construction of a grant or deed, and the rule is followed that a deed is to be construed most strongly against the grantor and the presumption of ownership to the center is then applied with its full force.

*United States*.—Jones v. Soulard, 24 How. 41; Railroad Co. v. Schurmeir, 7 Wall. 272; Forsythe v. Smale, 7 Biss. 201, 9 Fed. Cas. No. 4950.

*Colorado*.—Hanlon v. Hobson, 24 Colo. 284, 51 Pac. 433, 42 L. R. A. 502.

*Illinois*.—Braxon v. Bressler, 64 Ill. 488; Middleton v. Pritchard, 4 Ill. 510, 38 Am. Dec. 112.

*Kentucky*.—Kentucky Lumb. Co. v. Green, 87 Ky. 257, 8 S. W. 439; Runion v. Alley, 19 Ky. L. Rep. 268, 39 S. W. 849.

*Maine*.—Lowell v. Robinson, 16 Me. 357, 33 Am. Dec. 671; Granger v. Avery, 64 Me. 292.

*Michigan*.—Webber v. Pere Marquette Boom Co., 62 Mich. 626, 30 N. W. 469; Goff v. Cogle, 118 Mich. 307, 76 N. W. 489, 42 L. R. A. 161.

*New York*.—Luce v. Carley, 24 Wend. 451, 35 Am. Dec. 637.

*Vermont*.—Fletcher v. Phelps, 28 Vt. 257.

*Wisconsin*.—Chandos v. Mack, 77 Wis. 573, 46 N. W. 803, 20 Am. St. Rep. 139, 10 L. R. A. 207; Jones v. Pettibone, 2 Wis. 307, 319; Wisconsin River Imp. Co. v. Lyons, 30 Wis. 61; Wright v. Day, 33 Wis. 260.

Rule applies to grants by the United States government and when "the government has surveyed its lands along the bank of a river and has sold and conveyed such land by government subdivisions, its patent conveys the title to all islands lying between the meander line and the thread of the river, unless previous to such patent it has surveyed such islands as governmental subdivisions or expressly reserves them when not surveyed." Butter v. Grand Rapids

(2.) **Contrary View.**—In a few states the courts have erroneously<sup>5</sup> made navigability the test of ownership, and in these jurisdictions the title of the riparian owner is presumed to end at high-water mark.<sup>6</sup>

b. *Non-Navigable Streams.*—In all jurisdictions, the title of

& I. R. Co., 85 Mich. 246, 48 N. W. 569, 24 Am. St. Rep. 84.

**Subsequent Circumstances as Affecting the Presumption.**—“There may be facts, whether appearing on the face of the conveyance or not, from which it is justly inferred that it was not the intention of the parties that the general presumption should apply, but, in my opinion, it is not sufficient that circumstances which afterwards occur show it to be very injurious to the grantor that the conveyance should include half of the bed of the river.” Cotton, L. J., in *Micklethwait v. Newlay Bridge Co.*, 33 Ch. Div. 133, 145.

**Rebuttal of Presumption.**—Presumption can be rebutted not only by words in the deed itself, but also by evidence of the circumstances under which the deed was executed. *Duke of Devonshire v. Pattinson*, 20 Q. B. Div. (Eng.) 263.

5. See note in 42 L. R. A. 161, 171 to Goff *v.* Cogle, 118 Mich. 307, 76 N. W. 489.

6. *Alabama.*—*Mobile v. Eslava*, 9 Port. 577, 597, 33 Am. Dec. 325.

*Iowa.*—*McManus v. Carmichael*, 3 Iowa 1; *Renwick v. Davenport*, etc. R. Co., 49 Iowa 664.

*Minnesota.*—*In re Minnetonka Lake Imp.*, 56 Minn. 513, 58 N. W. 295, 45 Am. St. Rep. 494.

*Missouri.*—*Cooley v. Golden*, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300.

*Nebraska.*—*Kinhead v. Turgeon*, 74 Neb. 573, 104 N. W. 1061, 109 N. W. 744, 1 L. R. A. (N. S.) 762.

*North Carolina.*—*Collins v. Benbury*, 25 N. C. (3 Ired.) 277, 38 Am. Dec. 722.

*Pennsylvania.*—*Carson v. Blazer*, 2 Binn. 475, 4 Am. Dec. 463; *Flanagan v. Philadelphia*, 42 Pa. St. 219.

*Tennessee.*—*State v. Muncie Pulp Co.*, 104 S. W. 437, 450.

*West Virginia.*—*Ravenswood v.*

*Flemings*, 22 W. Va. 52, 46 Am. Rep. 485.

“The rule of navigability having been extended to fresh water lakes and streams in this country, the ownership by analogy, follows the rule, so that the states are entitled to assert the same ownership to the beds and shores of navigable fresh water lakes and streams as they may properly assert to the beds and shores of tidal waters.” *M’Gilvra v. Ross*, 161 Fed. 398.

**In Western States.**—The constitutions or statutes of some of the western states expressly declared the ownership of all navigable waters to be in the state. See the following cases:

*United States.*—*M’Gilvra v. Ross*, 161 Fed. 398.

*Arkansas.*—*St. Louis, etc. R. Co. v. Ramsey*, 53 Ark. 314, 13 S. W. 931, 22 Am. St. Rep. 195, 8 L. R. A. 559.

*California.*—*People v. Gold Run D. & M. Co.*, 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80; *Packer v. Bird*, 71 Cal. 134, 11 Pac. 873.

*Kansas.*—*Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330.

*Oregon.*—*Salem Imp. Co. v. McCourt*, 26 Or. 93, 41 Pac. 1105.

*Washington.*—*Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632; *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 95 Pac. 278.

**In New York** this rule is applied to the Mohawk river. *People v. Canal Appraisers*, 33 N. Y. 461.

**Meandered Stream.**—Where a stream has been meandered, patents from the United States are presumed to convey title only to the bank. *Dashiel v. Harshman*, 113 Iowa 283, 85 N. W. 85; *Brown v. Cunningham*, 82 Iowa 512, 48 N. W. 1042, 12 L. R. A. 583.

**National Boundary.**—Where a river forms a national boundary line between the state and a foreign

riparian owners upon non-navigable streams is presumed to extend to the center or thread of the stream.<sup>7</sup>

## II. NAVIGABILITY.

**1. Judicial Notice.**—A. IN GENERAL.—A court will ordinarily judicially notice the character, with respect to navigability<sup>8</sup> or non-

country, it will be presumed that the grant to the riparian owner conveyed only to the river's edge. *Matter of State Reservation at Niagara*, 16 Abb. N. C. (N. Y.) 159. And see the case of *Hensler v. Hartman* (reported in the note at p. 176); *Kingman v. Sparrow*, 12 Barb. (N. Y.) 201.

**7.** *United States*.—*Tyler v. Wilkinson*, 4 Mason C. C. 397, 24 Fed. Cas. No. 14,312; *Bowman's Devises v. Wathen*, 2 McLean 376, 3 Fed. Cas. No. 1,740.

*Alabama*.—*Sullivan v. Spotswood*, 82 Ala. 163, 2 So. 716.

*California*.—*Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674.

*Indiana*.—*Ross v. Faust*, 54 Ind. 471, 23 Am. Rep. 655.

*Michigan*.—*Hartz v. Detroit*, etc. R. Co., 153 Mich. 337, 116 N. W. 1084.

*North Carolina*.—*Hodges v. Williams*, 95 N. C. 331, 59 Am. Rep. 242.

*Pennsylvania*.—*Poor v. McClure*, 77 Pa. St. 214.

*Vermont*.—*Adams v. Barney*, 25 Vt. 225.

*Washington*.—*Griffith v. Holman*, 23 Wash. 347, 63 Pac. 239, 83 Am. St. Rep. 821, 54 L. R. A. 178. And see *Farnham, Waters & Water Rights*, § 57; *Gould on Waters*, 3d ed. § 46.

**8.** *United States*.—*King v. American Transp. Co.*, 14 Fed. Cas. No. 7,787; *Lands v. Cargo of 227 Tons of Coal*, 4 Fed. 478.

*Arkansas*.—*Bittle v. Stuart*, 34 Ark. 224.

*California*.—*People v. Truckee Lumb. Co.*, 116 Cal. 397, 48 Pac. 374, 58 Am. St. Rep. 183, 39 L. R. A. 581; *People v. Gold Run D. & M. Co.*, 66 Cal. 138, 146, 4 Pac. 1152, 56 Am. Rep. 80.

*Indiana*.—*Neaderhouser v. State*, 28 Ind. 257.

*Kansas*.—*Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330.

*Kentucky*.—*Warner v. Ford Lumb. & Mfg. Co.*, 123 Ky. 103, 93 S. W. 650, 12 L. R. A. (N. S.) 667 (Kentucky river); *Terrell v. City of Paducah*, 122 Ky. 331, 92 S. W. 310, 5 L. R. A. (N. S.) 289 (Tennessee river).

*Missouri*.—*McKinney v. Northcutt*, 114 Mo. App. 146, 89 S. W. 351.

*New York*.—*Browne v. Scofield*, 8 Barb. 239; *Matter of State Reservation at Niagara*, 16 Abb. N. C. 159, note.

*South Carolina*.—*Lockwood v. Bridge Co.*, 60 S. C. 492, 38 S. E. 112, 629; *Jones v. Seaboard Air-Line R. Co.*, 67 S. C. 181, 45 S. E. 188.

*Vermont*.—*Trout & Salmon Club v. Mather*, 68 Vt. 338, 35 Atl. 323, 33 L. R. A. 569.

*Wisconsin*.—*State v. Norcross*, 132 Wis. 534, 112 N. W. 40; *State v. Carpenter*, 68 Wis. 165, 31 N. W. 730, 60 Am. Dec. 848. And see "JUDICIAL NOTICE," Vol. VII, p. 913.

"That the Ohio river is navigable is a historical fact, which all courts may recognize." *State of Pennsylvania v. Wheeling*, etc. Bridge Co., 13 How. (U. S.) 518, 561.

"The courts would certainly take judicial notice of the navigability of the Mississippi, Missouri, Gasconade and Osage, and no doubt other of our principal rivers, inasmuch as the character of these streams is such that their navigable capacity for such purposes is a matter of common knowledge." *McKinney v. Northcutt*, 114 Mo. App. 146, 89 S. W. 351.

"That it (the Androscoggin river) is, in the present condition of the country, at some times and to some extent, naturally capable of floating logs and reasonably being substantially useful to the public for that kind of navigation, is a fact of history and physical geography, of

navigability<sup>9</sup> of natural streams, ponds, channels, or other bodies of water.<sup>10</sup>

**B. LIMITATIONS.** — But when the question arises as to small bodies of water the location and size of which are not generally known, the courts are justified in refusing to take judicial knowledge of the navigability of the water.<sup>11</sup> So also they will refuse

which it is our duty to take judicial notice." *Thompson v. Androscoggin Co.*, 54 N. H. 545. And see *Talbot v. Hudson*, 16 Gray (Mass.) 417.

**Navigable Waters of the United States.** — The supreme court of Massachusetts in *Com. v. King*, 150 Mass. 221, 22 N. E. 905, 5 L. R. A. 536, took judicial notice of the fact that "the Connecticut river above the dam at Holyoke does not, either by itself or by uniting with other waters, constitute a public highway over which commerce may be carried on with other states or with foreign countries," and was not within the maritime jurisdiction of the United States. Navigability in the sense of being a highway for interstate commerce and subject to the exclusive control of Congress was judicially noticed in *Little Rock, etc. R. Co. v. Brooks*, 39 Ark. 403, 43 Am. Rep. 227.

A state court will judicially notice that a river (the Mississippi) is navigable, and subject to the exclusive regulation of Congress. *Hodgman v. St. Paul, etc. R. Co.*, 23 Minn. 153, 160.

**Increased Capacity for Navigation.** "We take notice of the fact that the capacity of many small navigable streams in this state to float logs and lumber into the larger streams below and to market, has been greatly increased by the erection of dams across them to hold or discharge the water as circumstances may require." *Tewksbury v. Schulenberg*, 41 Wis. 584, 593.

**Decreased Navigability.** — "We can take judicial knowledge, we think, that the natural watercourses in this state have all decreased in volume, and many of them have been dried up, by the cultivation and clearing of the country." *Hilliker v. Coleman*, 73 Mich. 170, 41 N. W. 219; *Harrison v. Fite*, 148 Fed. 781, 78 C. C. A. 447.

**Passaic River** was judicially known

as a tidal stream. *McCarter v. Hudson Co. Water Co.*, 70 N. J. Eq. 525, 61 Atl. 710.

**Ebb and Flow of the Tide** in Sabine Pass is judicially noticed. *Crary v. Port Arthur Dock Co.*, 92 Tex. 275, 283, 47 S. W. 967.

**River Mersey in England** is known to be "wide and filled with salt water, as the tide ebbs and flows to a very great height." *McIntosh v. Gastenfofer*, 2 Rob. (La.) 403; *Whitney & Co. v. Gauche*, 11 La. Ann. 432.

**Part of the Geography of the State.** — *Gulf, etc. R. Co. v. State*, 72 Tex. 404, 10 S. W. 81, 13 Am. St. Rep. 815, 1 L. R. A. 849. And see *Hays v. State*, 8 Ind. 425.

**Geographical Situation of the falls of the Ohio** judicially noticed. *Cash v. Auditor*, 7 Ind. 227.

9. *Clark v. Cambridge & A. Irr. Co.*, 45 Neb. 798, 64 N. W. 239; *Ross v. Faust*, 54 Ind. 471, 23 Am. Rep. 655.

**Gowannus Canal** was not judicially known to be a public highway. *New York, etc. Co. v. Brooklyn*, 71 N. Y. 580.

**Location of Land** in a navigable lake was judicially noticed. *Wilcox v. Jackson*, 109 Ill. 261.

**Construction of Dams and Bridges** rendering a river non-navigable will be judicially noticed. *State v. Carpenter*, 68 Wis. 105, 31 N. W. 730, 60 Am. Rep. 848.

**To Give Jurisdiction**, under the mill-dam law, the court will not take judicial notice that a stream is not navigable. *Waller v. McConnell*, 19 Wis. 417.

10. *Harrison v. Fite*, 148 Fed. 781, 78 C. C. A. 447.

**Great Lakes** judicially noticed as navigable waters. *State v. Fishing & Shooting Club*, 127 Mich. 580, 87 N. W. 117.

11. *The Montello*, 11 Wall. (U. S.) 411; *Western & H. Inv. Co. v. Farmers' Nat. Bank*, 35 Or. 298, 57



to judicially know at what point a navigable stream ceases to be navigable.<sup>12</sup>

C. NOT CONCLUSIVE. — The effect of judicial notice of the navigability or non-navigability of a stream is merely to establish a *prima facie* case in favor of the party who was bound to establish the fact, and his opponent may dispute the proposition by evidence.<sup>13</sup>

Pac. 912; *People v. Board of Supervisors*, 122 Ill. App. 40.

"The courts cannot take judicial notice of its (Boquet river) character. Its name is not found upon the general maps of the state; it is not found in any general history of the country and its character is in no way defined in any public statute. And it is not of such notoriety as to be known generally to the people of the state; and hence the courts can take no more notice of its character and existence, than of the character, location, and usefulness of the ordinary public highways of the state. In this respect it is unlike the great rivers and lakes of the state, and the mountain ranges, which are matters of general history and public notoriety." *People v. Allen*, 42 N. Y. 378.

"Courts take judicial notice of the navigable character of our important rivers and inland lakes — those that are so within our common knowledge — but there are many of such insignificant capacity and doubtful utility that the question, being one of fact, is to be determined by the evidence produced." *Harrison v. Fite*, 148 Fed. 781, 78 C. C. A. 447.

**Rivers of No Historic Consequence** will not be judicially noticed. *De Camp v. Thompson*, 44 N. Y. Supp. 1014; *Neaderhouser v. State*, 28 Ind. 257; *Buffalo Pipe Line Co. v. New York, etc. R. Co.*, 10 Abb. N. C. (N. Y.) 107.

**Recognition by Legislature.** — The fact that the legislature has regarded a river as navigable and that other courts have also so considered it, will influence a court to take judicial notice. *Matter of State Reservation at Niagara*, 16 Abb. N. C. (N. Y.) 159, note.

12. "It Is Reasonable that the courts take judicial notice that certain rivers are navigable and others not, for these are matters of general knowledge. But it is not so clear

that it can fairly be said, in respect to a river known to be navigable, that it is, or ought to be, a matter of common knowledge at what particular place between its mouth and its source navigability ceases. And so it may well be doubted whether the courts will take judicial notice of that fact. It would seem that such a matter was one requiring evidence and to be determined by proof. That the Rio Grande, speaking generally, is a navigable river is clearly shown by the affidavits. It is also a matter of common knowledge and therefore the courts may take judicial notice of that fact. But how many know how far up the stream navigability extends? Can it be said to be a matter of general knowledge or one that ought to be generally known? If not, it should be determined by evidence." *United States v. Rio Grande Irr. Co.*, 174 U. S. 690, 698.

But in *Olive v. State*, 86 Ala. 88, 5 So. 653, 4 L. R. A. 33, the court took judicial knowledge of the fact that the Sipsey river was above the ebb and flow of the tide.

In *Peyroux v. Howard*, 7 Pet. (U. S.) 324, 342, the court judicially noticed that New Orleans was situated upon the Mississippi at a point where the tide ebbed and flowed.

In *State v. Wabash Paper Co.*, 21 Ind. App. 167, 51 N. E. 949, the court judicially noticed that Wabash and Miami counties were less than 400 miles from the mouth of the Wabash river and that the river was navigable beyond them.

13. In *State v. Norcross*, 132 Wis. 534, 112 N. W. 40, the complaint contained an allegation of the navigability of Rock river. The trial court sustained a demurrer upon the ground, among others, that they would take judicial notice of the non-navigability of the stream. The supreme court in reversing the decision, says, by Tunlin, J.: "This de-

**2. Burden of Proof.**—A. IN GENERAL.—The burden of proving navigability of a body of water is upon the party affirming it.<sup>14</sup>

B. TIDE WATER.—All tide water is *prima facie* navigable, and

cision involves two propositions, neither of which we are willing to approve. The first is that upon a question of the kind presented by an assertion of navigability in fact for some public purposes, the court could deprive a suitor of trial or hearing and foreclose him upon such inquiry by setting the court's own knowledge or judicial notice in opposition to the averments of his complaint. . . . The affirmative proposition that a certain river is navigable may well be judicially noticed in many instances. That a river is not navigable may sometimes be the subject of judicial notice; but considering the various degrees of navigability and the various kinds of navigation and the various appliances for the purposes of navigation, and the differing conditions along different portions of the same river, there must still remain a large class of cases in which to determine this question by judicial notice would deprive the party averring navigability or non-navigability as the foundation of his right of the opportunity of trial and hearing. *United States v. Rio Grande & I. Co.*, 174 U. S. 690, 19 Sup. Ct. 770. As to such matters the rule, we think, is as stated in 4 Wigmore Ev. § 2567. "That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. But the opponent is not prevented from disputing the matter by evidence, if he believes it disputable."

But compare *Walker v. Allen*, 72 Ala. 456, where an averment that a certain stream was navigable was held not to prevent the court from taking judicial notice that no tidal streams, which are *prima facie* navigable, were within the county—such averment being a mere legal conclusion.

14. *United States*.—*Harrison v. Fite*, 148 Fed. 781, 78 C. C. A. 447. *Alabama*.—*Lewis v. Coffee County*, 77 Ala. 190, 54 Am. St. Rep. 55; *Walker v. Allen*, 72 Ala. 456;

*Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439; *Olive v. State*, 86 Ala. 88, 5 So. 653, 4 L. R. A. 33; *Morrison v. Coleman*, 87 Ala. 655, 6 So. 374, 5 L. R. A. 384.

*Arkansas*.—*Little Rock, etc. R. Co. v. Brooks*, 39 Ark. 403, 43 Am. Rep. 277.

*Missouri*.—*McKinney v. Northcutt*, 114 Mo. App. 146, 89 S. W. 351.

*Vermont*.—*Trout & Salmon Club v. Mather*, 68 Vt. 338, 35 Atl. 323, 33 L. R. A. 569.

*Washington*.—*Griffith v. Holman*, 23 Wash. 347, 63 Pac. 239, 83 Am. St. Rep. 821, 54 L. R. A. 178.

"The plaintiff's dam having been injured by logs of the defendant as stated by the witnesses, it was incumbent on the latter to show that the river was a floatable stream at the point where the injury was inflicted." *Gwaltney v. Timber & Land Co.*, 111 N. C. 547, 16 S. E. 692.

There is no presumption that a dam was built across a navigable stream, and so the complaint in an action for trespass for injuries to the dam need not allege that the stream is not navigable. *Leihy v. Ashland Lumb. Co.*, 49 Wis. 165, 5 N. W. 471.

In *Western & H. Inv. Co. v. Farmers' Nat. Bank*, 35 Or. 298, 57 Pac. 912, the defendant's right depended upon the findings of the non-navigability of a certain so-called lake or swamp, and he was held to have the burden of proof.

**Survey Which Does Not Reserve** bed of a river above tide-water from grant or sale casts the burden of proof on the party asserting that it had the character of being navigable. *Sullivan v. Spotswood*, 82 Ala. 163, 2 So. 716; *Alabama, etc. Nav. Co. v. Georgia Pac. R. Co.*, 87 Ala. 154, 6 So. 73.

Where a stream is not meandered the presumption is that the stream is not navigable. *Clute v. Briggs*, 22 Wis. 608.

**Where an Artificial Ditch** was connected with a navigable stream, the burden of proving that it was

the burden of proving that it is not navigable is upon the party alleging its non-navigability.<sup>15</sup>

**3. Proof of Navigability.** — A. AT COMMON LAW. — At the common law the ebbing and flowing of the tide was the test of navigability and conclusive evidence thereof.<sup>16</sup>

B. IN UNITED STATES. — a. *In General.* — In the United States, generally, the ebb and flow of the tide need not be shown to establish the navigability of a stream,<sup>17</sup> but the presence of the tide is

legally navigable was held to be upon the party asserting its navigability. *Ligare v. Chicago*, etc. R. Co., 166 Ill. 249, 46 N. E. 803.

15. *King v. Montague*, 4 Barn. & C. (Eng.) 598, 10 E. C. L. 413; *Walker v. Allen*, 72 Ala. 456; *Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439; *Mayor of Colchester v. Brooke*, 7 Ad. & El. 339, 53 E. C. L. 339; *Sullivan v. Spotswood*, 82 Ala. 163, 2 So. 716; *Morgan v. King*, 18 Barb. (N. Y.) 277.

16. *Earl of Ilchester v. Raishleigh*, 61 L. T. N. S. (Eng.) 477; *Rex v. Montague*, 4 Barn. & C. (Eng.) 598, 10 E. C. L. 413; *Murphy v. Ryan*, Ir. Rep. 2 C. L. 143, 16 W. R. 678. *Compare* *Queen v. Meyers*, 3 U. C. C. P. 305, 319; *Miles v. Rose*, 1 Marsh. (Eng.) 313, 5 Taunt. 706, 15 R. R. 623; *Colchester Corp. v. Brooke*, 7 Q. B. 339, 15 L. J. Q. B. 59, 9 Jur. 1090; *Mayor of Lynn v. Turner*, Cowp. (Eng.) 86.

**Determination of Question.** — "It is the rise and fall of the water, and not the proportion of salt water to fresh, that determines whether a particular portion of a stream is within tide-water." *Attorney-General v. Woods*, 108 Mass. 436, 11 Am. Rep. 380; *citing* *King v. Smith*, 2 Doug. (Mich.) 441; *Peyroux v. Howard*, 7 Pet. (U. S.) 324, 338; *Lapish v. Bangor Bank*, 8 Greenl. (Me.) 85.

17. *United States.* — *The Daniel Ball*, 10 Wall. 557; *Bowman's Devises v. Wathen*, 2 McLean 376, 3 Fed. Cas. No. 1740.

*Alabama.* — *Walker v. Allen*, 72 Ala. 456; *Sullivan v. Spotswood*, 82 Ala. 163, 2 So. 716.

*Arkansas.* — *Little Rock*, etc. R. Co. v. *Brooks*, 39 Ark. 403, 43 Am. Rep. 277.

*Florida.* — *Bucki v. Cone*, 25 Fla. 1, 6 So. 160.

*Illinois.* — *Schulte v. Warren*, 218 Ill. 108, 75 N. E. 783.

*Iowa.* — *McManus v. Carmichael*, 3 Iowa 1.

*Maine.* — *Smart v. Aroostook Lumb. Co.*, 103 Me. 37, 68 Atl. 527.

*Minnesota.* — *Castner v. Steamboat*, 1 Minn. 73.

*New York.* — *People v. Canal Appraisers*, 33 N. Y. 461; *Ex parte Tibbits*, 17 Wend. 571.

*North Carolina.* — *State v. Baum*, 128 N. C. 600, 38 S. E. 900; *Wilson v. Forbes*, 13 N. C. (2 Dev.) 30; *Broadnax v. Baker*, 94 N. C. 675, 55 Am. Rep. 633; *State v. Eason*, 114 N. C. 787, 19 S. E. 88, 41 Am. St. Rep. 811, 23 L. R. A. 520; *Collins v. Benbury*, 25 N. C. (3 Ired.) 277, 38 Am. Dec. 722.

*Ohio.* — *Hickok v. Hine*, 23 Ohio St. 523.

*Oregon.* — *Hume v. Rouge River Pack. Co.*, 92 Pac. 1065.

*Pennsylvania.* — *Carson v. Blazer*, 2 Binn. 475, 4 Am. Dec. 463; *Shrunk v. Schuylkill Nav. Co.*, 14 Serg. & R. 71.

*Tennessee.* — *Stuart v. Clark's Lessee*, 2 Swan 9, 58 Am. Dec. 49; *Sigler v. State*, 7 Baxt. 493; *Elder v. Burrus*, 6 Humph. 358.

*Texas.* — *Jones v. Johnson*, 6 Tex. Civ. App. 262, 25 S. W. 650.

*West Virginia.* — *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. 60, 25 Am. St. Rep. 848, 5 L. R. A. 392.

*Wisconsin.* — *Diedrich v. Northwestern U. R. Co.*, 42 Wis. 248, 24 Am. Rep. 399.

*Contra*, in the New England states. *Scott v. Willson*, 3 N. H. 321; *Adams v. Pease*, 2 Conn. 481; *Com. v. Chapin*, 5 Pick. (Mass.) 199, 16 Am. Dec. 386.

**Common Law Rule Not Adopted** on account of its "utter want of fitness and adaptation to the condition

always strong although not conclusive evidence of navigability.<sup>18</sup>

b. *Navigability in Fact.* — (1.) *In General.* — Proof that water is navigable in fact will establish its navigability in law.<sup>19</sup>

(2.) *Interruption of Navigation.* — The interruption of navigation by natural barriers, such as falls or rapids, does not affect the legal navigability of the stream.<sup>20</sup>

(3.) *Continuous Navigability.* — It need not be shown that a stream is navigable at all seasons of the year, to warrant a finding of its navigability,<sup>21</sup> but it must appear that there are periods of naviga-

of things here, in our extended territory with its numerous inland lakes and countless streams." *Browne v. Scofield*, 8 Barb. (N. Y.) 239; *Starr v. Child*, 20 Wend. (N. Y.) 148; *Lowber v. Wells*, 13 How. Pr. (N. Y.) 454; *Broadnax v. Baker*, 94 N. C. 675, 55 Am. Rep. 633; *Stover v. Jack*, 60 Pa. St. 339, 100 Am. Dec. 566.

*In Canada*, the ebb and flow of the tide is not the test of navigability. *Gage v. Bates*, 7 U. C. C. P. 116; *Queen v. Meyers*, 3 U. C. C. P. 305.

18. *Prima Facie Case* made out by proof of the ebb and flow of the tide. *Glover v. Powell*, 10 N. J. Eq. 211, 225.

**Ebb and Flow of the Tide Not Conclusive Evidence.** — A river or creek in which the tide ebbs and flows is not navigable unless it is actually capable of navigation. *McKinney v. Northcutt*, 114 Mo. App. 146, 89 S. W. 351; *Rowe v. Bridge Corp.*, 21 Pick. (Mass.) 344; *State v. Pacific Guano Co.*, 22 S. C. 50.

19. *United States.* — *M'Gilvra v. Ross*, 161 Fed. 398; *United States v. Rio Grande Irr. Co.*, 174 U. S. 690; *The Daniel Ball*, 10 Wall. 557.

*Alabama.* — *Sullivan v. Spotswood*, 82 Ala. 163, 2 So. 716.

*Illinois.* — *Schulte v. Warren*, 218 Ill. 108, 75 N. E. 783.

*Indiana.* — *Ross v. Faust*, 54 Ind. 471, 23 Am. Rep. 655.

*Iowa.* — *McManus v. Carmichael*, 3 Iowa 1.

*Maine.* — *Smart v. Aroostook Lumb. Co.*, 103 Me. 37, 68 Atl. 527.

*Minnesota.* — *Lamprey v. State*, 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670.

*New York.* — *Morgan v. King*, 35 N. Y. 454, 91 Am. Dec. 58.

*North Carolina.* — *Wilson v. For-*

*bes*, 13 N. C. (2 Dev.) 30; *State v. Baum*, 128 N. C. 600, 38 S. E. 900; *State v. Twiford*, 136 N. C. 603, 48 S. E. 586; *Broadnax v. Baker*, 94 N. C. 675, 55 Am. Rep. 633.

*Oregon.* — *Hume v. Rogue River Pack. Co.*, 92 Pac. 1065.

*Pennsylvania.* — *Fulmer v. Williams*, 122 Pa. St. 191, 15 Atl. 726, 9 Am. St. Rep. 88, 1 L. R. A. 603.

*Tennessee.* — *Sigler v. State*, 7 Baxt. 493.

**Connection With a Navigable Stream** is immaterial if the stream is not itself navigable in fact. *Attorney-General v. Scott*, 34 Can. Sup. Rep. 603.

**Photographs** of the lake or stream may be admitted to aid in passing upon the navigability of the water. *Harrison v. Fite*, 148 Fed. 781, 78 C. C. A. 447; *Webster v. Harris*, 111 Tenn. 668, 69 S. W. 782, 59 L. R. A. 324.

20. *Matter of State Reservation at Niagara*, 16 Abb. N. C. (N. Y.) 159; *The Montello*, 20 Wall. (U. S.) 430; *Morgan v. King*, 18 Barb. (N. Y.) 277, *reversed*, 35 N. Y. 454; *Goodwill v. Police Jury*, 38 La. Ann. 752; *Spooner v. McConnell*, 1 McLean 337, 22 Fed. Cas. No. 13,245; *Attorney-General v. Fraser*, 37 Can. Sup. Rep. 577, 596.

21. *United States.* — *Harrison v. Fite*, 148 Fed. 781, 78 C. C. A. 447.

*Alabama.* — *Lewis v. Coffee County*, 77 Ala. 190, 54 Am. St. Rep. 55; *Walker v. Allen*, 72 Ala. 456; *Morrison v. Coleman*, 87 Ala. 655, 6 So. 374, 5 L. R. A. 384.

*Arkansas.* — *Little Rock, etc. R. Co. v. Brooks*, 39 Ark. 403, 43 Am. Rep. 277.

*Florida.* — *Bucki v. Cone*, 25 Fla. 1, 6 So. 160.

bility extending over a considerable length of time and recurring with considerable regularity.<sup>22</sup>

(4.) **Artificial Aid.**—Where it is shown that artificial aid is required to take advantage of the use of the stream,<sup>23</sup> or that the expenditure of time and money in making improvements is necessary to make use of the stream possible,<sup>24</sup> the stream will not be considered as navigable.

c. *Use for Trade.*—Where it is shown that a stream or other body of water is of use to the public at large for purposes of trade or commerce, this is sufficient to prove the navigability of the water.<sup>25</sup>

*Idaho.*—Johnson v. Johnson, 14 Idaho 561, 95 Pac. 499.

*Kentucky.*—Murray v. Preston, 106 Ky. 561, 50 S. W. 1095, 90 Am. St. Rep. 232.

*Mississippi.*—Smith v. Fonda, 64 Miss. 551, 1 So. 757.

*Missouri.*—McKinney v. Northcutt, 114 Mo. App. 146, 89 S. W. 351.

*New York.*—DeCamp v. Thomson, 16 App. Div. 528, 44 N. Y. Supp. 1014; Morgan v. King, 35 N. Y. 454, 91 Am. Dec. 58.

*Oregon.*—Felger v. Robinson, 3 Or. 455; Hallock v. Suitor, 37 Or. 9, 60 Pac. 384; Shaw v. Oswego Iron Co., 10 Or. 371; Kamm v. Normand, 91 Pac. 448.

*Virginia.*—Hot Springs Lumb. & Mfg. Co. v. Revercomb, 106 Va. 176, 55 S. E. 580, 9 L. R. A. (N. S.) 894.

*West Virginia.*—Gaston v. Mace, 33 W. Va. 14, 10 S. E. 60, 25 Am. St. Rep. 848, 5 L. R. A. 392.

"It is not necessary, in order to establish the easement in a river, to show that it is of use continuously during the whole year for the purpose of floatage; but it is sufficient if it appear that business men may calculate that, with tolerable regularity as to the season, the water will rise to and remain at such a height as will enable them to make it profitable to use it as a highway for transporting logs to market or mills lower down." Gwaltney v. Timber & Land Co., 111 N. C. 547, 16 S. E. 692.

**22. Sudden Freshets at Uncertain Times.**—Proof that occasionally and under unusual circumstances a stream could be used will not establish its navigability. Little Rock, etc. R. Co. v. Brooks, 39 Ark. 403, 43 Am. Rep.

277; Morrison v. Coleman, 87 Ala. 655, 6 So. 374, 5 L. R. A. 384; Smith v. Fonda, 64 Miss. 551, 1 So. 757; Lewis v. Coffee County, 77 Ala. 190, 54 Am. St. Rep. 55; Kamm v. Normand (Or.), 91 Pac. 448; Allison v. Davidson (Tenn. Ch. App.), 39 S. W. 905.

**23. United States.**—Harrison v. Fite, 148 Fed. 781, 78 C. C. A. 447. *Arkansas.*—Little Rock, etc. R. Co. v. Brooks, 39 Ark. 403, 43 Am. Rep. 277.

*Kentucky.*—Asher v. McKnight, 112 S. W. 647; Murray v. Preston, 106 Ky. 561, 50 S. W. 1095, 90 Am. St. Rep. 232.

*Maine.*—Treat v. Lord, 42 Me. 552, 66 Am. Dec. 298.

*Missouri.*—McKinney v. Northcutt, 114 Mo. App. 146, 89 S. W. 351.

*New York.*—DeCamp v. Thomson, 16 App. Div. 528, 44 N. Y. Supp. 1014.

*Oregon.*—Haines v. Hall, 17 Or. 165, 20 Pac. 831, 3 L. R. A. 609.

*Washington.*—Griffith v. Holman, 23 Wash. 347, 63 Pac. 239, 83 Am. St. Rep. 821, 54 L. R. A. 178; East Hoquiam Boom & L. Co. v. Neeson, 20 Wash. 142, 54 Pac. 1001. But see Olson v. Merrill, 42 Wis. 203.

**24. Natural Character of a stream** determines its navigability and not its condition after it has been cleaned out and deepened. Jeremy v. Elwell, 5 Ohio C. C. 379; Morgan v. King, 35 N. Y. 454, 91 Am. Dec. 58; Holden v. Robinson Co., 65 Me. 215; United States v. Rio Grande D. & I. Co., 9 N. M. 292, 51 Pac. 674; Webster v. Harris (Tenn.), 69 S. W. 782.

**25. Canada.**—Keewatin Power Co. v. Town of Kenora, 13 Ont. L. R. 237.

d. *Floatability*. — In many jurisdictions, where the lumbering industry is important, proof that a river is capable of being used advantageously for the purpose of carrying logs to a mill or market will establish its navigability for that purpose.<sup>26</sup>

*United States*. — *Harrison v. Fite*, 148 Fed. 781, 78 C. C. A. 447; *The Daniel Ball*, 10 Wall. 557; *The Montello*, 20 Wall. 430; *Chisolm v. Caines*, 67 Fed. 285.

*Alabama*. — *Walker v. Allen*, 72 Ala. 456; *Morrison v. Coleman*, 87 Ala. 655, 6 So. 374, 5 L. R. A. 384.

*Arkansas*. — *Little Rock, etc. R. Co. v. Brooks*, 39 Ark. 403, 43 Am. Rep. 277.

*Florida*. — *Bucki v. Cone*, 25 Fla. 1, 6 So. 160.

*Illinois*. — *Schulte v. Warren*, 218 Ill. 108, 75 N. E. 783.

*Indiana*. — *Neaderhouser v. State*, 28 Ind. 257.

*Louisiana*. — *Goodwill v. Police Jury*, 38 La. Ann. 752.

*Maine*. — *Smart v. Aroostook Lumb. Co.*, 103 Me. 37, 68 Atl. 527.

*New Mexico*. — *United States v. Rio Grande D. & I. Co.*, 9 N. M. 292, 51 Pac. 674.

*New York*. — *Browne v. Scofield*, 8 Barb. 239.

*North Carolina*. — *Gwaltney v. Timber & L. Co.*, 111 N. C. 547, 16 S. E. 692; *State v. Twiford*, 136 N. C. 603, 48 S. E. 586.

*Ohio*. — *Hickok v. Hine*, 23 Ohio St. 523.

*Oregon*. — *Nutter v. Gallagher*, 19 Or. 375, 24 Pac. 250; *Haines v. Welch*, 14 Or. 319, 12 Pac. 502.

*Tennessee*. — *Webster v. Harris*, 69 S. W. 782.

*Vermont*. — *Trout & Salmon Club v. Mather*, 68 Vt. 338, 35 Atl. 323, 33 L. R. A. 569.

*Washington*. — *Griffith v. Holman*, 23 Wash. 347, 63 Pac. 239, 83 Am. St. Rep. 821, 54 L. R. A. 178.

**"From the Somewhat Conflicting Authorities** which we have examined, we attain the conclusion that in determining the character of a stream, inquiry should be made as to the following points: whether it is fitted for valuable floatage; whether the public or only a few individuals are interested in transportation; whether any great public interests are involved

in the use of it for transportation; whether the periods of its capacity for floatage are sufficiently long to make it susceptible of use beneficially to the public; whether it has been previously used by the people generally, and how long it has been so used; whether it was meandered by the government surveyors, or included in the surveys; whether, if declared public, it will probably in future be of public use for carriage." *Rhodes v. Otis*, 33 Ala. 578, 596, 73 Am. Dec. 438.

"Capability of being used for useful purposes of navigation, of trade and travel, in the usual and ordinary modes, and not the extent and manner of the use, is the measure of navigability." *Sullivan v. Spotswood*, 82 Ala. 163, 2 So. 716.

"A stream of sufficient capacity and volume of water to float to market the products of the country will answer the conditions of navigability, and is a public highway, open to all persons for the business of floatage to which it is adapted, whatever the character of the product, or the kind of floatage suited to their conditions." *Bucki v. Cone*, 25 Fla. 1, 6 So. 160.

"Mode by Which Commerce is, or may be conducted, and the difficulties attending navigation," are not tests of navigability. *The Montello*, 20 Wall. (U. S.) 430; *Trout & Salmon Club v. Mather*, 68 Vt. 338, 35 Atl. 323, 33 L. R. A. 569.

"In this country, the capability of use by the public for the purposes of commerce rather than the extent and manner of that use, affords the true criterion of the navigability of waters. If they are capable in their natural state of being used for the purpose of commerce, no matter in what mode the commerce may be conducted, they are navigable in fact, and become, in law, public highways." *McKinley v. Northcutt*, 114 Mo. App. 146, 89 S. W. 351.

**26. Capacity To Float Logs** is evidence of navigability.

*e. Use for Pleasure.*—The fact that a stream has been used

*Alabama.*—Harold *v.* Jones, 86 Ala. 274, 5 So. 438, 3 L. R. A. 406.

*Idaho.*—Potlatch Lumb. Co. *v.* Peterson, 12 Idaho 769, 88 Pac. 426; Johnson *v.* Johnson, 14 Idaho 561, 95 Pac. 499.

*Kentucky.*—Goodin's Exrs. *v.* Kentucky Lumb. Co., 90 Ky. 625, 14 S. W. 775; Murray *v.* Preston, 106 Ky. 561, 50 S. W. 1095, 90 Am. St. Rep. 232.

*Maine.*—Smart *v.* Aroostook Lumb. Co., 103 Me. 37, 68 Atl. 527; Treat *v.* Lord, 42 Me. 552, 66 Am. Dec. 298; Brown *v.* Chadbourne, 31 Me. 9, 50 Am. Dec. 641.

*Michigan.*—Moore *v.* Sanborne, 2 Mich. 519, 59 Am. Dec. 209; Thunder Bay Boom Co. *v.* Speechly, 31 Mich. 336, 18 Am. Rep. 184.

*Missouri.*—McKinney *v.* Northcutt, 114 Mo. App. 146, 89 S. W. 351.

*New Hampshire.*—Collins *v.* Howard, 65 N. H. 190, 18 Atl. 794.

*New York.*—Brewster *v.* Rogers Co., 169 N. Y. 73, 62 N. E. 164, 58 L. R. A. 495; Morgan *v.* King, 35 N. Y. 454, 91 Am. Dec. 58.

*North Carolina.*—Gwaltney *v.* Timber & L. Co., 111 N. C. 547, 16 S. E. 692.

*Oregon.*—Felger *v.* Robinson, 3 Or. 455; Haines *v.* Hall, 17 Or. 165, 20 Pac. 831, 3 L. R. A. 609; Shaw *v.* Oswego Iron Co., 10 Or. 371; Kamm *v.* Normand, 91 Pac. 448; Hallock *v.* Sutor, 37 Or. 9, 60 Pac. 384.

*Tennessee.*—Webster *v.* Harris, 69 S. W. 782.

*Virginia.*—Hot Springs Lumb. & Mfg. Co. *v.* Revercomb, 106 Va. 176, 55 S. E. 580, 9 L. R. A. (N. S.) 894.

*Washington.*—Monroe Mill Co. *v.* Menzel, 35 Wash. 487, 77 Pac. 813, 102 Am. St. Rep. 905, 70 L. R. A. 272; Watkins *v.* Dorris, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199; Matthews *v.* Belfast Mfg. Co., 35 Wash. 662, 77 Pac. 1046.

*West Virginia.*—Gaston *v.* Mace, 33 W. Va. 14, 10 S. E. 60, 25 Am. St. Rep. 848, 5 L. R. A. 392.

*Wisconsin.*—J. S. Keator Lumb. Co. *v.* St. Croix Boom Co., 72 Wis. 62, 38 N. W. 529, 7 Am. St. Rep.

837; Sellers *v.* Union Lumb. Co., 39 Wis. 525; Whisler *v.* Wilkinson, 22 Wis. 546; Falls Mfg. Co. *v.* Oconto R. Imp. Co., 87 Wis. 134, 58 N. W. 257; A. C. Conn Co. *v.* Little Suamico Co., 74 Wis. 652, 43 N. W. 660; Village of Bloomer *v.* Town of Bloomer, 128 Wis. 297, 107 N. W. 974; Willow River Club *v.* Wade, 100 Wis. 86, 76 N. W. 273, 42 L. R. A. 305; Weatherby *v.* Meiklejohn, 56 Wis. 73, 13 N. W. 697; Olson *v.* Merrill, 42 Wis. 203; Cohn *v.* Wausau Boom Co., 47 Wis. 314, 2 N. W. 546.

"The Abundant Pine Forests in the country it traverses as appears in evidence, and the value of the logs they yield for milling purposes, present an important article of commerce, as much entitling the public to this natural highway for floating them as if various other products were being carried on it." Bucki *v.* Cone, 25 Fla. 1, 6 So. 160. And see Sullivan *v.* Spotswood, 82 Ala. 163, 2 So. 716.

**Capacity To Float** a single log, insufficient. American River Water Co. *v.* Amsden, 6 Cal. 443; Irwin *v.* Brown (Tenn.), 12 S. W. 340. And see People *v.* Elk River M. & L. Co., 107 Cal. 221, 40 Pac. 531, 48 Am. St. Rep. 125.

**But in States** in which the lumbering industry is not extensive, proof that for a few weeks in the year the stream could be used for floating logs will not establish its navigability. Hubbard *v.* Bell, 54 Ill. 110, 5 Am. Rep. 98; Rhodes *v.* Otis, 33 Ala. 578, 73 Am. Dec. 438; Olive *v.* State, 86 Ala. 88, 5 So. 653, 4 L. R. A. 33; Seaboard Air-Line R. Co. *v.* Sikes, 4 Ga. App. 7, 60 S. E. 868; Irwin *v.* Brown (Tenn.), 12 S. W. 340; Allison *v.* Davidson (Tenn. Ch. App.), 39 S. W. 905; Haines *v.* Welch, 14 Or. 319, 12 Pac. 502.

**Effect of Mill-Dam Laws.**—Where the question arises as to the navigability of a stream under the mill-dam laws, the capacity of the stream to float logs will not establish its navigability. Allaby *v.* Mauston Elec. Service Co., 135 Wis. 345, 116 N. W. 4.

**Opinion Evidence**, inadmissible as

for pleasure and recreation may establish its navigability although it has been seldom used as a channel for commerce.<sup>27</sup>

f. *Use for Fishing*.—The use of a stream by the public for fishing has been held not to be evidence tending to show its navigability.<sup>28</sup>

g. *Previous Use*.—Previous use is some evidence of the navigability of a stream,<sup>29</sup> but it is not conclusive upon that issue.<sup>30</sup>

to the floatability of a stream. *Holden v. Robinson Co.*, 65 Me. 215.

27. *Grand Rapids v. Powers*, 89 Mich. 94, 50 N. W. 661, 14 L. R. A. 498, 28 Am. St. Rep. 276; *Smart v. Aroostook Lumb. Co.*, 103 Me. 37, 68 Atl. 527.

**Use for Pleasure as Proof of Navigability**.—"Navigable streams are highways; and a traveler for pleasure is as fully entitled to protection in using a public way, whether by land or water, as a traveler for business." *Attorney-General v. Woods*, 108 Mass. 436, 11 Am. Rep. 380, citing *West Roxbury v. Stoddard*, 7 Allen (Mass.) 158, 171; *Trout & Salmon Club v. Mather*, 68 Vt. 338, 35 Atl. 323, 33 L. R. A. 569; *Lamprey v. State*, 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670; *State v. Twiford*, 136 N. C. 603, 48 S. E. 586. But see *Burroughs v. Whitwan*, 59 Mich. 279, 26 N. W. 491; *Harrison v. Fite*, 148 Fed. 781, 78 C. C. A. 447.

28. *Burroughs v. Whitwan*, 59 Mich. 279, 26 N. W. 491.

"While it is true therefore that one may take fish and shoot birds upon navigable waters, and while it is true also that one may go with boats thereon, the converse of these propositions is far from being true. Though the belief seems to be somewhat widely held, it is not true that wherever one may catch fish the waters are navigable, or that wherever one may row or pole a boat he has the right so to do because of the navigability of the water." *Bolsa Land Co. v. Burdick*, 151 Cal. 254, 90 Pac. 532, 12 L. R. A. (N. S.) 275.

29. See *Olive v. State*, 86 Ala. 88, 5 So. 653, 4 L. R. A. 33; *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. 60, 25 Am. St. Rep. 848, 5 L. R. A. 392; *Goodin's Exr. v. Kentucky Lumb. Co.*, 90 Ky. 625, 14 S. W. 775.

"In determining the natural ca-

pacity of a body of water for navigable purposes, whether navigable in law or in the ordinary sense, the extent to which it is used for purposes of navigation should be looked to, and this affords the strongest evidence as to its navigability or non-navigability in either sense." *Webster v. Harris (Tenn.)*, 69 S. W. 782.

"It appears from the evidence that the public were in the habit of passing through North Sand Cove before it was stopped up, and that by its use the distance from one part of the sound to another was shortened and navigation rendered safer in rough weather. These conditions constitute ample evidence of a navigable stream." *State v. Baum*, 128 N. C. 600, 38 S. E. 900.

**Previous Use Need Not Be Shown**. *Trout & Salmon Club v. Mather*, 68 Vt. 338, 35 Atl. 323, 33 L. R. A. 569; *Heyward v. Farmers' Min. Co.*, 42 S. C. 138, 46 Am. St. Rep. 702, 28 L. R. A. 42.

**"Navigability of Tidal Waters** does not materially depend upon past or present actual public use. Such use may establish navigability, but it is not essential to give the character." *Sullivan v. Spotswood*, 82 Ala. 163, 2 So. 716.

**But Lack of Previous Use** is sometimes a material point of evidence. *Burroughs v. Whitwan*, 59 Mich. 279, 26 N. W. 491; *Murray v. Preston*, 106 Ky. 561, 50 S. W. 1095, 90 Am. St. Rep. 232; *Lewis v. Coffee County*, 77 Ala. 190, 54 Am. Rep. 55; *Bayzer v. McMillan Mill Co.*, 105 Ala. 395, 16 So. 923, 53 Am. St. Rep. 133; *Hodges v. Williams*, 95 N. C. 331, 59 Am. Rep. 242.

30. **Fact That a Steamer** had previously run upon the river is not conclusive proof of its navigability where it further appears that only a part of the river was covered and artificial aid was used. *DeCamp v.*



**h. Size of the Stream.**—The size and length of the stream or lake and the interests involved may be shown upon the issue of the navigability of a stream;<sup>31</sup> and in some jurisdictions the possibility of its use by a large or small number of persons is a matter accorded great weight.<sup>32</sup>

Thomson, 44 N. Y. Supp. 1014. But ordinarily it will be given great weight. Railroad *v.* Ferguson, 105 Tenn. 552, 59 S. W. 343, 80 Am. St. Rep. 908; Ingraham *v.* Police Jury, 20 La. Ann. 226; Attorney-General *v.* Fraser, 37 Can. Sup. 577, 595.

**"The Evidence of Navigability"** should not be confined to the present or past use of the water as a highway of commerce for the transportation of agricultural and other products to market, but capacity for such use must be considered and the future development of the country along the shores of the bay or of new channels of commerce must not be lost sight of, whether a present inquiry may develop the probability of such use in the future, or not." Jones *v.* Johnson, 6 Tex. Civ. App. 262, 25 S. W. 650.

**Previous Navigability.**—"It does not follow that, because a stream or body of water was once navigable, it has since continued and remains so. Changes may occur, especially in small and unimportant waters, from natural causes, such as the gradual accretion of the banks and the filling up of the bed with deposits of the soil, the abandonment of use followed by the encroachment of vegetation, and the selection by the water of other and more natural and convenient channels of escape, that work a destruction of capacity and utility as a means of transportation and when the result may fairly be said to be permanent, a stream or lake in such condition should cease to be classed among those waters that are charged with a public use." Harrison *v.* Fite, 148 Fed. 781, 78 C. C. A. 447.

<sup>31.</sup> See Burns *v.* Crescent Gun & Rod Club, 116 La. 1039, 41 So. 249.

**Lake.**—In Brace & Hergert Mill Co. *v.* State, 49 Wash. 326, 95 Pac. 278, it was held immaterial that the

lake was small and little used in fact.

**Size as Affecting Navigability.**

"It is not every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable; but in order to give it the character of a navigable stream it must be generally and commonly useful to some purpose of trade or agriculture." Rowe *v.* Bridge Corp., 21 Pick. (Mass.) 344, cited and approved in Burns *v.* Crescent Gun & Rod Club, 116 La. 1039, 41 So. 249; Trout & Salmon Club *v.* Mather, 68 Vt. 338, 35 Atl. 323, 33 L. R. A. 569; Heyward *v.* Farmers' Min. Co., 42 S. C. 138, 46 Am. St. Rep. 702, 28 L. R. A. 42. The Montello, 20 Wall. (U. S.) 430; Toledo Liberal Shooting Club *v.* Erie Shooting Club, 90 Fed. 680, 33 C. C. A. 233. And see Wethersfield *v.* Humphrey, 20 Conn. 218; Schulte *v.* Warren, 218 Ill. 108, 75 N. E. 783.

**Mere Drainage Ditch** across private lands is not navigable. Bolsa Land Co. *v.* Burdick, 151 Cal. 254, 90 Pac. 532, 12 L. R. A. (N. S.) 275.

**Connection With Other Waters.**

Its connection or want of connection with other navigable bodies of water is a strong circumstance to be looked to in order to determine the navigability or non-navigability of a body of water. Webster *v.* Harris (Tenn.), 69 S. W. 782.

<sup>32.</sup> *Alabama.*—Peters *v.* New Orleans, etc. R. Co., 56 Ala. 528; Bayzer & Bayzer *v.* McMillan Mill Co., 105 Ala. 395, 16 So. 923, 53 Am. St. Rep. 133.

*Kentucky.*—Murray *v.* Preston, 106 Ky. 561, 50 S. W. 1095, 90 Am. St. Rep. 232.

*North Carolina.*—State *v.* Baum, 128 N. C. 600, 38 S. E. 900.

*Oregon.*—Haines *v.* Hall, 17 Or. 165, 20 Pac. 831, 3 L. R. A. 609; Nutter *v.* Gallagher, 19 Or. 375, 24 Pac. 250.

*South Carolina.*—Heyward *v.*

i. *Meandering of the Stream*. — The fact that a river was meandered when the official survey was made is evidence tending to prove its navigability.<sup>33</sup>

j. *Prior Decisions*. — Prior decisions of the court as to the navigability of the stream in question are admissible.<sup>34</sup>

Farmers' Min. Co., 42 S. C. 138, 19 S. E. 963, 20 S. E. 64, 46 Am. St. Rep. 702, 28 L. R. A. 42.

*Washington*. — *Griffith v. Holman*, 23 Wash. 347, 63 Pac. 239, 83 Am. St. Rep. 821, 54 L. R. A. 178.

33. See *Leigh v. Holt*, 5 Biss. 338, 15 Fed. Cas. No. 8,220; *Sullivan v. Spotswood*, 82 Ala. 163, 2 So. 716; *Alabama, etc. Nav. Co. v. Georgia Pac. R. Co.*, 87 Ala. 154, 6 So. 73; *Olive v. State*, 86 Ala. 88, 5 So. 653, 4 L. R. A. 33; *Morrison v. Coleman*, 87 Ala. 655, 6 So. 374, 5 L. R. A. 384; *Peters v. New Orleans, etc. R. Co.*, 56 Ala. 528; *Jones v. Pettibone*, 2 Wis. 307.

"The action of the government surveyors in meandering a body of water or in surveying its bed is to be considered as evidence upon the question of its navigability or unnavigability at the time; but it is not conclusive. The surveyors are invested with no power to foreclose inquiry into the true character of the water." *Harrison v. Fite*, 148 Fed. 781, 78 C. C. A. 447.

"It is true, the fact that a stream is not meandered does not establish the fact that it is a non-navigable stream, but probably indicates that in the minds of the officers ordering the survey it was not a navigable stream." *Griffith v. Holman*, 23 Wash. 347, 63 Pac. 239, 83 Am. St. Rep. 821, 54 L. R. A. 178. And see *State v. Superior Court*, 42 Wash. 491, 85 Pac. 264.

"Another mark of navigability which the evidence shows as existing in this case is, that in the United States survey of the adjacent lands, instead of including its bed the river was meandered." *Bucki v. Cone*, 25 Fla. 1, 6 So. 160.

**Presumption of Non-Navigability** arises from the fact that a stream was not meandered. *Allaby v. Mauston Elec. Service Co.*, 135 Wis. 345, 116 N. W. 4. But see *Willow River Club v. Wade*, 100 Wis. 86, 76 N. W. 273, 42 L. R. A. 305.

"We Judicially Know that the bed of this river was included in the surveys of the country, and this fact gives additional strength to the presumption of non-navigability resulting from disconnection with tide-waters." *Olive v. State*, 86 Ala. 88, 5 So. 653, 4 L. R. A. 33.

**Decision of Surveyor** under the act of 1796 providing that navigable rivers shall not be included in public surveys, is not conclusive upon the question of what is a navigable river. *Ross v. Faust*, 54 Ind. 471, 23 Am. Rep. 655, citing *Walk. Am. Law* (6th ed.), p. 300.

**By Statute** all meandered rivers are deemed public highways in *Washington*. *Watkins v. Dorris*, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199.

**Copies of Public Surveys** admissible to show that streams were meandered, as this tends to show the width of the stream which is one of the elements upon which depends its navigability. *State v. Bell*, 5 Port. (Ala.) 365.

**Land Surveyed as Swamp Land**. "The fact that this so-called bay was surveyed and platted as swamp land by the government, affords a strong presumption against the navigability of the water thereon." *Baldwin v. Erie Shooting Co.*, 127 Mich. 659, 87 N. W. 59.

**Reservation of Five Per Cent. of the Land in a Grant** by the state, for highways, does not necessarily prove a reservation of a stream within the tract as a public highway and a navigable water way. *De Camp v. Thomson*, 16 App. Div. 528, 44 N. Y. Supp. 1014.

34. *Inhab. of Charlestown v. County Comrs.*, 3 Met. (Mass.) 202; *In re Horicon Drainage Dist.* (Wis.), 116 N. W. 12; *State v. Wabash Paper Co.*, 21 Ind. App. 167, 51 N. E. 949.

"The Judgment of this court, or of any court of competent jurisdiction, properly pleaded in answer and

**k. Statutory Declaration of Navigability.** — (1.) **In General.** Navigability may be established by showing that by express statutory enactment the stream was declared navigable.<sup>35</sup>

(2.) **Limitations.** — The fact that the legislature has by statute recognized the navigability of a stream does not conclusively prove it is so in fact.<sup>36</sup>

1. **Prescription.** — Proof of a prescriptive right of navigation may be made.<sup>37</sup>

wherever admissible because between the same parties or those privy with them, or because involving a matter of repute, status, or declaration, may no doubt be received in evidence with proof that the conditions then existing are unchanged for the purpose of establishing, or tending to establish, the fact of non-navigability." State v. Norcross, 132 Wis. 534, 112 N. W. 40.

35. Bucki v. Cone, 25 Fla. 1, 6 So. 160; United States v. Union Bridge Co., 143 Fed. 377; Baker v. Lewis, 33 Pa. St. 301, 73 Am. Dec. 598; *In re* Horicon Drainage Dist. (Wis.), 116 N. W. 12. See the following cases:

*Alabama.* — Olive v. State, 86 Ala. 88, 5 So. 653, 4 L. R. A. 33; Bayzer v. McMillan Mill Co., 105 Ala. 395, 16 So. 923, 53 Am. St. Rep. 133.

*Illinois.* — People v. St. Louis, 10 Ill. 351, 368, 48 Am. Dec. 339.

*Indiana.* — State v. Wabash Paper Co., 21 Ind. App. 167, 51 N. E. 949.

*Missouri.* — Benson v. Morrow, 61 Mo. 345.

*New York.* — Morgan v. King, 18 Barb. 277, reversed, 35 N. Y. 454; Brewster v. Rogers Co., 169 N. Y. 73, 62 N. E. 164, 58 L. R. A. 495.

*Ohio.* — Cooper v. Hall, 5 Ohio 321.

*Pennsylvania.* — Wainwright v. McCullough, 63 Pa. St. 66; McKeen v. Delaware Canal Co., 49 Pa. St. 424.

**Not Necessary.** — Statutory declaration not necessary; but navigability may be established by parol evidence. Little Rock, etc. R. Co. v. Brooks, 39 Ark. 403, 43 Am. Rep. 277; Southern R. Co. v. Ferguson, 105 Tenn. 552, 59 S. W. 343, 80 Am. St. Rep. 908; Martin v. Bliss, 5 Blackf. (Ind.) 35, 32 Am. Dec. 49.

**Stream Not Declared** navigable is presumptively non-navigable. Allaby v. Mauston Elec. Serv. Co., 135 Wis. 345, 116 N. W. 4.

**Failure of Congress** to enumerate a stream in a list of navigable waters is evidence that it was not considered as navigable. Peters v. New Orleans, etc. R. Co., 56 Ala. 528. But see Shaw v. Crawford, 10 Johns. (N. Y.) 235.

**Statute Declaring Navigability** up to a certain point, impliedly declares it unnavigable beyond such point. American River Water Co. v. Amsden, 6 Cal. 443; Cardwell v. Sacramento, 79 Cal. 347, 21 Pac. 763.

36. DeCamp v. Thomson, 16 App. Div. 528, 44 N. Y. Supp. 1014; Olive v. State, 86 Ala. 88, 5 So. 653, 4 L. R. A. 33; Murray v. Preston, 106 Ky. 561, 50 S. W. 1095, 90 Am. St. Rep. 232; Duluth Lumb. Co. v. St. Louis Boom Co., 17 Fed. 419; Allison v. Davidson (Tenn.), 39 S. W. 905; People v. Elk River M. & L. Co., 107 Cal. 221, 40 Pac. 531, 48 Am. St. Rep. 125.

"It is clear to this court that the declaration of a state legislature cannot impress upon a stream a character of navigability for logs when the stream does not carry water sufficient to float a log. If a stream is not navigable in fact, the mere legislative declaration that it is navigable in fact cannot make it so." Potlach Lumb. Co. v. Peterson, 12 Idaho 769, 88 Pac. 426.

**Statute Declaring the Kansas River Non-Navigable** was held to have no effect upon the title of riparian owners. Wood v. Fowler, 26 Kan. 682, 40 Am. Rep. 330. And see Wood v. Chicago, R. I. & P. R. Co., 60 Iowa 456, 15 N. W. 284; Serrin v. Grefe, 67 Iowa 196, 25 N. W. 227; Chicago, etc. R. Co. v. Porter Bros., 72 Iowa 426, 34 N. W. 286.

37. Brubaker v. Paul, 7 Dana (Ky.) 428, 32 Am. Dec. 111; Stump v. McNairy, 5 Humph. (Tenn.) 363, 42 Am. Dec. 437; Shaw v. Crawford,

m. *Question of Fact*.—The question as to the navigability of a particular stream or body of water, is a question of fact for the determination of the jury upon a consideration of all the circumstances.<sup>38</sup>

**4. Obstruction of Navigation.**—A. PRESUMPTIONS.—A dam<sup>39</sup> or bridge<sup>40</sup> across a stream is presumed to be an obstruction to navigation and unlawful.

B. BURDEN OF PROOF.—The burden of proving that an obstruction of a navigable river was authorized by the proper authorities and that the obstruction was within the limitations of the authority which had been given is upon the party relying upon these facts,<sup>41</sup>

10 Johns. (N. Y.) 235; *Jeremy v. Elwell*, 5 Ohio C. C. 379; *Seaboard Air-Line R. Co. v. Sikes*, 4 Ga. App. 7, 60 S. E. 868.

**38. Canada.**—*Queen v. Meyers*, 3 U. C. C. P. 305.

*United States*.—*Healy v. Joliet*, etc. R. Co., 116 U. S. 181.

*Alabama*.—*Walker v. Allen*, 72 Ala. 456; *Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439; *Alabama*, etc. Nav. Co. v. Georgia Pac. R. Co., 87 Ala. 154, 6 So. 73; *Olive v. State*, 86 Ala. 88, 5 So. 653, 4 L. R. A. 33. *Arkansas*.—*Little Rock*, etc. R. Co. v. *Brooks*, 39 Ark. 403, 43 Am. Rep. 277.

*Florida*.—*Bucki v. Cone*, 25 Fla. 1, 6 So. 160.

*Illinois*.—*People v. Board of Supervisors*, 122 Ill. App. 40; *Ligare v. Chicago*, etc. R. Co., 166 Ill. 249, 46 N. E. 803.

*Louisiana*.—*Burns v. Crescent Gun & Rod Club*, 116 La. 1038, 41 So. 249.

*Maine*.—*Treat v. Lord*, 42 Me. 552, 66 Am. Dec. 298; *Smart v. Aroostook Lumb. Co.*, 103 Me. 37, 68 Atl. 527.

*Mississippi*.—*Smith v. Fonda*, 64 Miss. 551, 1 So. 757.

*Missouri*.—*McKinney v. Northcutt*, 114 Mo. App. 146, 89 S. W. 351.

*North Carolina*.—*Gwaltney v. Timber & Land Co.*, 111 N. C. 547, 16 S. E. 692; *State v. Twiford*, 136 N. C. 603, 48 S. E. 586.

*Ohio*.—*Jeremy v. Elwell*, 5 Ohio C. C. 379.

*Oregon*.—*Felger v. Robinson*, 3 Or. 455; *Western & H. Inv. Co. v. Farmers' Nat. Bank*, 35 Or. 298, 57 Pac. 912.

*Tennessee*.—*Railroad v. Fergu-*

*son*, 105 Tenn. 552, 562, 59 S. W. 343, 80 Am. St. Rep. 908.

*Texas*.—*Jones v. Johnson*, 6 Tex. Civ. App. 262, 25 S. W. 650.

*Washington*.—*Griffith v. Holman*, 23 Wash. 347, 63 Pac. 239, 83 Am. St. Rep. 821, 54 L. R. A. 178.

*West Virginia*.—*Gaston v. Mace*, 33 W. Va. 14, 10 S. E. 60, 25 Am. St. Rep. 848, 5 L. R. A. 392.

**Question for the Determination of the Court** where the facts are ascertained or undisputed. *Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439; *Morgan v. King*, 18 Barb. (N. Y.) 277; *Bayzer v. McMillan Mill Co.*, 105 Ala. 395, 16 So. 923, 53 Am. St. Rep. 133.

**Mixed Question of Law and Fact**, "The questions of law for the court being, what constitutes a public or navigable river and whether there was sufficient evidence thereof or to repel it; the questions of fact for the jury being, whether according to the data laid down by the court and the evidence it was in fact so navigable." *Queen v. Meyers*, 3 U. C. C. P. 305, 348; *Murray v. Preston*, 106 Ky. 561, 50 S. W. 1095, 90 Am. St. Rep. 232.

**39.** See *Tewksbury v. Schulenberg*, 41 Wis. 584, 590.

**40.** *Pennsylvania R. Co. v. Baltimore & N. R. Co.*, 37 Fed. 129.

**41.** *Doxsey v. Long Island R. Co.*, 35 Hun (N. Y.) 362. Compare *Whitaker v. Delaware & H. Canal Co.*, 87 Pa. St. 34.

**"The General Rule** is that a party may not lawfully obstruct navigation. To bring itself within an exception to that rule, the burden was upon the defendant to establish all the facts necessary to constitute the exception. The fact of obstruction

and clear, convincing proof is required to be made of both of these facts.<sup>42</sup>

**C. STATUTORY AUTHORIZATION.** — The fact that Congress or the state legislature has expressly authorized the construction of a work across a navigable stream is conclusive evidence that it is not an illegal obstruction.<sup>43</sup>

**D. REASONABLE USE.** — The question whether reasonable use has been made of navigable water, or whether it has been illegally obstructed, is under most circumstances a question of fact,<sup>44</sup> to aid

having been shown by plaintiff, the presumption was that it was unlawful, and to escape liability for damage it was incumbent on the defendant to show that it had done only what the law permitted in the particular case." *Cantrell v. Railway Co.*, 90 Tenn. 638, 18 S. W. 271.

"A *prima facie* case was made against the defendant when the plaintiffs proved that the steamer, adapted in all respects to the navigation of the river, and which had for years and in safety passed over this part of the stream almost daily, . . . had come in contact with the defendant's cable and received injury. The very fact of a collision and consequent injury, unexplained, authorized the finding that the defendant had, by its cables, unlawfully obstructed the navigation of the river and caused the damage." *Blanchard v. Western Union Tel. Co.*, 60 N. Y. 510.

**Compliance With Specifications.** Where an obstruction of navigation is alleged, in the construction of a bridge, the burden of proof is upon the defendant to show a compliance with the specifications under which the legislature authorized the bridge to be built. *Pennsylvania R. Co. v. Baltimore & N. Y. R. Co.*, 37 Fed. 129.

But in *Silver v. Missouri Pac. R. Co.*, 101 Mo. 79, 13 S. W. 410, it was held that where a bridge was expressly authorized by legislation the burden of proving that the requirements of the legislation were not met and that the bridge did not meet the specifications was upon the plaintiff.

**Lease From Riparian Owner.** Where a lease has been given to a person to use a river bank for a boom, the burden is upon the lessor to show that the use made was

negligent or improper. *Rogers v. Coal River B. & D. Co.*, 39 W. Va. 272, 19 S. E. 401.

42. In speaking of the right of a railroad company to bridge a navigable stream, the court said: "If it were in the power of the state to grant such right, it must be clearly and explicitly given. It will not be implied, simply because a navigable stream intervenes between terminal points of the chartered right of way." *Little Rock, etc. R. Co. v. Brooks*, 39 Ark. 403, 43 Am. Rep. 277.

43. *Frost v. Washington County R. Co.*, 96 Me. 76, 51 Atl. 806, 59 L. R. A. 68; *Clinton Bridge Case*, 10 Wall. (U. S.) 454; *Miller v. City of New York*, 13 Blatchf. 469, 17 Fed. Cas. No. 9,585; *State v. Sunapee Dam Co.*, 70 N. H. 458, 50 Atl. 108, 59 L. R. A. 55; *Southern R. Co. v. Reeder (Ala.)*, 44 So. 699.

44. *Morgan v. King*, 18 Barb. (N. Y.) 277; *Queen v. Meyers*, 3 U. C. C. P. 305; *Blanc v. Klumpke*, 29 Cal. 156.

"When a great public benefit results from the abridgment of the right of passage, the great public benefit makes that abridgment no nuisance. It was therefore a question for the jury to say from the facts of the case, first whether there was any abridgment of the right of navigating the Mississippi river by the erection of this wharf boat; and if there was such abridgment, whether there was such public benefit as to constitute that abridgment no nuisance." *Pilcher v. Hart*, 1 Humph. (Tenn.) 524, 535.

Whether the appropriation of water from a navigable stream is such as to obstruct and interfere with its navigability is a question of fact. *United States v. Rio Grande Irr. Co.*, 174 U. S. 690.

Where a raft was moored in a

in the determination of which all pertinent evidence is admissible.<sup>45</sup>

**E. SPECIAL INJURY.**—Before an individual can recover damages in an action for the obstruction of a navigable stream, he must aver and prove that he has suffered special injury, independent of the general injury to the public.<sup>46</sup>

**F. PRESCRIPTIVE RIGHTS.**—The right to obstruct navigation cannot be established by proof of a prescriptive user, since prescriptive rights do not arise against the state.<sup>47</sup>

### III. RIPARIAN RIGHTS.

**1. Diversion.**—**A. BURDEN OF PROOF**—A material diversion of water is *prima facie* wrongful and the burden of proving that it was authorized is upon the defendant.<sup>48</sup> He also has the burden of

river, it was held that the reasonableness of the place, time, and manner of the mooring was a question of fact for the jury. *Hayward v. Knapp*, 23 Minn. 430.

**45. Test of Reasonable Use.** "In determining the question of reasonable use, regard must be had to the subject-matter of the use, the occasion and manner of its application, its object, extent, necessity and duration, and the established usage of the country. The size of the stream, also the fall of water, its volume, velocity and prospective rise and fall, are important elements to be taken into account. *Davis v. Winslow*, 51 Me. 264, 297, 81 Am. Dec. 573.

**Reasonable Use** of a floatable stream is shown where the owner of the dam provided suitable sluices in and around a dam through which logs, etc., could pass. *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. 60, 25 Am. St. Rep. 848, 5 L. R. A. 392. See *Crookston Water Wks. P. & L. Co. v. Sprague*, 91 Minn. 461, 98 N. W. 347, 99 N. W. 420, 103 Am. St. Rep. 525, 64 L. R. A. 977.

A boom which prevents the passage of logs is an unreasonable obstruction. *Powell v. Springston Lumb. Co.*, 12 Idaho 723, 88 Pac. 97.

**Custom of Lumbermen** with reference to tying up rafts along the river was held admissible upon the issue of negligence of the plaintiff in so mooring. *Hayward v. Knapp*, 23 Minn. 430.

**46. Alabama, etc. Nav. Co. v. Georgia Pac. R. Co.**, 87 Ala. 154, 6 So. 73; *Little Rock, etc. R. Co.*

*v. Brooks*, 39 Ark. 403, 43 Am. Rep. 277; *Griffith v. Holman*, 23 Wash. 347, 63 Pac. 239, 83 Am. St. Rep. 821, 54 L. R. A. 178; *Blanc v. Klumpke*, 29 Cal. 156; *Smart v. Aroostook Lumb. Co.*, 103 Me. 37, 68 Atl. 527.

**Special Injury Is a Question of Fact.**—*Harrison v. Sterett*, 4 H. & McH. (Md.) 540.

**47. Brown v. Black**, 43 Me. 443; *Knox v. Chaloner*, 42 Me. 150.

**Dam in a Navigable River.**—Prescriptive right to maintain cannot arise. *Olive v. State*, 86 Ala. 88, 5 So. 653, 4 L. R. A. 33; *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. 60, 25 Am. St. Rep. 848, 5 L. R. A. 392. Nor a bridge. *Railroad v. Ferguson*, 105 Tenn. 552, 59 S. W. 343, 80 Am. St. Rep. 908.

**Discharge of Mining Debris** into a navigable stream cannot be justified upon the ground of a prescriptive right. And a custom allowing it is unreasonable when the use of the stream of purposes of navigation is interfered with. *People v. Gold Run D. & M. Co.*, 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80.

**48. Western States.**—The peculiar rules applied in the western states are noticed in a subsequent part of this article.

**"The Diversion Was Prima Facie a Wrong.** and though in its nature it was capable of excuse or justification, by proof of the existence of other facts which would render it lawful, the burden of showing the existence of such facts was upon the defendant." *Haight v. Price*, 21 N. Y. 241.

proving that part of the water was returned to the stream,<sup>49</sup> or that the waters diverted would never have reached the plaintiff in its natural flow.<sup>50</sup>

**B. ADMISSIBILITY.** — *a. In General.* — To establish the fact of a material diversion of water the proof relied upon is often indirect and circumstantial; but any relevant facts may be shown.<sup>51</sup>

*b. Expert Evidence.* — Expert evidence is admissible to determine the cause of a diversion of water,<sup>52</sup> unless from the questions asked the answers would have been mere naked opinions upon the precise question which the jury was to decide.<sup>53</sup>

**Injury Presumed** from the fact of a wrongful diversion. *McEvoy v. Gallagher*, 107 Wis. 331, 83 N. W. 633.

**49. Return of Water.** — In an action for damages for diversion of waters, the burden of proving the fact that part of the waters were returned, and the amount, is upon the defendant. *Lonsdale Co. v. City of Woonsocket*, 25 R. I. 428, 56 Atl. 448.

**50. In the Arid Regions** of the west it is well known that the rivers have an important sub-surface flow, and in *Platte Valley Irr. Co. v. Buckers Irr. M. & I Co.*, 25 Colo. 77, 53 Pac. 334, the court said: "With these physical conditions present it will be presumed that water flowing in a natural channel, which reaches the bank of a stream and there disappears in the sands of the bed, augments the flow in the main stream by percolation until the contrary is shown; and the burden of proof is on the party diverting such water, to establish that it does not mingle with the main waters of the stream."

**51.** "The gravamen in the plaintiff's writ is, that the defendant had withdrawn, and continued to withdraw more water than he had a right to do. Whatever had a tendency to prove this fact was competent evidence. Of this character was the proof that the flume had been extended, and other alterations made. . . . And to show that an excess was taken beyond the quantity conveyed, it was proved first that the passage through which the water passed had been enlarged . . . and that secondly, by extending the capacity of the mill, a greater power was necessary to

propel it." *Butman v. Hussey*, 12 Me. 407.

**Amount Diverted at Time of Trial.**

Evidence showing the amount diverted at the time of the trial is admissible to prove the amount diverted at the time alleged in the cause of action, under similar circumstances. *Read v. Barker*, 30 N. J. L. 378.

**Amount Subsequently Diverted.**

Where no record has been kept of the amount diverted during the period in question, a record of that subsequently diverted is admissible with evidence showing whether it was more or less than that previously diverted. *Irving v. Borough of Media*, 194 Pa. St. 648, 45 Atl. 482.

**Exact Amount Need Not Be Shown.** — "The determination of the amount of abstraction probably cannot be made with mathematical precision. But if there has been abstraction amounting to actionable injury, the mill owner is entitled to compensation upon the best obtainable evidence." *Harper v. Mountain Water Co.* (N. J.), 43 Atl. 984.

**52. Expert Evidence** is admissible to determine whether the diversion of a stream was caused by the sinking of the foundation of an aqueduct which crossed the stream, whereby the stream was drained off by percolation. *Covert v. Brooklyn*, 6 App. Div. 73, 39 N. Y. Supp. 744; *Moyer v. New York, etc. R. Co.*, 98 N. Y. 645.

**53.** Where the issue was whether water was diverted from a stream by means of wells sunk near it, an expert was not allowed to answer a question as to whether it was possible for water to be taken from the stream by these wells on the ground

c. *Former Judgment*. — Where the action is for a continued diversion, the judgment in the prior action is admissible in evidence and conclusive of the plaintiff's right.<sup>54</sup>

C. DAMAGES. — a. *In General*. — A riparian proprietor is entitled to at least nominal damages for the material diversion of water without proof of any actual injury.<sup>55</sup>

b. *Temporary Diversion*. — Where the diversion is temporary only, the actual damages alleged and proved<sup>56</sup> to have been suffered up to the time of the trial<sup>57</sup> can be recovered.<sup>58</sup>

that "evidence of that character is only allowed when, from the nature of the case, the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is attainable." Van Wycklen v. Brooklyn, 118 N. Y. 424, 24 N. E. 179.

54. "The judgment in the former case was substantially for the diversion of the water of the same stream. It settled conclusively that the defendant below had no right to so divert it. If some other items of damage were considered in that case, it bears only on the measure of damages, in this action." Long v. Trexler (Pa.), 8 Atl. 620.

55. *United States*. — Webb v. Portland Mfg. Co., 3 Sumn. 189, 29 Fed. Cas. No. 17,322; Whipple v. Cumberland Mfg. Co., 2 Story 661, 29 Fed. Cas. No. 17,516.

*Alabama*. — Stein v. Burden, 24 Ala. 130, 148, 60 Am. Dec. 453.

*California*. — Creighton v. Evans, 53 Cal. 55.

*Connecticut*. — Parker v. Griswold, 17 Conn. 288, 42 Am. Dec. 739; Watson v. New Milford Water Co., 71 Conn. 442, 42 Atl. 265.

*Georgia*. — White v. East Lake Land Co., 96 Ga. 415, 23 S. E. 393, 51 Am. St. Rep. 141.

*Illinois*. — Plumleigh v. Dawson, 6 Ill. 544, 41 Am. Dec. 199.

*Maine*. — Munroe v. Stickney, 48 Me. 462; Butman v. Hussey, 12 Me. 407.

*Massachusetts*. — Bolivar Mfg. Co. v. Neponset Mfg. Co., 16 Pick. 241.

*New Hampshire*. — Tillotson v. Smith, 32 N. H. 90, 64 Am. Dec. 355; Blodgett v. Stone, 60 N. H. 167.

*New York*. — New York Rubber

Co. v. Rothery, 132 N. Y. 293, 30 N. E. 841, 28 Am. St. Rep. 575.

*Pennsylvania*. — Miller v. Miller, 9 Pa. St. 74, 49 Am. Dec. 545.

*Vermont*. — Chatfield v. Wilson, 27 Vt. 670.

*Washington*. — Shotwell v. Dodge, 8 Wash. 337, 36 Pac. 254.

*Compare* Elliot v. Fitchburg R. Co., 10 Cush. (Mass.) 191, 57 Am. Dec. 85; Amoskeag Mfg. Co. v. Goodale, 46 N. H. 53; Cooper v. Hall, 5 Ohio 321.

56. Churchill v. Rose, 136 Cal. 576, 69 Pac. 416.

57. Bare v. Hoffman, 79 Pa. St. 71, 21 Am. Rep. 42; Hargreaves v. Kimberly, 26 W. Va. 787; Williams v. Camden & R. Water Co., 79 Me. 543, 11 Atl. 600; Thayer v. Brooks, 17 Ohio 489; Watts v. Norfolk & W. R. Co., 39 W. Va. 196, 19 S. E. 521, 45 Am. St. Rep. 894, 23 L. R. A. 674.

58. Marsh v. Delaware, etc. R. Co., 59 Hun 615, 12 N. Y. Supp. 376; Aberdeen v. Bradford, 94 Md. 670, 51 Atl. 614.

**Diminished Rental Value** is sometimes said to be the most satisfactory measure of damages where the diversion is only temporary. Colrick v. Swinburne, 105 N. Y. 503, 12 N. E. 427; Clark v. Pennsylvania R. Co., 145 Pa. St. 438, 22 Atl. 989.

**Hauling of Water** from a distance, made necessary by the diversion may be shown. Hart v. Evans, 8 Pa. St. 13.

**Damage From Diversion Subsequent to the Commencement of the Action** may be shown as evidence of the consequences of the diversion under similar circumstances, before the suit. Stein v. Burden, 24 Ala. 130, 147, 60 Am. Dec. 453; Polly v. McCall, 37 Ala. 20, 30.

**Opinion Evidence**. — A witness may be asked to state from facts within



c. *Permanent Diversion*. — The measure of damages where the diversion is permanent is the difference in value of the property before and after the diversion was made.<sup>59</sup>

D. *QUESTION OF FACT*. — The questions as to whether there was a diversion<sup>60</sup> and as to its reasonableness<sup>61</sup> are questions of fact for the determination of the jury.

2. *Detention or Obstruction*. — A. *BURDEN OF PROOF*. — While the burden of proving the fact of detention of the water is upon the party alleging it,<sup>62</sup> this having been proved, the reasonableness of such detention must be shown by the other party, as it is a fact peculiarly within his own knowledge.<sup>63</sup>

his own knowledge what, in his opinion, was the amount of damages suffered by the plaintiff because of the diversion of the water; and to authorize the giving of such opinion it is not necessary that the party be an expert. *Hargreaves v. Kimberly*, 26 W. Va. 787. And expert opinion evidence as to the damage sustained is admissible, but only where it appears that the witness was cognizant of the size of the stream, its supply of water and the amount diverted. *Stein v. Burden*, 24 Ala. 130, 147, 60 Am. Dec. 453. And see *Clark v. Rockland Water P. Co.*, 52 Me. 68.

*Return of a Certain Percentage* of the water diverted may be shown in mitigation of damages. *Mannville Co. v. Worcester*, 138 Mass. 89, 52 Am. Rep. 261.

*Actual Benefit*. — That the diversion was really a benefit to the lower riparian owner may be shown in mitigation. *Addison v. Hack*, 2 Gill (Md.) 221, 41 Am. Dec. 421.

59. *Southern Marble Co. v. Darnell*, 94 Ga. 231, 245, 21 S. E. 531; *Hanover Water Co. v. Ashland Iron Co.*, 84 Pa. St. 279; *Miller v. Windsor Water Co.*, 148 Pa. St. 429, 23 Atl. 1132; *Lee v. Springfield Water Co.*, 176 Pa. St. 223, 35 Atl. 184; *Gallagher v. Kingston Water Co.*, 25 App. Div. 82, 49 N. Y. Supp. 250.

*Opinion of a Witness* who is familiar with the property is admissible as to the depreciation in value of property resulting from the diversion of water. *Lee v. Springfield Water Co.*, 176 Pa. St. 223, 35 Atl. 184.

*Cost of an Engine* necessary to furnish power because of the diminished water power may be shown. *Howe v. Inhab. of Weymouth*, 155

Mass. 439, 29 N. E. 646. And see *Irving v. Media*, 10 Pa. Super. 132; *Sparks Mfg. Co. v. Newton*, 60 N. J. Eq. 399, 45 Atl. 596.

*Loss of Water Power*. — Where a plaintiff is entitled to compensatory damages, evidence of the extent, location and availability of the water power furnished before the stream was diverted is admissible. *Roberts v. Claremont R. & L. Co.*, 73 N. H. 121, 59 Atl. 619.

*Expert Evidence* as to the quantity of grain the mill could grind and the value of the water for milling purposes was admitted in *Read v. Barker*, 30 N. J. L. 378.

*The Total Capacity* of the pipe used in diverting the water is to be considered, although the full amount is not used at the time, since future and prospective damages must be allowed where the action is conclusive upon future rights of the parties. *Leonard v. Rutland*, 66 Vt. 105, 28 Atl. 885.

60. *Ellis v. Tone*, 58 Cal. 289; *Rice v. Norfolk & C. R. Co.*, 130 N. C. 375, 41 S. E. 1031.

61. *Union Min. & M. Co. v. Ferris*, 2 Sawy. 176, 24 Fed. Cas. No. 14,371; *Hogg v. Connellsville Water Co.*, 168 Pa. St. 456, 31 Atl. 1010; *White v. East Lake Land Co.*, 96 Ga. 415, 23 S. E. 393, 51 Am. St. Rep. 141; *Minnesota L. & T. Co. v. St. Anthony Falls W. P. Co.*, 82 Minn. 505, 85 N. W. 520.

62. See *Bullard v. Saratoga Victory Mfg. Co.*, 77 N. Y. 525.

63. "This instruction is said to have been against the law of the case, because the law recognizes changes in the current, in its velocity and the quantity of water below all water mills, and such changes

B. ADMISSIBILITY. — All the surrounding circumstances may be shown to establish the fact of detention or obstruction.<sup>64</sup>

C. REASONABLENESS OF DETENTION. — a. *In General.* — What is a reasonable use of the stream will vary with the circumstances of each case, and any evidence bearing upon the issue is admissible.<sup>65</sup>

b. *Previous Use.* — The previous use made of the water may be shown.<sup>66</sup>

c. *Custom.* — The local customs generally acquiesced in by the community may be shown and are entitled to great weight.<sup>67</sup>

are presumed to be necessary and proper until the contrary appears.

To this point no authorities are cited and we doubt if any can be found to sustain the position assumed by counsel, which seems to be altogether outweighed by the reasons which may be opposed to it. If not universal, it may at least be said to be a rule of very general application, that a sufficient *prima facie* case is made when it is shown that loss or injury has been sustained by the plaintiff, and that the same was caused by the act or default of the defendant. A corresponding rule, and one no less general in its application, is that matters of excuse or justification must be shown by the party claiming the benefit of them. It is generally true of such matters, also, that they are peculiarly within the knowledge of the party seeking the benefit of them, and are not known or are incapable of disproof by the other party." *Timm v. Bear*, 29 Wis. 254.

64. Where the issue is whether the acts of the defendant have actually lessened the natural flow of the stream, the plaintiff may show how it was before and after the changes made by the defendant and the condition on particular occasions and under particular circumstances. *Holden v. Lake Co.*, 53 N. H. 552.

65. *Oakland Woolen Co. v. Union Gas. & E. Co.*, 101 Me 198, 63 Atl. 915; *Whitney v. Wheeler Cotton Mills*, 151 Mass. 396, 24 N. E. 774, 7 L. R. A. 613; *Clark v. Rockland W. P. Co.*, 52 Me. 68.

"Regard must be had to the subject-matter of the use, the occasion and manner of its application, its object, extent, and the necessity for it, to the previous usage, and to the

nature and condition of the improvements upon the stream; and so also the size of the stream, the fall of water, its volume, velocity and prospective rise and fall, are important elements to be considered." *Timm v. Bear*, 29 Wis. 254.

**Nature and Use of the Machinery** used by the defendant may be shown. *Pool v. Lewis*, 41 Ga. 162, 5 Am. Rep. 526; *Dilling v. Murray*, 6 Ind. 324, 63 Am. Dec. 385; *Gould v. Boston Duck Co.*, 13 Gray (Mass.) 442.

**Capacity of the Stream** is an important element in determining the reasonableness of use. *Mason v. Hoyle*, 56 Conn. 255, 14 Atl. 786; *Dilling v. Murray*, 6 Ind. 324, 63 Am. Dec. 385.

**Capacity of Mill.** — Fact that defendant's mill wheel had a capacity of fifty per cent. more than the natural flow of the stream would supply, and that he detained the water and ran the wheel to its full capacity, is evidence that his use was unreasonable. *Timm v. Bear*, 29 Wis. 254.

**Extent of Benefit** to the defendant compared with the injury to the plaintiff may be shown on the issue of reasonable use. *Mason v. Hoyle*, 56 Conn. 255, 14 Atl. 786.

66. **Previous Use** by the plaintiff, *i. e.*, the manner in which the water of the stream had been used, its power, volume and steadiness, and the amount of work which had been done in the mill for a series of years before the erection of the new dam and the change of machinery by the defendant may be shown. *Timm v. Bear*, 29 Wis. 254.

67. *Gould v. Boston Duck Co.*, 13 Gray (Mass.) 442; *City of Springfield v. Harris*, 4 Allen (Mass.) 494, 81 Am. Dec. 715; *White v. Manufac-*

d. *Question of Fact.* — The reasonableness of the use and detention of water is for the jury to determine.<sup>68</sup>

3. *Pollution.* — A. BURDEN OF PROOF. — The plaintiff has the burden of establishing his injury by reason of the defendant's acts,<sup>69</sup> but the reasonableness of such acts must be shown by the defendant.<sup>70</sup>

B. ADMISSIBILITY. — a. *In General.* — Any evidence tending to prove the fact or cause of the pollution is admissible.<sup>71</sup>

turing Co., 60 S. C. 254, 268, 38 S. E. 456.

"When the question of reasonable conduct under given circumstances is in issue, the usage, custom, habit, or conduct of others under similar circumstances may be relevant as evidence upon that issue." *Hazard Powder Co. v. Somersville Mfg. Co.*, 78 Conn. 171, 61 Atl. 519.

*Detention.* — *Usage.* — "Indeed in most cases this proof is the most satisfactory and conclusive that could be adduced, being established by the parties concerned, who understand better than any others what is reasonable and convenient, and who would not be likely to acquiesce in anything which was not so." *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102.

"The immemorial local custom upon the stream . . . to let the water flow to the plaintiff's mills without any long or injurious detention, according to the authorities in this and other jurisdictions, has an important bearing upon the question." *Mason v. Hoyle*, 56 Conn. 255, 272, 14 Atl. 786.

*Contra.* — *Custom of Mill Owners* to close their water gates while the mill was not at work was held inadmissible in *Timm v. Bear*, 29 Wis. 254, 269, upon the ground that the jury would not be aided thereby in determining the question of reasonable user, the circumstances being so different.

<sup>68.</sup> *Connecticut.* — *Hazard Powder Co. v. Somersville Mfg. Co.*, 78 Conn. 171, 61 Atl. 519; *Mason v. Hoyle*, 56 Conn. 255, 14 Atl. 786.

*Georgia.* — *Pool v. Lewis*, 41 Ga. 162, 5 Am. Rep. 526.

*Maine.* — *Phillips v. Sherman*, 64 Me. 171.

*New York.* — *Bullard v. Saratoga*

*Victory Mfg. Co.*, 77 N. Y. 525; *Pollitt v. Long*, 3 Thomp. & C. 232.

*Pennsylvania.* — *Miller v. Miller*, 9 Pa. St. 74, 49 Am. Dec. 545; *Hetrich v. Deachler*, 6 Pa. St. 32; *Hartzell v. Sill*, 12 Pa. St. 248.

*South Carolina.* — *White Manufacturing Co.*, 60 S. C. 254, 38 S. E. 456.

<sup>69.</sup> *Haskins v. Haskins*, 9 Gray (Mass.) 390.

In an action for damages for the negligence of the defendant by which the river bed was alleged to have been filled with debris from the construction of a bridge, "it was incumbent upon the plaintiff to furnish evidence from which the jury might conclude with some degree of certainty that the deposit of sediment and the filling up of the river bed . . . was the result solely of the action of the defendant company." *Sipe v. Pennsylvania R. Co.*, 219 Pa. St. 210, 68 Atl. 705.

<sup>70.</sup> "Whenever it appears that any use of a stream by one riparian owner interferes with the reasonable use of the stream by a lower riparian owner, to his injury, either by the interruption, diversion, abstraction, or pollution of the water, the burden of proof is upon the former to show that his use is reasonable; and the greater the injury is to the lower owner, the greater necessity for such use must the upper owner show in order to establish its reasonableness." *Red River Roller Mills v. Wright*, 30 Minn. 249, 15 N. W. 167, 40 Am. Rep. 194.

<sup>71.</sup> Testimony that before the defendant's plant was constructed the conditions complained of did not exist, is admissible. *State v. Glucose Sugar Ref. Co.*, 117 Iowa 524, 91 N. W. 794; *State v. Smith*, 82 Iowa 423, 48 N. W. 727.

*Fish Dying* in large numbers is

b. *Expert Evidence*.—The opinions of experts, based upon scientific examination and experiments is admissible to establish the fact, cause and source of the pollution.<sup>72</sup>

C. *REASONABLE USE*.—a. *In General*.—Evidence of all the surrounding circumstances is admissible to aid the jury<sup>73</sup> in determining the question whether a stream has been polluted by unreasonable user.<sup>74</sup>

evidence of pollution. *State v. Glucose Sugar Ref. Co.*, 117 Iowa 524, 91 N. W. 794; *State v. Smith*, 82 Iowa 423, 48 N. W. 727.

**Samples of Sediment** taken from the river within the period for which damages were claimed and properly identified, were admitted in *West Muncie Strawboard Co. v. Slack*, 164 Ind. 21, 72 N. E. 879. And see *Watson v. Colusa-Parrott M. & S. Co.*, 31 Mont. 513, 79 Pac. 14.

**Question of Fact**.—Whether the alleged acts caused the pollution is a question of fact. *Abraham v. City of Fremont*, 54 Neb. 391, 74 N. W. 834.

72. *McCollum v. Germantown Water Co.*, 54 Pa. St. 40, 93 Am. Dec. 656.

**Result of Chemical Analysis** may be shown. *State v. Glucose Sugar Ref. Co.*, 117 Iowa 524, 91 N. W. 794.

73. *Prentice v. Geiger*, 74 N. Y. 341; *Muncie Pulp Co. v. Koontz*, 33 Ind. App. 532, 70 N. E. 999.

"The law does not lay down any fixed rule for determining what is a reasonable use of the water of a stream by a riparian owner. What constitutes a reasonable use is not a question of law but of fact, to be determined by the jury or the court from all the circumstances of the case." *Red River Roller Mills v. Wright*, 30 Minn. 249, 15 N. W. 167, 40 Am. Rep. 194.

"The questions of fact which arise in determining whether a use is reasonable are limited by certain rules of law. . . . In like manner the discharge of a noxious substance into the stream in such quantity as materially to affect the purity of the water, is an invasion of his right of property, and as a matter of law, is unreasonable." *MacNamara v. Taft*, 196 Mass. 597, 83 N. E. 310, 13 L. R. A. (N. S.) 1044; *Worthen*

& *Aldrich v. White Spring P. Co.* (N. J. Eq.) 70 Atl. 468.

74. *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. St. Rep. 763; *Hayes v. Waldron*, 44 N. H. 580, 84 Am. Dec. 105; *Snow v. Parsons*, 28 Vt. 459; *Parker v. American Woolen Co.*, 195 Mass. 591, 81 N. E. 468, 10 L. R. A. (N. S.) 584; *Muncie Pulp Co. v. Koontz*, 33 Ind. App. 532, 70 N. E. 999.

**Rule Stated**.—"In determining what is a reasonable use, regard must be had to the subject-matter of the use; the occasion and manner of its application; the object, extent, necessity and duration of the use; the nature and size of the stream; the kind of business to which it is subservient; the importance and necessity of the use claimed by one party and the extent of the injury to the other party; the state of improvement of the country in regard to mills and machinery, and the use of the water as a propelling power; the general and established usages of the country in similar cases and all the other and ever-varying circumstances of each particular case bearing upon the question of the fitness and propriety of the use of the water under consideration." *Red River Roller Mills v. Wright*, 30 Minn. 249, 15 N. W. 167, 44 Am. Rep. 194.

"The jury in determining the question would be entitled to consider all the circumstances—such as the general character and condition of the stream, its volume and rapidity, the degree of injury which it [the use] occasioned, the custom and usage of the country, and the necessity of using the stream for this purpose. The jury might find the use to be reasonable at some periods and in certain stages of the water, and unreasonable at others." *Prentice v. Geiger*, 74 N. Y. 341.

b. *Customs*.—The right to pollute a stream cannot be established by proof of a custom to do so,<sup>75</sup> but evidence of the customs of the community is admissible to aid in determining the reasonableness of the use.<sup>76</sup>

4. *Flowage*.—A. BURDEN OF PROOF.—a. *In General*.—The plaintiff has the burden of proving the wrongful maintenance of the obstruction causing the flowage, by the defendant,<sup>77</sup> and the nature and extent of his injuries.<sup>78</sup> The defendant relying upon a grant or license must prove it.<sup>79</sup>

**Extent of the Benefit** to the one and of the injury to the other party, may be shown. *Hayes v. Waldron*, 44 N. H. 580, 84 Am. Dec. 105; *Red River Roller Mills v. Wright*, 30 Minn. 249, 15 N. W. 167, 40 Am. Rep. 194. But in *Bowan v. Humphrey*, 124 Iowa 744, 100 N. W. 854, the court held that evidence that the business in which the defendant was engaged was of great public benefit, was inadmissible.

75. **Unreasonable**.—A general custom to pollute a stream by mining debris cannot arise as it would be unreasonable. *Pennsylvania Coal Co. v. Sanderson*, 94 Pa. St. 302, 39 Am. Rep. 785.

76. *Snow v. Parsons*, 28 Vt. 459, 67 Am. Dec. 723; *Prentice v. Geiger*, 74 N. Y. 341. See *Haskins v. Haskins*, 9 Gray (Mass.) 390.

**"Evidence of the Uniform and General Custom** in like cases is competent, although of course not conclusive, upon the question of whether a use is a reasonable one. Usage in such matters is some proof of what is considered a reasonable and proper use of that which is a common right, because it affords evidence of the tacit consent of all parties interested to the general convenience or necessity of such use. Of course much would depend upon the character and size of the stream and the uses to which it is adapted. Such evidence, however, might not be competent where the use of a navigable stream amounted to an interruption of the public right of navigation which is always paramount to any mere private use by a riparian owner." *Red River Roller Mills v. Wright*, 30 Minn. 249, 15 N. W. 167, 40 Am. Rep. 194.

**Jury Presumed** to be sufficiently informed as to what constitutes a rea-

sonable use of a watercourse, so that evidence of usage is inadmissible. *Hayes v. Waldron*, 44 N. H. 580.

77. *Chaffin v. Fries Mfg. & P. Co.*, 135 N. C. 95, 47 S. E. 226.

**Overflow From Lake**.—Where damage was caused by the overflowing of a lake, the burden of proof was upon the plaintiff to prove that the lake was under the control of the defendant. *Birmingham R. & E. Co. v. Dorse* (Ala.), 32 So. 493.

**Increase in Height of a new dam**, where the defendant had acquired the right to maintain the old dam, must be affirmatively shown. *Godfrey v. Maberry*, 84 N. C. 255.

**Presumption That Bridge Was Skillfully Constructed**.—There is a presumption that a bridge was skillfully constructed so as to be reasonably adapted and sufficient for the use made of it, and the burden is upon the party alleging negligence in its construction which causes backwater. *Berninger v. Sanbury H. & W. R. Co.*, 203 Pa. St. 516, 53 Atl. 361.

78. "Complainant has the burden of proof to show the precise extent and character of his injuries." *Miller v. Cornwell*, 71 Mich. 270, 38 N. W. 912.

"In order to make out his case and recover more than nominal damages, it was incumbent upon the plaintiff to prove to the satisfaction of the jury that the water did flow back upon his land, that this was caused by the wrongful acts of the defendant and that he had suffered some injury therefrom prior to the institution of this suit." *Lewin v. Simpson*, 38 Md. 468, 483; *Watts v. Norfolk & W. R. Co.*, 39 W. Va. 196, 19 S. E. 521, 45 Am. St. Rep. 894, 23 L. R. A. 674.

79. **"The Plaintiff Having Proved**

b. *Proximate Cause*. — The plaintiff also has the burden of proving that the act or negligence of the defendant was the proximate cause of his injury.<sup>80</sup>

B. FORMER LEVEL OF WATER. — a. *In General*. — Where it is claimed that the injury was caused by an unlawful increase in the height of an old dam, any evidence tending to prove the height of the dam or the level of the water before and after the change is admissible.<sup>81</sup>

the existence of the dam, that it was maintained by the defendant, to his injury, a *prima facie* case was made out imposing upon the defendant the burden of showing his legal right to maintain the obstruction by showing a grant, license or prescriptive right." Ten Eyck v. Runk, 26 N. J. L. 513.

80. Treichel v. Great Northern R. Co., 80 Minn. 96, 82 N. W. 1110; Riddle v. Delaware County, 156 Pa. St. 643, 27 Atl. 569; Langdon v. Chicago, etc. R. Co., 48 Iowa 437; Karchner v. Pennsylvania R. Co., 218 Pa. St. 309, 67 Atl. 644.

But compare Jones v. Seaboard Air Line R. Co., 67 S. C. 181, 45 S. E. 188, where it was held that the allegation of an extraordinary flood was an affirmative defense which it was incumbent upon the defendant to prove.

"Our Law holds that damages cannot be recovered against man when it is caused by the act of God. The law also holds that, where damages occur from an act of God and from the negligence of man occurring co-incidentally, there can be no recovery, unless it be affirmatively proved that, if there had been no act of God the damage would still have occurred." Morris v. Receivers of Richmond, etc. R. Co., 65 Fed. 584.

Where the defendant pleads a general denial and also that the proximate cause was an unprecedented flood, the burden of proof was upon the plaintiff to prove that the damage was due to the defendant's embankment. Gulf, C. & S. F. R. Co. v. Huffman (Tex. Civ. App.), 81 S. W. 536.

Where it is alleged that other causes brought about the result, the plaintiff must show by a preponderance of the evidence that the injury would not have resulted if the em-

bankment had not existed. Ilfrey v. Sabine & E. T. R. Co., 76 Tex. 63, 13 S. W. 165.

81. To prove the height to which a dam has formerly raised water, reference may be made to any objects either in the channel or on the banks of pond or stream. Perry v. Binney, 103 Mass. 156.

**Opinions as to Height of Water Necessary To Run the Mill.** — Expert millwright may give his opinion that if the dam which it was alleged had been improperly raised in height was formerly of the height claimed it would have been impossible for the mill to have done the work which it had done for many years past. Detweiler v. Groff, 10 Pa. St. 376. But it has been held that evidence that water raised to the height which the plaintiff claimed was the limit of the right of the defendant, would not give sufficient power to their mill, was immaterial. Perley v. Marshall, 57 N. H. 206.

**Instructions Given by the Owner to the Builder.** — The builder of the new dam may testify that he was shown the old water marks on the rocks and told not to build the new dam so that it would raise the water, as this tends to show the height of the old dam and that the new dam was no higher. Godfrey v. Maberry, 84 N. C. 255. But it has also been held that on the issue whether the dam was built to an unwarranted height, instructions given by the defendant owner to the builder were inadmissible; they were not a part of the *res gestae*. Finch v. Green, 16 Minn. 355.

**Weight of Expert Evidence.** — To determine whether the level of a stream has been raised by the dam, instrumental measurements are not conclusive, but the testimony of wit-

**b. Declarations and Admissions.**—The declarations and admissions of the defendant or of the person through whom he claims<sup>82</sup> are admissible to establish the height to which the water may rightfully be maintained.<sup>83</sup>

**C. CAUSE OF FLOWAGE.**—**a. In General.**—Any pertinent evidence is admissible to determine the cause of the alleged flowing of the land.<sup>84</sup>

nesses as to "actual visible facts," such as the rise and fall of the water in fixed monuments is admissible. *Brown v. Bush*, 45 Pa. St. 61.

Results of three surveys as to the level of the water will not overcome the evidence of witnesses based on actual sight and knowledge of the water. *Gibson v. Fischer*, 68 Iowa 29, 25 N. W. 914.

**82. Declarations of Third Persons are Inadmissible.**—Declarations of the deceased builder of a dam as to its height are inadmissible—they are not admissible upon the theory of a vertical boundary. *Lynn v. Thomson*, 17 S. C. 129.

An entry on the record book following the record of a deed, stated that the dam on the premises was rebuilt on a certain date at a specified height. The court held that such entry was a mere unofficial statement of the town clerk, not required by law, and inadmissible in evidence. *Dutton v. Stoughton*, 79 Vt. 361, 65 Atl. 91.

**83. Declarations of plaintiff tending to show the defendant's right to flow the land, are admissible.** *M'Kellip v. M'Ilhenny*, 4 Watts (Pa.) 317, 28 Am. Dec. 711.

**Admissions and Declarations of a former owner made during his ownership of the mill are admissible to show the height to which he was entitled to maintain the water in the pond.** *Horner v. Stillwell*, 35 N. J. L. 307.

"While the title or estate which a man holds by deed cannot be limited by the admissions or declarations of a former owner, still where the extent of a water power does not appear upon the face of the deed, it is competent to show to what extent the right to this water power was exercised by a former owner and occupier of the land, and for that pur-

pose his admission as to the extent which he occupied the right, is admissible against his successor or grantee." *Ten Eyck v. Runk*, 26 N. J. L. 513. See *Towner v. Thompson*, 81 Ga. 171, 6 S. E. 184.

**Declaration by former owner of the dam that a certain stone marked the height of his right to flow is admissible without proof that such declaration did not refer to other lands than those in question.** *Tyler v. Mather*, 9 Gray (Mass.) 177.

**84. Lewin v. Simpson**, 38 Md. 468.

**Other Overflows before the defendant's embankment was constructed may be shown.** *Texas & P. R. Co. v. Padgett*, 14 Tex. Civ. App. 435, 37 S. W. 92; *Gulf, etc. R. Co. v. Wishart*, 28 Tex. Civ. App. 162, 66 S. W. 860.

**Maps and Plats of the premises, properly identified, are admissible to aid the jury.** *K. & S. R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621.

**Admissions.—Bill of Complaint in another action relating to the same subject-matter, containing averments of fact is competent evidence as admissions concerning these facts.** *K. & S. R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621.

Evidence that the defendant cut its embankment during the overflow was held admissible not as an admission of negligence, but as tending to show the effect of the embankment in holding back the water and causing the overflow. *Gulf, etc. R. Co. v. Dunlap* (Tex. Civ. App.), 26 S. W. 655.

**Proof that eighty per cent. of the water passage is shut off by an embankment is proof of negligent construction.** *Lampley v. Atlantic Coast Line R. Co.*, 63 S. C. 462, 41 S. E. 517.

**Method of Constructing Other Bridges.**—To determine whether a bridge was constructed with reason-

b. *Admissions by Conduct.*—The repair or alteration of an embankment or other obstruction of a stream cannot be shown as an admission of negligence or of the cause of the flowing of the land.<sup>85</sup>

c. *Opinion Evidence.*—The opinion of any person who is acquainted with the facts is admissible as to the cause of the flowage,<sup>86</sup> and the opinions of experts are necessarily and constantly

able care, leaving room enough between the piers for the passage of ice and drift, the method of construction of other bridges over the same river may be shown and considered. *Omaha & R. V. R. Co. v. Brown*, 16 Neb. 161, 20 N. W. 202.

Under the Texas Statute (Sayles' Rev. St., art. 4436) providing for the construction of necessary culverts and sluices by railroads, negligence by the railroad need not be shown to enable a plaintiff to recover for the flowing of his lands. *Missouri, etc. R. Co. v. Crow*, 43 Tex. Civ. App. 280, 95 S. W. 743; *San Antonio & A. P. R. Co. v. Gurley*, 37 Tex. Civ. App. 283, 83 S. W. 842; *Missouri, etc. R. Co. v. Dubose* (Tex. Civ. App.), 95 S. W. 588.

85. "It is a matter of common knowledge that railroad tracks and machinery as well as all other instrumentalities used in operating trains are continually undergoing repairs and being improved. Undoubtedly the public is greatly interested in the continuance of such improvements. Where accidents have directed the attention of the company to a particular portion of the roadbed or other instrumentality that by additional safeguards would be rendered more safe, to hold as a general rule that if the desired improvement is made, the company thereby admits that it had been negligent would result in deterring the company from promptly making the improvement. Indeed it would be a harsh rule if every change for the better is to be considered as evidence showing former negligence." *Gulf, etc. R. Co. v. McGowan*, 73 Tex. 355, 11 S. W. 336.

Evidence that the defendant made a cut in its embankment to let the water off was not admissible as an admission of negligence in its construction. *Gulf, etc. R. Co. v. Dunlap* (Tex. Civ. App.), 26 S. W. 655.

But in an action for flowing the plaintiff's land by means of a ditch dug to drain off a pit but through which the waters of a stream backed up onto the plaintiff's land, evidence that the defendant constructed a dam across the end of the pit through which the waters had escaped was admitted upon the ground that the public was in no way interested and therefore it was not against public policy to show the repairs made. *Chicago, etc. R. Co. v. Longbottom* (Tex. Civ. App.), 80 S. W. 542.

86. See article "EXPERT AND OPINION EVIDENCE," Vol. V, p. 506.

Non-expert, familiar with the locality, may state that because of the negligence of the defendant in filling the channel of a stream when building a bridge, the waters above the bridge were backed upon the land. *Standley v. Atchison, etc. R. Co.*, 121 Mo. App. 537, 97 S. W. 244.

A non-expert witness, acquainted with the country, having stated the facts upon which he bases his opinion, may give his opinion that the overflow of the plaintiff's land was caused by the embankment of the defendant. *Gulf, etc. R. Co. v. Locker*, 78 Tex. 279, 14 S. W. 611; *International & G. N. R. Co. v. Klaus*, 64 Tex. 293; *Ethridge v. San Antonio & A. P. R. Co.* (Tex. Civ. App.), 39 S. W. 204.

A witness, not an expert, may testify that the effect of the backwater made by defendant's dam is to diminish the power of the plaintiff's mill-wheel. *Williamson v. Yingling*, 80 Ind. 379.

Testimony of non-experts, familiar with the land, as to how the water would flow if the embankment were not there, admissible. *Taylor v. San Antonio, etc. R. Co.*, 36 Tex. Civ. App. 658, 83 S. W. 738.

A witness may be asked whether "the bridge was located in the best practical way to pass the waters in time of flood." *Riddle v. Delaware*



admitted.<sup>87</sup> Such evidence has been said to be entitled to great weight.<sup>88</sup>

d. *Res Inter Alios Acta*. — Evidence as to the effect the alleged

County, 156 Pa. St. 643, 27 Atl. 569.

Testimony of witnesses that bridges and culverts were insufficient to carry off the water in time of flood was held competent. *Blunck v. Chicago & N. W. R. Co.* (Iowa), 115 N. W. 1013.

"Witnesses who had experienced floods at this point at times when there were no obstructions here complained of were allowed to state how much higher the obstructions caused the water to rise, and how much longer it remained over the land. In our opinion such questions were unobjectionable." *Owen v. Chicago, etc. R. Co.*, 109 Mo. App. 608, 83 S. W. 92.

But in *Kendrick v. Furman* (Neb.), 115 N. W. 541, it was held that the question "what causes the sand to go back up there?" was inadmissible as being the very substance of the issue to be determined by the jury. And so the testimony of a witness that the dam would not have gone out but for the high state of the water has been held inadmissible as a conclusion of fact which was within the province of the jury. *Darling v. Thompson*, 108 Mich. 215, 65 N. W. 754.

**Unskilled Witnesses** familiar with the surroundings may give their opinions as to whether a bridge caused the overflow because openings left for the passage of water were not large enough. *International & G. N. R. Co. v. Klaus*, 64 Tex. 293. But see *Jones v. Seaboard Air-Line R. Co.*, 67 S. C. 181, 45 S. E. 188.

**Sufficiency of Knowledge.** — To entitle the opinion of a non-expert witness as to the cause of an overflow to be admissible, it must be shown not only that he was familiar with the locality and the stream, but also that he was familiar with the embankment in question and the area of the waterways. *Gulf, etc. R. Co. v. Harbison* (Tex. Civ. App.), 88 S. W. 452.

<sup>87</sup> *Gulf, etc. R. Co. v. Wynne* (Tex. Civ. App.), 91 S. W. 823.

**Rule Stated.** — "In an action

against a railway company to recover damages to crops by flooding the plaintiff's lands, expert testimony is admissible to show the laws of alluvial streams, the cause and manner of the growth of deposits of sediments and the effect of such deposits upon streams in a long course of years in a case where the channel of the stream has been obstructed." *Ohio & M. R. Co. v. Neutzel*, 143 Ill. 46, 32 N. E. 529.

"Nothing is better established than the proposition that this kind of evidence (expert) is admissible as to the effect of obstructions in causing backwater." *Grisby v. Clear Lake Water Co.*, 40 Cal. 396, 405.

Where the issue is whether the destruction of a house was caused by the embankment setting back the waters, a sailor may give his opinion as an expert as to the height of the waves at the time, although other persons actually saw them. *Ilfrey v. Sabine & E. T. R. Co.*, 76 Tex. 63, 13 S. W. 165.

Expert evidence is admissible upon the issue of whether backwater was caused by a dam lower down the stream, or by a natural obstruction. *Ball v. Hardesty*, 38 Kan. 540, 16 Pac. 808.

Opinion of an expert that the overflow which produced the injury complained of was the result of natural causes and not of the construction of the embankment is admissible as being a matter of scientific knowledge. *Ohio & M. R. Co. v. Webb*, 142 Ill. 404, 32 N. E. 527.

Opinion of an expert as to the capacity of the culvert to carry away all the water that might be expected is admissible. *Chicago & A. R. Co. v. Calkins*, 17 Ill. App. 55.

**88. Weight of the Evidence.** On the issue whether the dam was the cause of the overflow, the opinion of witnesses was held to be entitled to as much weight as the measurements made by surveyors. *McLeod v. Lee*, 17 Nev. 103, 28 Pac. 124. "The character of the measurements taken as they were, with a spirit

operating cause has had upon other lands is admissible,<sup>89</sup> but only where it appears that the surrounding conditions were practically similar.<sup>90</sup>

**D. EXTRAORDINARY FLOODS.**—To assist in the determination of the question whether or not a particular flood which caused an overflow of an embankment or bridge was extraordinary and not to be expected, the comparative size of other floods<sup>91</sup> may be

level and a square, in the river amidst the eddying tide of the water and the drifting currents of the sand, could not, it seems to us, be any more direct or certain than the observation, judgments and opinions of witnesses who were well acquainted with the premises."

**89.** Testimony as to the effect of the water on the land of others is admissible in an action for damages for flowage caused by the obstruction of a railroad culvert, as "this was one method by which the effect of the damming of the waters of the branch was made palpable." *Shores v. Southern R. Co.*, 72 S. C. 244, 51 S. E. 699.

Evidence that other lands situated near the plaintiff's land were not affected by a similar rainfall more injuriously than before the construction of the defendant's embankment, is admissible to prove that the embankment had not materially obstructed the stream. *Moss v. Gulf, etc. R. Co.* (Tex. Civ. App.), 103 S. W. 221.

Where similarity of location, surroundings and conditions is shown, evidence as to the effect of the rainfall on other lands was held admissible "to show not only that the storm was an unprecedented one, but also that the overflow was of such magnitude that the injury complained of by appellee would have occurred had there been no railroad bridge and embankment to obstruct the flow of the waters." *Missouri, etc. R. Co. v. Bell* (Tex. Civ. App.), 93 S. W. 198.

**90.** Courts are very careful in requiring proof of similarity of all important circumstances before they will allow evidence to be given of the condition of other lands situated upon the same river and alleged to have been affected in the same way.

*St. Louis, etc. R. Co. v. Craig*, 10 Tex. Civ. App. 238, 31 S. W. 207; *Battles v. Fobes*, 21 Pick. (Mass.) 239; *Gulf, etc. R. Co. v. Locker*, 78 Tex. 279, 14 S. W. 611; *San Antonio & A. P. R. Co. v. Kiersey* (Tex.), 109 S. W. 862; *Gulf, etc. R. Co. v. Caldwell* (Tex. Civ. App.), 102 S. W. 461; *Missouri, etc. R. Co. v. Bell* (Tex. Civ. App.), 93 S. W. 198.

Evidence as to the effect the raising of a dam in another county had in filling up the stream and flowing land is irrelevant, where the issue is whether the raising of the dam in question injured the plaintiff. *Ellis v. Harris' Exr.*, 32 Gratt. (Va.) 684.

**Overflow of Lands Which Could Not Have Been Affected by the Obstruction.**—Evidence that lands which could not have been affected by defendant's embankment and dam were overflowed is immaterial. *Gulf, etc. R. Co. v. Locker*, 78 Tex. 279, 14 S. W. 611; *Gulf, etc. R. Co. v. Nicholson* (Tex. Civ. App.), 25 S. W. 54.

**91. Previous and Subsequent overflows of the river, of the same or greater extent, may be shown to prove that the overflow in question was not caused by an unusual or extraordinary flood.** *Gulf, etc. R. Co. v. Holliday*, 65 Tex. 512. And see *Mayor of New York v. Bailey*, 2 Denio (N. Y.) 433, 441; *Patterson v. Illinois C. R. Co.* (Miss.), 29 So. 93.

**Frequent Occurrence of floods, all of which were of the size of the one in question, is evidence that it was not an extraordinary flood.** *Pittsburgh, etc. R. Co. v. Gilleland*, 56 Pa. St. 445, 94 Am. Dec. 97.

**Extraordinary Rains.**—The fact that extraordinary rains fell at the time is admissible as tending to show that the resulting flood was unprec-

shown and also the effect of the same flood upon other lands.<sup>92</sup>

**E. VIEW BY JURY.**—The jury is entitled to view the premises flowed in order to aid in understanding the evidence offered.<sup>93</sup>

**F. QUESTIONS OF FACT.**—The cause of the flowage<sup>94</sup> and whether the flood was an extraordinary one are questions for the jury.<sup>95</sup>

**G. DAMAGES.**—Nominal damages may always be recovered,<sup>96</sup> and any evidence which tends to show the actual damages suffered from the injury is admissible.<sup>97</sup>

**5. Prescriptive Rights.**—**A. BURDEN OF PROOF.**—The burden

edented. *Wallingford v. Maysville*, etc. R. Co., 32 Ky. L. Rep. 1049, 107 S. W. 781.

**Testimony of a Witness** who has lived in the neighborhood only two years, as to the unprecedented character of the rainfall, is insufficient to warrant the submission to the jury of the question of extraordinary flood. *Baugh v. Gulf*, etc. R. Co. (Tex. Civ. App.), 100 S. W. 958.

**92.** *Missouri*, etc. R. Co. *v. Bell* (Tex. Civ. App.), 93 S. W. 198.

That lands both above and below the plaintiff's land had suffered from the overflow of the river, although the embankment was not present, was admissible to show that the flood was an extraordinary one. *Gulf*, etc. R. Co. *v. Locker*, 78 Tex. 279, 14 S. W. 611.

**93.** *Johnson v. Boorman*, 63 Wis. 268, 22 N. W. 514; *Close v. Samm*, 27 Iowa 503.

**94.** *Mississippi & T. R. Co. v. Archibald*, 67 Miss. 38, 7 So. 212; *Georgia R. & B. Co. v. Berry*, 78 Ga. 744, 4 S. E. 10; *Town v. Missouri Pac. R. Co.*, 50 Neb. 768, 70 N. W. 402.

Whether a trestle constituted an obstruction to the natural flow of water by reason of which the land was flooded is a question of fact. *St. Louis*, etc. R. Co. *v. Winkelmann*, 47 Ill. App. 276.

Whether the injury from the breaking of the dam was caused by the negligence of the defendant in constructing it, or by the high state of the water, is a question of fact for the jury. *Darling v. Thompson*, 108 Mich. 215, 65 N. W. 754.

**95.** *Gulf*, etc. R. Co. *v. Holliday*, 65 Tex. 512; *Jones v. Seaboard Air Line R. Co.*, 67 S. C. 181, 45 S. E. 188; *Patterson v. Illinois Cent. R.*

*Co. (Miss.)*, 29 So. 93; *Chicago*, etc. R. Co. *v. Schaffer*, 26 Ill. App. 280.

**96.** *Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53; *Chaffin v. Fries Mfg. & P. Co.*, 135 N. C. 95, 47 S. E. 226. *Contra*, *Cooper v. Hall*, 5 Ohio 321.

**97.** See Gould on Waters, § 211.

**Condition of the Land at the Time of the Trial** may be shown, although damages suffered subsequent to the commencement of the action cannot be recovered "for the purpose of furnishing the most precise and reliable information as to the nature and extent of the injury, and thus enabling the jury by comparison to judge of the amount of damages resulting from the alleged nuisance prior to the commencement of the action." *Morris Canal & B. Co. v. Ryerson*, 27 N. J. L. 457.

**Impairment of Fertility** on account of the flowage may be shown. *Southern R. Co. v. Morris*, 119 Ga. 234, 46 S. E. 85.

**Probable Yield of the crop** which was destroyed may be shown. *Chicago*, etc. R. Co. *v. Schaffer*, 26 Ill. App. 280.

**Cost of Preparing the Land and planting the crop** may be shown, where the crop itself was not up at the time of the overflow. *Houston*, etc. R. Co. *v. Darwin* (Tex. Civ. App.), 105 S. W. 825.

**Loss of Profits from the working of the mill** may be shown. *Gibson v. Fischer*, 68 Iowa 29, 25 N. W. 914.

**Opinion Evidence.**—Any witness who has a knowledge of the land may testify as to its value, and the extent of the damage done by the overflow. *McGroarty v. Lehigh Val. Coal Co.*, 212 Pa. St. 53, 61 Atl. 570; *Lynch v. Troxell*, 207 Pa. St. 162, 56 Atl. 413; *Chicago*, etc. R. Co. *v.*

of proving a prescriptive right is upon the party claiming under it.<sup>98</sup>

**B. PRESUMPTION.** — *a. In General.* — The basic presumption of all prescriptive rights, that a grant will be presumed after adverse user for a period equal to the period of limitations, applies to claims to a prescriptive right in the various riparian rights.<sup>99</sup>

Schaffer, 26 Ill. App. 280; K. & L. R. Co. v. Horan, 131 Ill. 288, 23 N. E. 621. But see Sinclair v. Roush, 14 Ind. 450.

Plaintiff, a farmer, may testify as to the value of the crop destroyed by the flowage of his land. Byrne v. M. & St. L. R. Co., 29 Minn. 200, 12 N. W. 698.

**Measure of Damages**, where the injury is permanent, is the difference in the market value of the land before and after the injury. Louisville & N. R. Co. v. Ponder, 31 Ky. L. Rep. 878, 104 S. W. 279.

**Malice** may be shown upon the issue of damages. Amoskeag Mfg. Co. v. Goodale, 46 N. H. 53.

**98. Diversion.** — Hunter v. Coalter, 4 Rand. (Va.) 58; Haight v. Price, 21 N. Y. 241.

"Every proprietor who claims a right either to throw the water back, above, or to diminish the quantity which is to descend below, must in order to maintain his claim either prove an actual grant or license from the proprietor affected by his operations, or must prove an uninterrupted enjoyment of twenty years." Matter of Water Comrs., 4 Edw. Ch. (N. Y.) 545.

**Flowage.** — Dutton v. Stoughton, 79 Vt. 361, 65 Atl. 91.

"The burden of proof in this case lies on the defendant. The complainants, as owners of the fee of the lands above, have clearly the right to have the river kept at its natural height and in its natural channel along their land, unless the defendant can show by grant or prescription a right to flow back at a greater height." Carlisle v. Cooper, 19 N. J. Eq. 256.

**Obstruction.** — "The party who claims the right to obstruct or interfere with such flow by reason of long usage, must prove to the satisfaction of the jury that such ob-

struction or interference has been continued, exclusive and with knowledge and acquiescence of the owner of the land, for twenty years." Jones v. Crow, 32 Pa. St. 398.

**Proof of Use and Extent Thereof.** "In this matter of proof of use so as to acquire the right, the burden of proof is legally and properly on the defendant. He is seeking without consideration of any kind to appropriate property clearly belonging to another and to acquire title by a law which was designed to quiet just titles, and must, therefore, show himself within the provisions of that law." Carlisle v. Cooper, 19 N. J. Eq. 256, 268.

**Assessment of Taxes Where the Payment of Taxes Is an Element of Adverse Possession.** — "The burden of showing that none have been assessed is not upon the claimant by possession. That is a negative which he is not required to prove. If there has been an assessment, it is for the other party to show the fact. This is a rule which convenience requires." Oneto v. Restano, 78 Cal. 374, 20 Pac. 743.

**99. Diversion.** — Steen v. Burden, 24 Ala. 130, 148, 60 Am. Dec. 453; Shields v. Arndt, 4 N. J. Eq. 234; Coalter v. Hunter, 4 Rand. (Va.) 58; Norton v. Volentine, 14 Vt. 239; Olney v. Fenner, 2 R. I. 211, 57 Am. Dec. 711; Irving v. Borough of Media, 194 Pa. St. 648, 45 Atl. 482.

**Pollution.** — Warren v. Hunter, 1 Phila. (Pa.) 414; Masonic Assn. v. Harris, 79 Me. 250, 9 Atl. 737.

**Flowage.** — *Georgia.* — Columbus Power Co. v. City Mills Co., 114 Ga. 558, 40 S. E. 800.

*Massachusetts.* — Ludlow Mfg. Co. v. Indian Orchard Co., 177 Mass. 61, 58 N. E. 181; Williams v. Nelson, 23 Pick. 141, 34 Am. Dec. 45.

*Minnesota.* — Swan v. Munch, 65 Minn. 500, 67 N. W. 1022, 60 Am. St. Rep. 491, 35 L. R. A. 743.

b. *Nature*. — Although the facts upon which this presumption is based may be contradicted or explained, the inference of a grant to be drawn from the established facts is conclusive and cannot be controverted.<sup>1</sup>

C. ADVERSE USER. — a. *In General*. — While proof must be made that the user was adverse to the rights of the owner,<sup>2</sup> this will often

*New Hampshire*. — *Eastman v. Amoskeag Mfg. Co.*, 47 N. H. 71.

*New York*. — *Hall v. State*, 72 App. Div. 360, 77 N. Y. Supp. 282; *Baldwin v. Calkins*, 10 Wend. 167; *Hammond v. Zehner*, 21 N. Y. 118.

*North Carolina*. — *Gerenger v. Summers*, 24 N. C. (2 Ired.) 229; *Griffin v. Foster*, 53 N. C. (8 Jones) 337.

*Texas*. — *Haas v. Choussard*, 17 Tex. 588.

*Vermont*. — *Hurlbut v. Leonard*, *Brayt*, 201.

**Grant of Right of Use Presumed** in favor of upper riparian owners where an artificial channel was used for twenty years in place of the natural bed of the stream. *Delaney v. Boston*, 2 Har. (Del.) 489; *Ford v. Whitlock*, 27 Vt. 265. And see *Smith v. Musgrove*, 32 Mo. App. 241; *Matheson v. Ward*, 24 Wash. 407, 64 Pac. 520, 85 Am. St. Rep. 955.

**Basis of Presumption**. — In the early case of *Williams v. Nelson*, 23 Pick. (Mass.) 141, 34 Am. Dec. 45, the court after a full discussion of the principles involved, concluded that "all those considerations of expediency and public policy, as well as of law, on which the ordinary presumption is founded, in favor of actual enjoyment, and on which such enjoyment is deemed to be rightful, apply with great force and exactness to the case of flowing," since if the flowing was not originally with the owner's consent, acquiescence in the flowing is not easily accounted for; it would be difficult to prove the circumstances under which ancient dams were erected and privileges obtained; and it would tend greatly to unsettle this class of rights to hold otherwise.

"The fact that flashboards have been maintained for twenty years, unexplained, raises the presumption that a prescriptive right has been gained." *Ludlow Mfg. Co. v. Indian Orchard*

*Co.*, 177 Mass. 61, 58 N. E. 181.

1. *Borden v. Vincent*, 24 Pick. (Mass.) 301; *Weed v. Keenan*, 60 Vt. 74, 13 Atl. 804, 6 Am. St. Rep. 93. Compare *Field v. Brown*, 24 Gratt. (Va.) 74; *Nichols v. Aylor*, 7 Leigh (Va.) 546.

"The Owner of the Servient Tenement cannot overcome the presumption of right arising from an uninterrupted user of twenty years, by proof that no grant was in fact made. He may rebut the presumption by contradicting or explaining the facts upon which it rests, but he cannot overcome it by proof in denial of a grant. He may show that the right claimed is one that could not be granted away, or that the owner of the servient tenement was legally incapable of making, or the owner of the dominant tenement incapable of receiving such a grant. . . .

He may explain the user or enjoyment by showing that it was under permission asked and granted; or that it was secret and without means of knowledge on his part; or that the user was such as to be neither physically capable of prevention nor actionable. . . . But if there be neither legal incompetency nor physical incapacity, and the user be open and notorious and be such as to be actionable or capable of prevention by the servient owner, he can only defeat the acquisition of the right on the ground that the user was contentious, or the continuity of the enjoyment was interrupted during the period of prescription. *Lehigh Val. R. Co. v. McFarlan*, 43 N. J. L. 605, 621.

2. *Cleveland, etc. R. Co. v. Huddleston*, 21 Ind. App. 621, 52 N. E. 1008; *Rickels v. Log Owners' Boom Co.*, 139 Mich. 111, 102 N. W. 652.

"If the enjoyment is shown to have originated in mistake or by favor or license, or if it was com-

appear sufficiently from the very fact and nature of the use.<sup>3</sup> Any relevant evidence is admissible upon the question.<sup>4</sup>

b. *Knowledge of Owner*.—Express evidence of knowledge on the part of the plaintiff need not be produced, where the use is itself open and visible, for notice will be presumed.<sup>5</sup>

menced and continued in any manner which does not indicate an assertion of right, the enjoyment is not adverse and consequently the presumption is not raised." *Mitchell v. Parks*, 26 Ind. 354.

Prescriptive right to detain waters can be established, but only by showing that the detention was made under a claim of right and inconsistent with or contrary to the interests and adverse to the title of the lower riparian owner. *Brace v. Yale*, 10 Allen (Mass.) 441.

3. *Hammond v. Zehner*, 21 N. Y. 118. See note in 93 Am. St. Rep. 711, to the case of *Oregon, etc. Co. v. Allen Ditch Co.*, 41 Or. 209, 69 Pac. 455.

Mere flowage of land by a dam for the necessary length of time would establish a prescriptive right, since "it is not to be supposed that he would have suffered such a continued injury to his land without objection, unless the plaintiffs had acquired the right." *Parker v. Hotchkiss*, 25 Conn. 321.

The general rule is that the enjoyment of an easement of this character (flowage of land) is presumed to be adverse unless something appears to rebut that presumption. This is the general rule where there is no express evidence that the user was accompanied by a claim of right, and no express evidence of a disclaimer of the right by the party enjoying the easement." *Perrin v. Garfield*, 37 Vt. 304, 310.

"We hold that where one land owner, by a ditch and levee on his own lands, diverts water and throws it on the lands of another, to his injury, and this injury continues without increase for ten years, and there is no evidence on the question whether such user is permissive or otherwise, the jury may, without further proof, infer that the use was adverse and as of right. This question, however, must depend much on

the nature of the use." *Polly v. McCall*, 37 Ala. 20.

**Easement To Take Water From Spring**.—Where the plaintiff claims the right to take water from a spring on defendant's land by means of a pipe, and proves that he has done it for the prescriptive period, the burden is upon the defendant to show that such use was permissive and under a license. *Law v. McDonald*, 9 Hun (N. Y.) 23. See *Hammond v. Zehner*, 21 N. Y. 118.

4. **Situation of the Parties To Be Considered**.—Establishment of a right by prescription to pollute waters "does not depend entirely upon proof of the manner in which the respondents have acted in reference to the operation of their mills, and the disposition of the waste therefrom." In connection with that fact must be considered the situation of the parties against whom such right is claimed, during the time necessary to the establishment of such right. *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763.

**Declarations of Mortgagor** in possession, that he did not hold adversely, are admissible upon the issue of a prescriptive right. *Betts v. Davenport*, 3 Conn. 286.

**Existence of Fruit Trees** on land of a lower riparian owner tends to show that the use of a stream by an upper riparian owner was not adverse, that is, that the use made by him was not to such an extent as to interfere with rights of the lower owner. *Boyce v. Cupper*, 37 Or. 256, 61 Pac. 642.

5. *Ludlow Mfg. Co. v. Indian Orchard Co.*, 177 Mass. 61, 58 N. E. 181. See *Oregon, etc. Co. v. Allen Ditch Co.*, 41 Or. 209, 69 Pac. 455, 93 Am. St. Rep. 701; *Cobb v. Smith*, 38 Wis. 21; *Grisby v. Clear Lake Water Co.*, 40 Cal. 396.

Where the easement claimed was the right to flow lands by the erection of a mill dam, the court held

c. *Interference With Owner.* — No actual interference with the owner's use of the stream or his land need be shown,<sup>6</sup> provided his legal rights are infringed, although there is authority for the view that adverse user is not established without proof of actual injury.<sup>7</sup>

D. *CONTINUED USE.* — Continued and uninterrupted use for the required time must be established, and any circumstances tending to show such use are admissible in evidence.<sup>8</sup>

E. *EXTENT OF THE RIGHT.* — The extent of the prescriptive right alleged is measured by the use actually made under the claim of right,<sup>9</sup> and any pertinent evidence is admissible upon the question.<sup>10</sup>

that there was a presumption of notice from the mere fact of the existence of the dam, although the land flowed was wild and uncultivated. *Perrin v. Garfield*, 37 Vt. 304.

6. *Ludlow Mfg. Co. v. Indian Orchard Co.*, 177 Mass. 61, 58 N. E. 181; *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. (Mass.) 241. And see 1 *Farnham, Waters and Water Rights*, § 537.

7. *Parker v. Hotchkiss*, 25 Conn. 321.

Notice of a claim of right to maintain a dam, or even actual maintenance will not result in a prescriptive right. "It is only when the dam begins to be so maintained that the orator's meadow is actually injured by the back water that prescription begins to run." *Dutton v. Stoughton*, 79 Vt. 361, 65 Atl. 91.

"While the owner of the land sustains no damage and can therefore maintain no suit or process, or in any way prevent such flowing, he cannot be presumed to have granted or relinquished any of his legal rights." *Foster v. Sebago Imp. Co.*, 100 Me. 196, 60 Atl. 894.

8. *Mueller v. Fruen*, 36 Minn. 273, 30 N. W. 886; *Wills v. Babb*, 222 Ill. 95, 78 N. E. 42; *Geer v. Durham Water Co.*, 127 N. C. 349, 37 S. E. 474.

"The evidence need not be direct and positive; it may be circumstantial, or any kind of evidence that will convince the court." *Carlisle v. Cooper*, 19 N. J. Eq. 256.

**No Acquiescence Short of the Full Period** authorizes a presumption of either a grant or a license. *Haight v. Price*, 21 N. Y. 241; *Campbell v. Smith*, 8 N. J. L. 140, 14 Am. Dec. 400.

"Adverse Possession for a shorter period than twenty years, is not of itself a sufficient ground to sustain the presumption of a grant. It is evidence, but unless the circumstances attending it give it weight, it is not sufficient evidence." *Gilman v. Tilton*, 5 N. H. 231.

**Occasional Use of Flashboards** for a brief period will not prove an uninterrupted use. *Pierce v. Travers*, 97 Mass. 306; *Carlisle v. Cooper*, 21 N. J. Eq. 576.

Prescriptive right is not established by proof that a dam has been maintained at the alleged height for the required time, if in fact the lands were not flowed during the time. *Smith v. Russ*, 17 Wis. 234. And see *Gibson v. Fischer*, 68 Iowa 29, 25 N. W. 914; *Horne v. Stillwell*, 35 N. J. L. 307.

9. **Pollution.** — *Mississippi Mills Co. v. Smith*, 69 Miss. 299, 11 So. 26, 30 Am. St. Rep. 546; *McCallum v. Germantown Water Co.*, 54 Pa. St. 40, 93 Am. Dec. 656.

**Flowage.** — *Stiles v. Hooker*, 7 Cow (N. Y.) 266; *In re Minnetonka Lake Imp.*, 56 Minn. 513, 58 N. W. 295; *Cobia v. Ellis*, 149 Ala. 108, 42 So. 751.

10. **Diversion.** — *Irving v. Borough of Media*, 194 Pa. St. 648, 45 Atl. 482.

"The right is supposed to have had its origin in a grant and the grant being lost, the user is the only evidence of the right granted, and as the presumption of a grant only exists where there has been an adverse, continuous and uninterrupted user, according to the nature of the easement claimed, for the period of twenty years, the prescriptive right is confined to the right as exercised for

**F. REBUTTAL.** — Any evidence tending to show that the user was not acquiesced in or that the right was disputed, is admissible.<sup>11</sup>

that period of time." *Prentice v. Geiger*, 74 N. Y. 341.

Where a dam has been constructed across a river, "the same proof of user which establishes the right is equally conclusive in establishing the limitations of that right;" and the extent of the grant presumed is not measured by the capacity of the dam, but by the rise actually made in the water. *Burnham v. Kempton*, 44 N. H. 78, 90. *Contra*, *Bliss v. Rice*, 17 Pick. (Mass.) 23, 33.

"**The Evidence on Part of the Defendant** consists, and must consist mainly, in direct proof that gates and boards were placed and kept up to a certain height over the sill; that on part of the complainants, of proof as to the gates and boards, and in part as to the situation of the river and objects on the pond and river above the dam, tending to show that the dam could not have been kept at the height claimed." *Carlisle v. Cooper*, 19 N. J. Eq. 256, 269.

**Declarations of the Grantor** of the defendants with reference to the nature of the use of the water are inadmissible in their behalf, where the prescriptive right they claim was acquired adversely to him and not through him. *Alhambra Water Co. v. Richardson*, 72 Cal. 598, 14 Pac. 379.

**11. Occasional Suspension or Interruption of the Right.**—"The lowering of the water by drought could not have that effect, else the presumption could never arise but would be defeated by the course of nature. Nor will letting off the water for the purpose of repairs and only for the period required for repairs, for that is only for the better enjoyment of the franchise, and not a surrender of it." *Gerenger v. Summers*, 24 N. C. (2 Ired.) 226.

**Building a Levee** to protect land is evidence that the owner did not acquiesce in the flowage. *Wills v. Babb*, 222 Ill. 95, 78 N. E. 42, 6 L. R. A. (N. S.) 136.

**Denial of the Right** within the period of prescription is admissible. *Field v. Brown*, 24 Gratt. (Va.) 74.

**Suit Instituted** within ten years of the inception of the right claimed, to recover damages for the exercise of the supposed right, may be shown. *Field v. Brown*, 24 Gratt. (Va.) 74; *Postlethwaite v. Payne*, 8 Ind. 104.

**Admission of Owner** that a dam has been raised and his promise to remedy it when a new dam was built, made to another riparian owner, does not prevent a right by prescription arising against the plaintiff. *Lynn v. Thomson*, 17 S. C. 129. And see *Willey v. Hunter*, 57 Vt. 479.

Complaints of flowage made by persons having no interest in the land flowed, to others having no interest, and not resulting in an actual interference with the mill owner's use of the dam, would not be evidence of a legal interruption of the use. *Bucklin v. Truell*, 61 N. H. 503.

The fact that payments had been made by former owners of the dam, many years before to settle claims for flowing other land is inadmissible where a prescriptive right is claimed to flow the lands in question, which began at a time prior to such payments. *Tyler v. Mather*, 9 Gray (Mass.) 177.

Evidence that the owner of land flowed by surplus water from a tank several times objected and demanded that it be stopped is sufficient to rebut the presumption of a grant. *Chicago & N. W. R. Co. v. Hoag*, 90 Ill. 339; *Nichols v. Aylor*, 7 Leigh (Va.) 546.

**Verbal Protest** held insufficient to prevent the acquirement of prescriptive rights. *Morris Canal & B. Co. v. Diamond Mills Paper Co.* (N. J. Eq.), 64 Atl. 746.

The fact that the claimant was ordered within twenty years by an upper riparian proprietor to remove flashboards and did so, rebuts the presumption of a grant. *Sumner v. Tileston*, 7 Pick. (Mass.) 198.



G. WEIGHT AND SUFFICIENCY. — The evidence to establish a prescriptive right must be clear and strong.<sup>12</sup>

H. ABANDONMENT. — Mere non-user will not establish the abandonment of the easement.<sup>13</sup>

#### IV. RIGHTS BY APPROPRIATION.

1. **In General.** — A. CALIFORNIA RULE. — In many of the western states, the doctrines in relation to the appropriation of water from streams which originated and were developed in California and which merely modify the common law principles, are adopted and followed.<sup>14</sup> The basis of these doctrines rests upon the presumption of an implied grant from the United States government as proprietor of the public domain,<sup>15</sup> and this in turn is justified by the acquiescence of the government in the actual appropriation of these waters by the miners and early settlers under their local customs

12. **Diversion.** — *Whitney v. Wheeler Cotton Mills*, 151 Mass. 396, 24 N. E. 774, 7 L. R. A. 613; *Jones v. Crow*, 32 Pa. St. 398 ("clear, definite and unequivocal").

**Pollution.** — *McCallum v. Germantown Water Co.*, 54 Pa. St. 40, 93 Am. Dec. 656.

**Flowage.** — *Hammond v. Zehner*, 21 N. Y. 118.

13. *Ludlow Mfg. Co. v. Indian Orchard Co.*, 177 Mass. 61, 58 N. E. 181; *Butterfield v. Reed*, 160 Mass. 361, 35 N. E. 1128.

"The question of abandonment is a very different one from having the easement defeated and divested by the adverse use of another." *Polson v. Ingram*, 22 S. C. 541, holding that it was not error for the court to refuse to charge that "twenty years non-user will presume the abandonment of an easement."

Non-user for twenty years is not conclusive evidence of an abandonment of the easement though it raises a presumption of abandonment. *Horner v. Stillwell*, 35 N. J. L. 307; *Veghte v. Raritan Power Co.*, 19 N. J. Eq. 142.

14. *Alaska.* — See *Ketchikan Co. v. Citizens' Co.*, 2 Alaska 120.

*California.* — *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674; *Anaheim Water Co. v. Fuller*, 150 Cal. 327, 88 Pac. 978.

*Kansas.* — *Clark v. Allaman*, 71 Kan. 206, 80 Pac. 571, 70 L. R. A. 971.

*Montana.* — *Smith v. Denniff*, 24 Mont. 20, 60 Pac. 398, 81 Am. St. Rep. 408, 50 L. R. A. 741.

*Nebraska.* — *Crawford Co. v. Hathaway*, 60 Neb. 574, 84 N. W. 271; *Cline v. Stock*, 71 Neb. 70, 98 N. W. 454, 102 N. W. 265.

*North Dakota.* — *Bigelow v. Draper*, 6 N. D. 152, 69 N. W. 570.

*Oklahoma.* — See *Markwardt v. City of Guthrie*, 18 Okla. 32, 90 Pac. 26, 9 L. R. A. (N. S.) 1150.

*Oregon.* — *Carson v. Gentner*, 33 Or. 512, 52 Pac. 506, 43 L. R. A. 130.

*South Dakota.* — *Lone Tree Co. v. Cyclone Co.*, 15 S. D. 519, 91 N. W. 352.

*Texas.* — *McGhee, etc. Co. v. Hudson*, 85 Tex. 587, 22 S. W. 398.

*Washington.* — *Benton v. Johncox*, 17 Wash. 277, 49 Pac. 495, 61 Am. St. Rep. 912, 39 L. R. A. 107.

15. "A water right can therefore be acquired only by the grant, express or implied, of the owner of the land and water. The right acquired by appropriation and user of the water on the public domain is founded in grant from the United States government as owner of the land and water; such grant has been made by Congress." *Smith v. Denniff*, 24 Mont. 20, 60 Pac. 398, 81 Am. St. Rep. 408, 50 L. R. A. 741.

"Under the law of Congress a grant of the kind of property in question is presumed by the act of appropriation." *Barkley v. Tieleke*, 2 Mont. 59.

and usages and its subsequent recognition of these customs by statute.<sup>16</sup>

**B. COLORADO RULE.**—Others of the western states follow the lead of Colorado and entirely repudiate the common law principles of riparian rights as being entirely unsuited to the existing conditions and treat the question as one in which the rights of the government as a proprietor never entered.<sup>17</sup>

**2. Acquirement.**—**A. BURDEN OF PROOF.**—The person who claims to be the prior appropriator,<sup>18</sup> or who alleges that his grantor was the prior appropriator<sup>19</sup> has the burden of proving that fact.

**B. PRESUMPTION.**—Under the California rule where priority of appropriation gives the priority of right only when the riparian lands are owned by the United States, there is a presumption that such lands are private property.<sup>20</sup>

**16. § 9 of Act of 1886,** reads: "Whenever, by priority of possession, rights to the use of water for mining, agricultural or other useful purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same."

"Under this view it is universally recognized that an appropriation constitutes a grant from the United States to the appropriator, originally implied from the silent acquiescence of the United States, now resting on §§ 2339, 2340, Revised Statutes of the United States. The very title of these acts enunciates the theory of a grant from the United States. 'An act *granting* the right of way to ditch and canal owners over the public lands and for other purposes.'" Weil, *Water Rights in the Western States*, 2nd. ed. p. 64. See *Meng v. Coffee*, 67 Neb. 500, 93 N. W. 713, 60 L. R. A. 910.

**17. Arizona.**—*Clough v. Wing*, 2 Ariz. 371, 17 Pac. 453; *Boquillas Co. v. Curtis*, 89 Pac. 504.

**Colorado.**—*Coffin v. Left Hand Ditch Co.*, 6 Colo. 443; *Crippen v. White*, 28 Colo. 298, 64 Pac. 184.

**Idaho.**—*Drake v. Earhart*, 2 Idaho 716, 23 Pac. 541; *Boise, etc. Co. v. Stewart*, 10 Idaho 38, 77 Pac. 25, 321.

**Nevada.**—*Reno, etc. Co. v. Stevenson*, 20 Nev. 269, 21 Pac. 317, 19 Am. St. Rep. 364, 4 L. R. A. 60; *Jones*

*v. Adams*, 19 Nev. 78, 6 Pac. 442, 3 Am. St. Rep. 788; *Twaddle v. Winters*, 29 Nev. 88, 85 Pac. 230, 89 Pac. 289.

**New Mexico.**—*Trambley v. Luter-man*, 6 N. M. 15, 27 Pac. 312; *Gutierrez v. Albuquerque Land, etc. Co.*, 188 U. S. 545 (applying the law of New Mexico).

**Utah.**—*Stowell v. Johnson*, 7 Utah 215, 26 Pac. 290; *Cole v. Richards Irr. Co.*, 27 Utah 205, 75 Pac. 376.

**Wyoming.**—*Moyer v. Preston*, 6 Wyo. 308, 44 Pac. 845, 71 Am. St. Rep. 914; *Willey v. Decker*, 11 Wyo. 496, 73 Pac. 210, 100 Am. St. Rep. 939.

**18. Gardner v. Wright**, 48 Or. 609, 91 Pac. 286.

**19.** "One who asserts that a water right and ditch are appurtenant to certain lands has the burden of proving that they are appurtenances and must connect himself with the title of the prior appropriator." *Smith v. Denniff*, 24 Mont. 20, 29, 60 Pac. 398, 81 Am. St. Rep. 408, 50 L. R. A. 741.

**20. Cave v. Tyler**, 133 Cal. 566, 65 Pac. 1089. *Compare Natoma Water & M. Co. v. Hancock*, 101 Cal. 42, 31 Pac. 112, 35 Pac. 334.

"It does not appear whether the lands through which the stream ran at the time the defendant claims to have acquired his right of appropriation were private or public property. If they were public lands of the United States at that time, we think it devolved upon the defendant to show that fact." *City of Santa Cruz*

C. HOW PROVED. — a. *Actual Appropriation*. — All that is necessary to establish an appropriation of water is proof of a completed actual diversion and beneficial use.<sup>21</sup>

b. *Statutory Methods*. — (1.) *In General*. — By proceeding according to the provisions of the statutes which have been adopted in all of the states, the appropriator acquires the benefit of the doctrine of relation, by which his rights are measured as of the time when he started work; reference must be made to the several statutes to determine what proof must be made under each of them.<sup>22</sup>

(A.) *INTENTION TO USE BENEFICIALLY*. — To prove the intention of the appropriator to make a beneficial use of the water, his acts and conduct and the surrounding circumstances may be shown.<sup>23</sup>

*v. Enright*, 95 Cal. 105, 30 Pac. 197, *distinguishing* *Burdge v. Smith*, 14 Cal. 380; *Smith v. Doe*, 15 Cal. 101.

21. "Appropriation is the intent to take accompanied by some open, physical demonstration of the intent, and for some valuable use." *Larimar Co. R. Co. v. People*, 8 Colo. 614, 9 Pac. 794.

"In appropriating the waters of a spring upon the public lands, only such acts are necessary, and such indications and evidences of appropriation required, as the nature of the case and the face of the country will admit of, and are under the conditions and circumstances at the time, practicable to accomplish the purpose of the water." *Silver Peak Mines v. Valcalda*, 79 Fed. 886.

**Erection of a Dam** across a natural stream is an actual appropriation of so much of the water as is detained. *Kelly v. Natoma Water Co.*, 6 Cal. 105.

**Declarations of Defendant** that his right to use of water was secondary to that of the plaintiff, with other evidence that the plaintiff had used the water for many years, was sufficient proof of a prior appropriation by the plaintiff. *Morgan v. Shaw*, 47 Or. 333, 83 Pac. 534.

**Written Declarations** of two appropriators of a stream were held admissible as evidence of their intention as to the quantity and time of the appropriation and of the understanding of the parties respecting each other's rights to the water, although there was no statute requiring such declarations to be made.

*Sweetland v. Olsen*, 11 Mont. 27, 27 Pac. 339.

22. Cal. Civ. Code, Div. Second, Title VIII; Colorado, 3 Mill's Ann. Stats. 1905, §§ 2265a-2265h. For a digest of the statutes of the western states, see Weil, *Water and Water Rights*, 2d ed., part VI.

23. *White v. Todd's etc. Co.*, 8 Cal. 443, 68 Am. Dec. 338.

"Such intention, unless established by notice, or in some other public manner, could in no way be known to or control others wishing to take water from the same stream, and such intention could only be inferred or deduced, first, from the capacity of the ditch at its head, and perhaps second, by the amount of irrigable land of the ditch proprietors upon which it could reasonably be supposed that they intended to apply it." *Taughenbaugh v. Clark*, 6 Colo. App. 235, 40 Pac. 153.

"The intention of the claimant is therefore a most important factor in determining the validity of an appropriation of water. When that is ascertained, limitation of the quantity of water necessary to effectuate his intent can be applied according to the acts, diligence and needs of the appropriator." *Power v. Switzer*, 21 Mont. 523, 55 Pac. 32.

"As every appropriation of water must be for a beneficial or useful purpose, either existing or contemplated, a complainant's intent at the time of appropriation must be determined by his acts, and by surrounding circumstances, its actual and contemplated use, and the pur-

(B.) **DUE DILIGENCE.** — In determining whether due diligence has been exercised in the prosecution and completion of the work, reference must be had to the natural conditions under which it was carried on and to the character of the work itself.<sup>24</sup>

(2.) **Irrigation Codes.** — Following the example of Wyoming, several of the western states have recently adopted comprehensive irrigation codes under which an exclusive method of procedure in making and proving an appropriation would seem to have been adopted.<sup>25</sup>

**3. Extent of Right.** — A. **AMOUNT APPROPRIATED.** — a. *In General.* — Proof of the amount claimed in the posted notice will establish the maximum right of the appropriator,<sup>26</sup> but evidence as to the capacity of the ditch will establish the amount of water actually appropriated,<sup>27</sup> and the amount he is entitled to will be finally determined by the amount used beneficially.<sup>28</sup>

pose thereof." *Toohy v. Campbell*, 24 Mont. 13, 60 Pac. 396.

**Intention Alone Insufficient.**

Where the plaintiff intended to construct some time in the future a reservoir for use in connection with his ditch, but did not do so within a reasonable time thereafter, the right to use water in filling its reservoir is not acquired. *New Loveland & G. Irr. & L. Co. v. Consolidated H. S. D. & R. Co.*, 27 Colo. 525, 62 Pac. 366, 52 L. R. A. 266. See *Ortman v. Dixon*, 13 Cal. 33.

**24. "What Constitutes Reasonable Diligence"** must necessarily depend upon the nature and magnitude of the enterprise, and to some extent upon the organized effort put forth in accomplishing the desired object." *Oviatt v. Big Four Min. Co.*, 39 Or. 118, 65 Pac. 811.

"The only matters in cases of this kind which can be taken into consideration are such as would affect any person who might be engaged in the same undertaking, such as the state of the weather, the difficulty of obtaining laborers, or something of that character. It would be a most dangerous doctrine to hold that ill-health or pecuniary inability of a claimant of a water privilege will dispense with the necessity of actual appropriation or the diligence which is usually required in the prosecution of the work necessary for that purpose." *Ophir Min. Co. v. Carpenter*, 4 Nev. 534, 97 Am. Dec. 550.

"Circumstances surrounding the parties at the date of the appropriation, such as the nature and climate of the country, and the difficulties of procuring labor and materials may be shown. *Kimball v. Gearhart*, 12 Cal. 27.

**Due Diligence a Question of Fact.** *Weaver v. Eureka Lake Co.*, 15 Cal. 271.

**25.** See the various statutes of Colorado, Idaho, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Utah and Wyoming.

**26.** *Last Chance Water Ditch Co. v. Heilbron*, 86 Cal. 1, 26 Pac. 523.

**27.** *Ophir S. M. Co. v. Carpenter*, 6 Nev. 393; *Browning v. Lewis*, 39 Or. 11, 64 Pac. 304; *Senior v. Anderson*, 115 Cal. 496, 47 Pac. 454.

**28.** *United States.* — *Union Mill & M. Co. v. Dangberg*, 81 Fed. 73.

*Alaska.* — *Ketchikan Co. v. Citizens Co.*, 2 Alaska 120.

*California.* — *Strong v. Baldwin*, 137 Cal. 432, 70 Pac. 288; *Smith v. Hawkins*, 120 Cal. 86, 52 Pac. 139; *McKinney v. Smith*, 21 Cal. 374.

*Colorado.* — *Town of Sterling v. Pawnee Co.*, 42 Colo. 421, 94 Pac. 339.

*Idaho.* — *Van Camp v. Emery*, 13 Idaho 202, 89 Pac. 752.

*Montana.* — *Toohy v. Campbell*, 24 Mont. 13, 60 Pac. 396.

*Nebraska.* — *Courthouse, etc. Co. v. Willard*, 75 Neb. 408, 106 N. W. 463.

b. *Statutory Decree*. — A statutory decree establishing priorities is conclusive evidence of the volume of water each person is entitled to and can only be attacked upon the ground of fraud.<sup>29</sup>

B. *CAPACITY OF DITCH*. — Any competent evidence which tends to show the capacity of a ditch may be received.<sup>30</sup>

4. *Wrongful Diversion*. — The burden of proving that there has been a wrongful diversion by reason of an enlarged user of the

*Nevada*. — *Twaddle v. Winters*, 89 Pac. 289.

*New Mexico*. — *Millheiser v. Long*, 10 N. M. 99, 61 Pac. 111.

*Oregon*. — *Mann v. Parker*, 48 Or. 321, 86 Pac. 598; *Gardener v. Wright*, 48 Or. 609, 91 Pac. 286.

*South Dakota*. — *Stenger v. Tharp*, 17 S. D. 13, 94 N. W. 402.

*Utah*. — *Nephi Irr. Co. v. Vickers*, 29 Utah 315, 81 Pac. 144.

*Wyoming*. — *Johnson v. Little Horse Co.*, 13 Wyo. 208, 79 Pac. 22, 110 Am. St. Rep. 986, 70 L. R. A. 341.

"The measure of the right as to extent, follows the nature of the appropriation, or the uses for which it is taken. The intent to take and appropriate and the outward act go together." *Ortman v. Dixon*, 13 Cal. 33.

"In determining the amount of water appropriated for useful or beneficial purposes, the number of acres claimed or owned by each party and the amount of water necessary to the proper irrigation of the same should be taken into consideration." *Kirk v. Bartholomew*, 3 Idaho 367, 29 Pac. 40.

The amount of water an appropriator is entitled to from a specified user is to be determined by a reference to the system used in the locality, although a more economical method might be followed. *Rodgers v. Pitt*, 89 Fed. 420.

In *Senior v. Anderson*, 115 Cal. 496, 47 Pac. 454, the entire stream was diverted and the court said: "But that is by no means conclusive of the quantity of water appropriated, nor is it, without showing a useful purpose to which the water of some of it was applied, evidence of any appropriation."

*Enlarged User*. — Amount turned into the ditch is not conclusive, but

the appropriator has a reasonable time to remove obstructions and readjust the grade so as to fill the ditch to its capacity. *White v. Todd's Val. Water Co.*, 8 Cal. 443, 68 Am. Dec. 338.

29. *Platt Val. Irr. Co. v. Central Tr. Co.*, 32 Colo. 102, 75 Pac. 391; *Water S. & S. Co. v. Larimer & W. Co.*, 24 Colo. 322, 51 Pac. 496, 46 L. R. A. 322; *Boulder & W. Co. v. Lower Boulder D. Co.*, 22 Colo. 115, 43 Pac. 540.

*Acts and Conduct Antecedent to the Decree* are inadmissible to prove the fact that the appropriation had never been perfected to the full amount claimed, before the decree was made. *O'Brien v. King*, 41 Colo. 487, 92 Pac. 945; *Alamosa Creek Canal Co. v. Nelson*, 42 Colo. 104, 93 Pac. 1112.

30. *Expert Opinion Admissible*. *Union Mill & M. Co. v. Dangberg*, 81 Fed. 73, 110.

*Non-Expert* who has had experience may testify to the capacity of a ditch; and his testimony is as competent as the testimony of an expert based upon actual mathematical measurement. *Frey v. Lowden*, 70 Cal. 550, 11 Pac. 838.

*Opinion of a Non-Expert Witness* is admissible to prove the grade of a ditch. *Paschane W. Co. v. Standart*, 97 Cal. 476, 32 Pac. 532.

*Carrying Capacity of a Ditch* depends not only upon its width and depth, but upon the velocity of the flow, and hence the grade of the ditch must be shown. *Last Chance W. D. Co. v. Heilbron*, 86 Cal. 1, 26 Pac. 523.

*Judicial Admission*. — On the issue as to what was the capacity of defendant's ditch, a complaint in a former action by the plaintiff for a readjudication of priorities, which contained a statement as to the

stream is upon the party alleging that to be the fact,<sup>31</sup> but the burden of proving as a defense that the complainant is not injured by the diversion is upon the defendant.<sup>32</sup> The fact that an increased acreage is being watered is not even presumptive evidence that an unlawful use of the water is being made,<sup>33</sup> but this should be established by proof of the amount of water turned into the headgate of the ditch.<sup>34</sup>

**5. Loss of Rights.**—A. ABANDONMENT. — a. *Burden of Proof.* The burden of proving an abandonment of the right to appropriate water is upon the party who alleges such abandonment.<sup>35</sup> But where water from a ditch is turned into a stream, with no intention of abandoning it, the owner who claims the right to abstract it

capacity of the ditch, was held competent as an admission. *Boulder & White Rock Co. v. Leggett D. & R. Co.*, 36 Colo. 455, 86 Pac. 101.

31. *Platte Val. Irr. Co. v. Central Tr. Co.*, 32 Colo. 102, 75 Pac. 391.

32. A junior appropriator who has diverted water from a tributary to the main stream, has the burden of proving that the water would never reach the senior appropriator, if left to its natural course. *Peterson v. Payne* (Colo.), 95 Pac. 301.

"Where a senior seeks to enjoin a junior appropriator of water from diverting the same to the injury of the former, and the junior appropriator seeks to avoid the same upon the ground that if the use which he threatens to make of it is restrained, the owner of the senior right will derive no benefit, such a defense ought to be established by clear and satisfactory evidence." *Alamosa Creek Canal Co. v. Nelson*, 42 Colo. 140, 93 Pac. 1112.

33. "The Mere Fact that it is the intention of appellee to apply the water, diverted from its original headgate into the new headgate and new ditch, upon a larger acreage, does not even presumptively establish that more water, measured in time or quantity, will be used than was diverted through the original headgate, nor will it presumptively establish injury to the vested rights of others." *Fulton Irr. D. Co. v. Meadow Isl. D. Co.*, 35 Colo. 588, 86 Pac. 748.

"The mere fact that an additional acreage was being supplied with water from these priorities was not

sufficient to establish the issue of an enlarged use when it appeared that the same acreage was also supplied from other sources." *Platte Val. Irr. Co. v. Central Tr. Co.*, 32 Colo. 102, 75 Pac. 391.

"The mere fact that, since the transfer, a greater acreage has been irrigated by the decreed priority of the Jackson ditch than before, does not establish a greater diversion. Greater economy in use or less thorough irrigation or difference in soil as to absorbing quality, may account for that." *Cache La Poudre Irr. Co. v. Larimer & Weld R. Co.*, 25 Colo. 144, 53 Pac. 318, 71 Am. St. Rep. 123.

34. **Best Evidence** that a greater quantity of water was being used "would be testimony that more water was now being diverted into the ditch. Certainly, evidence that more water is now being turned into the headgate of the Jackson ditch would be more satisfactory proof of injury to the plaintiff than the inference to be drawn from the mere fact that more land was being irrigated." *Cache La Poudre Irr. Co. v. Larimer & Weld R. Co.*, 25 Colo. 144, 53 Pac. 318, 71 Am. St. Rep. 123.

35. *Platte Val. Irr. Co. v. Central Tr. Co.*, 32 Colo. 102, 75 Pac. 391; *Alamosa Creek Canal Co. v. Nelson*, 42 Colo. 140, 93 Pac. 1112; *Beaver Brook R. & C. Co. v. St. Vrain Co.*, 6 Colo. App. 130, 40 Pac. 1066; *Hall v. Lincoln*, 10 Colo. App. 360, 50 Pac. 1047; *Putnam v. Curtis*, 7 Colo. App. 437, 43 Pac. 1056; *Richardson v. McNulty*, 24 Cal. 339.

lower down has the burden of proving that he is taking no more than rightfully belongs to him.<sup>86</sup>

b. *Direct Testimony*. — The owner of the water right may testify directly that he had no intention of abandoning it.<sup>87</sup>

c. *Declarations*. — The declarations of a person are admissible as evidence upon the question of an abandonment.<sup>88</sup>

d. *Acts and Conduct*. — The acts and conduct of the appropriator are of course competent, and often the only evidence from which to determine the question of abandonment.<sup>89</sup>

36. Where water from an artificial ditch is turned into a stream and conveyed for some distance, it is not necessarily abandoned, but the person claiming to be entitled to its use can only claim such portion as he establishes a right to by clear evidence. *Butte C. & D. Co. v. Vaughn*, 11 Cal. 143, 70 Am. Dec. 769.

"The mere turning of the water into the natural stream was not an abandonment of it, nor did such act prevent the owners from again claiming it. The burden, however, is upon him who turns water into a natural stream to show that he has not taken more out of it than belonged to him." *Herrimon Irr. Co. v. Keel*, 25 Utah 96, 69 Pac. 719.

37. *Boulder & White Rock D. Co. v. Leggett D. & R. Co.*, 36 Colo. 455, 86 Pac. 101. See *Cache La Poudre Irr. Co. v. Larimer & Weld R. Co.*, 25 Colo. 144, 53 Pac. 318, 71 Am. St. Rep. 123.

38. *Wimer v. Simmons*, 27 Or. 1, 39 Pac. 6, 50 Am. St. Rep. 685; *Oviatt v. Big Four Min. Co.*, 39 Or. 118, 65 Pac. 811; *Gould v. Maricopa Canal Co.*, 8 Ariz. 429, 76 Pac. 598; *Watts v. Spencer (Or.)*, 94 Pac. 39.

"These declarations were admissible as an exception to the general rule excluding hearsay statements. They were admissible as declarations evidencing the mental condition of the declarant; that is, that he did not intend by a disuse of his ditch to abandon the water right decreed thereto, and that he was intending to exercise such water right by his diversion through other head gates. The rule is that when it is material to prove the state of a person's mind or what were his intentions

you may prove what he said, because that is a means by which you can find out what his intentions were." *Central Tr. Co. v. Culver*, 35 Colo. 93, 83 Pac. 1064.

**Declarations Against Interest.** Proof that the defendant's grantor made a verbal sale of his water right, and repeatedly declared that he no longer had any interest in the ditch, is admissible to prove an abandonment. It would not be admissible to prove title in the plaintiff. *Griseza v. Terwilliger*, 144 Cal. 456, 77 Pac. 1034.

39. *Oviatt v. Big Four Min. Co.*, 39 Or. 118, 65 Pac. 811; *Power v. Switzer*, 21 Mont. 523, 55 Pac. 32; *Gould v. Maricopa Canal Co.*, 8 Ariz. 429, 76 Pac. 598; *Wood v. Etiwanda Water Co.*, 147 Cal. 228, 81 Pac. 512; *Watts v. Spencer (Or.)*, 94 Pac. 39.

"A Single Act may be of such character, and done in such manner, and under such circumstances, that an intention to abandon may be inferred from it." *Putnam v. Curtis*, 7 Colo. App. 437, 43 Pac. 1056.

**Verbal Sale** of the water right may be shown to prove an abandonment. *Griseza v. Terwilliger*, 144 Cal. 456, 77 Pac. 1034.

Evidence that when water was scarce defendants did not enforce their rights to their full extent is insufficient to raise a presumption of abandonment. *Hall v. Lincoln*, 10 Colo. App. 360, 50 Pac. 1047.

Abandonment of land operated as in abandonment of so much of the water as was required for irrigating such land. *Rutherford v. Lucerne Canal Co.*, 12 Wyo. 299, 75 Pac. 445.

**Acts and Conduct Antecedent to a Statutory Decree of Priorities** are admissible to prove the element of

e. *Non-User*. — Abandonment is a matter of intention,<sup>40</sup> and it is not shown by mere proof of non-user;<sup>41</sup> but non-user is a fact to be considered with other circumstances of the case from which an abandonment may be inferred.<sup>42</sup>

intention in abandonment, but are inadmissible to show non-user. "Evidence of the antecedent acts of which defendant complains, though not proper to prove the right of the owner to a less amount of water than that decreed to him, and not proper to show the element of non-use in a subsequent abandonment, certainly is proper, and not prejudicial, as throwing light on the intention which the appropriator entertained, when, for so long a time, he ceased after the decree to make use of a part of his decreed property." *Alamosa Creek Canal Co. v. Nelson*, 42 Colo. 140, 93 Pac. 1112. And see *O'Brien v. King*, 41 Colo. 487, 92 Pac. 945.

40. *Norman v. Corbley*, 32 Mont. 195, 79 Pac. 1059; *Watts v. Spencer* (Or.), 94 Pac. 39; *Hall v. Lincoln*, 10 Colo. App. 360, 50 Pac. 1047; *Putnam v. Curtis*, 7 Colo. App. 437, 43 Pac. 1056.

"As abandonment is a matter of intention, it is peculiarly within the province of a trial court to determine from all the facts and circumstances of each particular case whether abandonment has or has not taken place." *Cooper v. Shannon*, 36 Colo. 98, 85 Pac. 175.

41. *California*. — *Utt v. Frey*, 106 Cal. 392, 39 Pac. 807, cited and approved in *Wood v. Etiwanda Water Co.*, 147 Cal. 228, 81 Pac. 512.

*Colorado*. — *New Mercer Ditch Co. v. Armstrong*, 21 Colo. 357, 40 Pac. 989.

*Idaho*. — *Welch v. Garrett*, 5 Idaho 639, 51 Pac. 405.

*Montana*. — *Gassert v. Noyes*, 18 Mont. 216, 44 Pac. 959.

*Nebraska*. — *Farmers' Canal Co. v. Frank*, 72 Neb. 136, 154, 100 N. W. 286.

*Oregon*. — *Wimer v. Simmons*, 27 Or. 1, 39 Pac. 6, 50 Am. St. Rep. 685; *Dodge v. Morden*, 7 Or. 457.

*South Dakota*. — *Edgemont Imp. Co. v. Tubbs Sheep Co.*, 115 N. W. 1130.

*Utah*. — *Promontory Ranch Co. v. Argile*, 28 Utah 398, 79 Pac. 47; *Gill v. Malan*, 29 Utah 431, 82 Pac. 471.

"Abandonment is made up of two elements,—act and intention. Non-user alone, at least short of the period of the statute of limitations is not sufficient to prove an abandonment, but non-user continued for a considerable length of time coupled with other acts of a character tending to show an intention on the part of the owner not to resume or repossess himself of the thing whose use he relinquished, may constitute an abandonment." *Alamosa Creek Canal Co. v. Nelson*, 42 Colo. 140, 93 Pac. 1112.

"Non-user of the ditch, or any part thereof, during that portion of the time that its use was prevented by circumstances over which the plaintiff had no control is not evidence of abandonment of, or intention to abandon, such ditch." *Welch v. Garrett*, 5 Idaho 639, 51 Pac. 405; *Ada County Irr. Co. v. Farmers' Canal Co.*, 5 Idaho 793, 51 Pac. 990, 40 L. R. A. 485.

42. *Non-User* with other evidence as to the acts and conduct of the party will often establish an abandonment. *Oviatt v. Big Four Min. Co.*, 39 Or. 118, 65 Pac. 811 (where the defendant left the premises, sold the movables, and the property was sold for taxes, although he intended to go back some time, if he could); *Davis v. Gale*, 32 Cal. 26, 91 Am. Dec. 554 (where miners left their ditch after all the gold in a placer mine was exhausted, although leaving it in the care of a licensee); *Stalling v. Ferrin*, 7 Utah 477, 27 Pac. 686 (continuous neglect to repair evidences an abandonment). But see *Smith v. Hope Min. Co.*, 18 Mont. 432, 45 Pac. 632 (where mill was shut down, but a caretaker was left in charge, non-use for nine years did not prove an abandonment); *Dodge v. Marden*, 7 Or. 457 (a bill of sale of mining claims held not to



**B. ADVERSE POSSESSION.** — a. *Burden of Proof.* — The burden of proving a right by adverse possession of a water right to which another person has a prior claim is upon the person claiming under it,<sup>43</sup> and he must produce clear and convincing proof of it.<sup>44</sup> But where possession has been had for the necessary time, the burden of proving that the use originated in a grant or license is upon the person denying the claim.<sup>45</sup>

b. *Proof of Adverse User.* — Proof of an adverse user of water rights is made as in the case of the acquirement of other rights by this method,<sup>46</sup> but a few illustrative cases will be found in the notes.<sup>47</sup>

evidence an intention to abandon water rights).

**Disputable Presumption** of abandonment arises from non-user for an unreasonable length of time. Sieber v. Frink, 7 Colo. 148, 2 Pac. 901.

**Non-User for Statutory Period of Limitations** affords conclusive evidence of abandonment. See Dodge v. Marden, 7 Or. 457.

43. Lavery v. Arnold, 36 Or. 84, 57 Pac. 906, 58 Pac. 524; Smith v. North Canyon Water Co., 16 Utah 194, 52 Pac. 283; American Co. v. Bradford, 27 Cal. 360; Bauers v. Bull, 46 Or. 60, 78 Pac. 757; Strong v. Baldwin, 137 Cal. 432, 70 Pac. 288.

"The adverse use must be under claim of right. . . . The burden of proof is upon him (the claimant) and he must establish the adverse enjoyment in the most satisfactory manner before the court can indulge in any presumption that the complainant granted to him any material portion of the motive power of its mill." Union Min. & M. Co. v. Ferris, 2 Sawy. 176, 188, 24 Fed. Cas. No. 14,371.

"The burden of proving an adverse uninterrupted use of water, with the knowledge and acquiescence of the party having a prior right, is cast on the party claiming it." Union Mill & M. Co. v. Dangberg, 81 Fed. 73, 91.

**Extent of Right Must Appear.** "The burden is upon him who would establish by user a prescriptive right to an easement, to present clear and distinct evidence of the extent to which the user has been exercised." Strong v. Baldwin, 137 Cal. 432, 70 Pac. 288.

44. Morris v. Bean, 146 Fed. 423, 433; MacRae v. Small, 48 Or. 139, 85 Pac. 503.

45. Knight v. Cohen (Cal. App.), 93 Pac. 396.

"While an adverse user cannot grow out of mere permissive enjoyment, the burden of proving possession thus claimed to have been held by such permission or subserviency is cast upon the party attempting to defeat such claim." Gardner v. Wright, 48 Or. 609, 91 Pac. 286.

"The burden is in the first instance upon plaintiff to prove his title by prescription. After showing the continuous occupancy and use of the water as though he were the owner, for more than five years, he establishes a *prima facie* case. It then devolves upon the defendant to show that the use was permissive or without the knowledge of said defendant." Gurnsey v. Antelope Creek W. Co., 6 Cal. App. 387, 92 Pac. 326.

**Presumption of Adverse Character of Use From Fact of Use.** — "In case of the death of a person who probably attempted to assert an adverse user of an easement, as his declarations to that effect would be in his own interest, and therefore inadmissible, the law from the mere use, invokes a presumption that it was initiated under a claim of right, thereby imposing upon the adverse party the burden of proving that the use was in pursuance of a license." Bauers v. Bull, 46 Or. 60, 78 Pac. 757.

46. See article "ADVERSE POSSESSION," and *supra*, III, 5.

47. **Invasion of Prior Owner's Right Must Be Shown.** — "In order

## V. SURFACE WATERS.

**1. Burden of Proof.** — Where the rule of the civil law is applied and the land with a lower elevation owes the duty of receiving the drainage from higher adjacent land, the party claiming the servitude has the burden of proving that his land has the greater elevation.<sup>48</sup>

**2. Drainage Proceedings.** — **A. BURDEN OF PROOF.** — The petitioner in drainage proceedings is regarded as plaintiff<sup>49</sup> and has the

to constitute a right by prescription, there must have been such an invasion of the rights of the party against whom it is claimed, that he would have had ground of action against the intruder." *Faulkner v. Rondoni*, 104 Cal. 140, 37 Pac. 883; *Anaheim Water Co. v. Semi-Tropic W. Co.*, 64 Cal. 185, 30 Pac. 623; *Watts v. Spencer (Or.)*, 94 Pac. 39; *Wimer v. Simmons*, 27 Or. 1, 39 Pac. 6, 50 Am. St. Rep. 685; *Alta Land Co. v. Hancock*, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217.

"The defendant's use is not adverse until it becomes injurious to the complainant and amounts to an actual invasion of its right." *Union Min. & M. Co. v. Ferris*, 2 Sawy. 176, 187, 24 Fed. Cas. No. 14,371.

"When there is sufficient water in the river to supply all parties, there can be no such thing as adverse use of the water. . . . It is only when the water becomes so scarce that all of the parties cannot be supplied and that one appropriator takes water which by priority belongs to another appropriator, that there is an adverse use." *Egan v. Estrada*, 6 Ariz. 248, 56 Pac. 721.

"The use must be such as to constitute an invasion of a right which the owner may at any time assert but fails to do so until the full statutory period has passed." *Buller v. Herm Meyer*, 32 Mont. 541, 81 Pac. 334.

**Offer To Pay** for a ditch used for diverting water is evidence that user of it was not adverse. *Jensen v. Hunter (Cal.)*, 41 Pac. 14.

**The Notice** of a diversion which had been signed by defendant's grantor and posted in a conspicuous place, was held admissible to prove that the defendant claimed adversely

to all others. *City of Santa Cruz v. Enright*, 95 Cal. 105, 30 Pac. 197.

**What User Is Open and Notorious.** "No particular act or series of acts is necessary to be done in order that the possession may be notorious, but any visible act which clearly demonstrates an intention to claim ownership and possession will be sufficient to establish claim of adverse possession. . . . Such claim may be made out by visible acts without any assertions by word of mouth." *Gurnsey v. Antelope Creek W. Co.*, 6 Cal. App. 387, 92 Pac. 326.

**Continuity of User** depends entirely upon the nature and character of the right claimed, and an irrigating ditch need not be used every day. *Hesperia Land Co. v. Rogers*, 83 Cal. 10, 23 Pac. 196, 17 Am. St. Rep. 209.

**Presumption of Knowledge From Visible Use.** — "When the use is not secret or clandestine, but open, visible, and notorious, the presumption of knowledge follows." *Gurnsey v. Antelope Creek W. Co.*, 6 Cal. App. 387, 92 Pac. 326.

**48.** "The burden is on the appellant to show, among other things, that his is the dominant estate. In other words, he must prove that his land in its natural condition is relatively higher than that of the defendant, so that the former will be relieved in some material degree of its burden of surface water by permitting its unrestricted flow in the direction of the latter." *Matteson v. Tucker*, 131 Iowa 511, 107 N. W. 600.

**49.** "In analogy to proceedings to establish a public highway, where there are adversary parties, we think that upon a petition to construct a ditch, the petitioner should be regarded as plaintiff and the remon-

burden of proving the public utility of the ditch<sup>50</sup> and compliance with statutory requirements.<sup>51</sup> In actions to recover assessments, the plaintiff has the burden of proving the compliance with all statutory provisions, such as the giving of notice,<sup>52</sup> but the defendant must prove that his assessment was excessive.<sup>53</sup>

**B. PRESUMPTIONS.** — There is a presumption that the best method was followed in locating a drain,<sup>54</sup> and that all assessments were properly made and levied.<sup>55</sup>

**C. NOTICE OF PETITION.** — The giving of notice of hearing on a petition may be proved by parol evidence.<sup>56</sup>

**D. PUBLIC UTILITY.** — To show the public utility of a proposed

strants as defendants." *Neff v. Reed*, 98 Ind. 341. And see *Wilson v. Talley*, 144 Ind. 74, 42 N. E. 362, 1009.

But where a drain was ordered constructed across the land of a petitioner, according to the suggestion of a remonstrator, the burden of proving that the land of the petitioner was benefited thereby was upon the remonstrator. *Lancaster v. Leaman*, 110 Ky. 251, 61 S. W. 281.

**50.** Where the drainage law requires the petition for the construction of a ditch to state that the public health will be improved or public highways benefited, if these statements are controverted the burden of proving them is upon the petitioner. *Neff v. Reed*, 98 Ind. 341. And see *Hardy v. McKinney*, 107 Ind. 364, 8 N. E. 232.

**51.** One who asserts title through a ditch allotment, or under a lien for ditch assessments has the burden of proving that the law was substantially complied with in relation to notice to parties affected. *Brosemer v. Kelsey*, 106 Ind. 504, 7 N. E. 569.

**52.** When a party asserts title under and through an allotment under the act of 1875, or seeks to have a lien declared for the amount of the allotment when the tax deed is ineffectual to convey title, the burden is upon him to allege and prove that the law was substantially complied with in relation to notice to parties to be affected." *Brosemer v. Kelsey*, 106 Ind. 504, 7 N. E. 569. See *Pickering v. State*, 106 Ind. 228, 6 N. E. 611.

**53.** Where the Only Issue raised by the remonstrance is that the land

of the remonstrator is assessed too much, he has the burden of the issue. *Conwell v. Tate*, 107 Ind. 171, 8 N. E. 36; *Rogers v. Venis*, 137 Ind. 221, 36 N. E. 841; *Morrow v. Geeting* (Ind. App.), 41 N. E. 848; *Wilson v. Talley*, 144 Ind. 74, 42 N. E. 362, 1009.

**54.** Location of Drain raises a presumption that the commissioners adopted the cheapest and most practicable method of drainage. *Meranda v. Spurlin*, 100 Ind. 380.

**55.** *Swamp Land R. Dist. v. Wilcox*, 75 Cal. 443, 17 Pac. 241.

"When it is shown that the surveyor had jurisdiction to make the repairs, the presumption is that the assessments were made by him against the land owners thereby in proportion to the benefits received by such repairs." *Morrow v. Geeting* (Ind. App.), 41 N. E. 848.

That assessments are not in proportion to the benefits must be proved by the remonstrator, where the report of the viewers is before the court. *Wilson v. Talley*, 144 Ind. 74, 42 N. E. 362, 1009.

**56.** Proof of posting notice of an intended petition for the location of a drain could be made only by affidavit under the early Indiana statute. *Scott v. Brackett*, 89 Ind. 413. But by virtue of an amendment, proof can now be made by oral testimony. *Meranda v. Spurlin*, 100 Ind. 380; *Carr v. Boone*, 108 Ind. 241, 9 N. E. 110.

The certificate of the clerk as to notice of the hearing of the petition is not the only evidence admissible upon the question. *Hepler v. People*, 226 Ill. 275, 80 N. E. 759.

ditch, evidence of all the surrounding circumstances may be admitted.<sup>57</sup>

**E. RECOVERY OF ASSESSMENTS.** — In an action to enforce a ditch lien or recover an assessment, the plaintiff must show the regularity of all the prior proceedings,<sup>58</sup> and the record of these proceedings is admissible in evidence.<sup>59</sup> The report of the appraisers is only *prima facie* evidence as to the amount of the benefit to the land in question.<sup>60</sup>

**57.** *Meranda v. Spurlin*, 100 Ind. 380.

Evidence that a drain would among other benefits carry off water from the vicinity of a public school is sufficient to justify a finding that it was of public utility. *Collins v. Rupe*, 109 Ind. 340, 10 N. E. 91.

Where a new ditch is to be constructed along the line of an old one, evidence of the cost, size and capacity of the old ditch is admissible in determining whether the new ditch is a practicable and necessary improvement. *Drebert v. Trier*, 106 Ind. 510, 7 N. E. 223; *Hardy v. McKinney*, 107 Ind. 364, 8 N. E. 232.

**View by Jury.** — "The jury may consider as evidence, facts brought to their knowledge from their actual view of the proposed route made as provided by statute." *Lake Erie & W. R. Co. v. Comrs.*, 63 Ohio St. 23, 57 N. E. 1009; *Williams v. Lockoman*, 46 Ohio St. 416, 21 N. E. 358.

**Opinion Evidence.** — The opinions of witnesses as to the public utility of the proposed drain are inadmissible. *Yost v. Conroy*, 92 Ind. 464, 47 Am. Rep. 156; *Meranda v. Spurlin*, 100 Ind. 380. But see *Heick v. Voight*, 110 Ind. 279, 11 N. E. 306; *Bennett v. Meehan*, 83 Ind. 566, 43 Am. Rep. 78.

**58. Public Utility Must Be Shown.** — Where neither the petition, the finding of the board of commissioners, nor any evidence of the public utility of the ditch is presented, no assessment can be recovered. *Tillman v. Kircher*, 64 Ind. 104; *Bate v. Sheets*, 64 Ind. 209.

**Proof of Notice of Assessment.** Proof that notice was sent to defendant by mail, without evidence as to the time when or place where it was

sent or its contents, is insufficient. *Hayes v. State*, 96 Ind. 284.

**59. "The Objections Predicated** upon rulings of the court in admitting in evidence the report and assessment of benefits, made by the commissioners of drainage, and the entry made by the plaintiff as drainage commissioner, showing the assessments made for the construction of the drain are not tenable. This was the proper method of proving the amount the plaintiff was entitled to recover against the defendants respectively." *McKinney v. State*, 117 Ind. 26, 19 N. E. 613.

**The Original Petition** filed, and the order book entries in the proceeding for the location of a ditch, are admissible. *Voss v. State*, 9 Ind. App. 294, 36 N. E. 654.

**Record Entered in the Minute Book of the Supervisors** of the order appointing commissioners to view the land and make assessments is *prima facie* evidence of the facts recited. *Swamp Land R. Dist. v. Wilcox*, 75 Cal. 443, 17 Pac. 241.

**Ditch Book** kept by the clerk containing a record of all ditch proceedings is competent evidence only when the records are certified by the judge. *Dixon v. Labry*, 24 Ky. L. Rep. 697, 69 S. W. 791.

**60.** *Eel River D. Assn. v. Topp*, 16 Ind. 242.

Proof that the assessment was too high will not defeat the action but will only reduce the recovery. *New Eel River D. Assn. v. Durbin*, 30 Ind. 173.

**Opinion Evidence.** — On an appeal from a special assessment, the opinion of non-experts is admissible as to how much the land in question will be benefited by the drainage. *Spear v. Drainage Comrs.*, 113 Ill. 632.

## VI. SUBTERRANEAN WATERS.

**1. Presumptions and Burden of Proof.**—A. NATURE OF THE WATER.—On account of the great difficulty in determining the nature of underground water, the courts have formulated the presumption that underground waters are percolating waters,<sup>61</sup> and the burden of proving that they flow in well defined and known channels is upon the party alleging such to be the fact.<sup>62</sup>

<sup>61.</sup> Gould on Waters, § 281; Tampa Water Wks. Co. v. Cline, 37 Fla. 586, 20 So. 780, 53 Am. St. Rep. 262, 33 L. R. A. 376; Barclay v. Abraham, 121 Iowa 619, 96 N. W. 1080, 100 Am. St. Rep. 365, 64 L. R. A. 255; Wyandot Club v. Sells, 6 Ohio N. P. 64; Huber v. Merkel, 177 Wis. 355, 94 N. W. 354, 98 Am. St. Rep. 933, 62 L. R. A. 589; Wheelock v. Jacobs, 70 Vt. 162, 40 Atl. 41, and note in 67 Am. St. Rep. 663.

"Underground waters are presumed to be percolating waters until it is shown that they exist in a known and well defined channel.

. . . The burden of proof then, is upon the plaintiffs in this case to show that the waters in controversy exist in a known underground stream, with well defined channel, if they would have the law of a similar surface stream apply here." Pence v. Carney, 58 W. Va. 296, 52 S. E. 702, 6 L. R. A. (N. S.) 266.

"Distinct and well defined subterranean streams of water are comparatively rare; their existence in any case cannot be presumed." Frazier v. Brown, 12 Ohio St. 294.

**Springs.**—"In the absence of evidence, it will be presumed that the spring was formed and fed by the percolation of water through the surrounding soil, and was not the outbreak upon the surface of a subterranean stream." Metcalf v. Nelson, 8 S. D. 87, 65 N. W. 911, 59 Am. St. Rep. 746; Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299.

**Wells.**—"The waters of a well are presumed to be furnished by percolation. Ocean Grove v. Asbury Park, 40 N. J. Eq. 447.

<sup>62.</sup> **Channel** must be shown to be both well defined and known. Barclay v. Abraham, 121 Iowa 619, 96 N. W. 1080, 100 Am. St. Rep. 365,

64 L. R. A. 255; Wyandot Club v. Sells, 6 Ohio N. P. 64; Wheelock v. Jacobs, 70 Vt. 162, 40 Atl. 41, and note in 67 Am. St. Rep. 663.

**In Considering This Question**, the knowledge required cannot be reasonably held to be that derived from a discovery in part by excavation exposing the channel, but must be a knowledge, by reasonable inference, from existing and observed facts, in the natural, or rather the pre-existing condition of the surface of the ground. The onus of proof lies of course on the plaintiff claiming the right, and it lies upon him to show that without opening the ground by excavation or by having recourse to abstruse speculations of scientific persons, men of ordinary power and attainments would know or could with reasonable diligence ascertain, that the stream when it emerges into light, comes from and has flowed through a defined subterranean channel." Black v. Ballymena Comrs., 17 L. R. Ir. 459. And see Wyandot Club v. Sells, 6 Ohio N. P. 64; City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585; Pence v. Carney, 58 W. Va. 296, 52 S. E. 702, 6 L. R. A. (N. S.) 266.

"The waters below are presumed to be wandering percolating waters until a defined, continuous channel is shown; and even then, in order to apply to them the rules settled in reference to surface streams it must be further shown not only that the stream has a distinct defined underground channel, but this must be known or notorious." Clarke County v. Mississippi Lumb. Co., 80 Miss. 535, 31 So. 905.

Where a stream disappears, the burden of proving that it connected with a stream which later flowed through the plaintiff's land is upon him, where he alleges a wrongful

B. DIVERSION OR INTERFERENCE. — The burden of proving a diversion or interference with a subterranean stream, is upon the party alleging it.<sup>63</sup>

2. **Nature of the Water.** — A. IN GENERAL. — Evidence to prove the character of underground waters must necessarily be indirect and inferential in most cases, and any evidence which tends to throw light upon the issue is admissible.<sup>64</sup>

B. JUDICIAL NOTICE. — Judicial notice has been taken of the fact that the source or basis of an artesian well is percolating water, and not an underground stream.<sup>65</sup>

diversion of water. *Farwell v. Sturgis Water Co.*, 10 S. D. 421, 73 N. W. 916.

63. *Tampa Water Wks. Co. v. Cline*, 37 Fla. 586, 20 So. 780, 53 Am. St. Rep. 262, 33 L. R. A. 376; *Yarwood v. W. Los Angeles W. Co.*, 132 Cal. 204, 64 Pac. 275.

**Privilege or License** to divert must be established by the defendant relying upon it. *Whetstone v. Bowser*, 29 Pa. St. 59.

64. See the note to *Wheelock v. Jacobs*, 70 Vt. 162, 40 Atl. 41, in 67 Am. St. Rep. 663.

Where it was shown that a spring from which a city was supplied with water was replenished upon the opening of the gates in a certain dam, it was held that it was shown that the supply of water for the spring came from the dam, but the court refused to find that such supply reached the spring in well defined channels, although after leaving the dam part of the water passed along the surface as a surface stream. *Springfield Water Wks. Co. v. Jenkins*, 62 Mo. App. 74.

Where sandstone strata were separated by a layer of clay impervious to water, it was held that in the absence of any other showing it would be assumed that the sandstone was uniformly porous and that the effect of the clay was merely to change the direction of the percolation, without forming a stream. *Gould v. Eaton*, 111 Cal. 639, 44 Pac. 319, 52 Am. St. Rep. 201.

When in boring for a well water was struck and the flow in another well near by largely ceased and was muddied and filled with dirt, it was held that it sufficiently appeared that both wells were fed from the same

stream. *Burroughs v. Saterlee*, 67 Iowa 396, 25 N. W. 808.

The fact that when the ditch in question was dug, the water ceased to rise in the spring and about the same quantity now flows in the ditch does not prove that the water reached the spring in a well defined channel, since the theory that it reached it by percolation is equally as consistent with the facts. *Taylor v. Welch*, 6 Or. 199.

"The mere fact that the excessive flow from one well interrupted that of several others did not tend to point out the location, course, or even existence of a subterranean river or smaller water course." *Barclay v. Abraham*, 121 Iowa 619, 96 N. W. 1080, 100 Am. St. Rep. 365, 64 L. R. A. 255; *Pence v. Carney*, 58 W. Va. 296, 52 S. E. 702, 6 L. R. A. (N. S.) 266.

The fact that in drilling a well, when water was struck there was no sudden drop of the drill but that it rested on the bottom of the well, is evidence that the water does not flow in a stream. *Huber v. Merkel*, 117 Wis. 355, 94 N. W. 354, 98 Am. St. Rep. 933, 62 L. R. A. 589.

65. "It has long since become a matter of common scientific knowledge that the ordinary artesian well derives its supply from a pervious stratum of rock imprisoned between two impervious strata of earth or rock, the water-bearing stratum being inclined and coming to the surface at some distant and higher point called the 'intake,' where it receives the water, and that the water percolates with greater or less rapidity along and through the inclined plane, obedient to the law of gravity until it reaches some obstruction, so as

C. **EXPERT EVIDENCE.** — The testimony of experts is admissible to aid in determining the nature of the water.<sup>66</sup>

D. **EXPERIMENTS.** — The results of experiments are admissible.<sup>67</sup>

E. **FISH.** — The presence of fish in waters is evidence that the water flows in a well defined channel.<sup>68</sup>

F. **NATURE OF ROCK.** — Courts often refer to the fact that underground streams are most likely to be found where there is a limestone formation.<sup>69</sup>

G. **FORMER SURFACE FLOW.** — The fact that a stream many years before flowed on the surface is strong evidence that it now flows in a defined and known channel where it later emerges on the surface.<sup>70</sup>

H. **SURFACE INDICATIONS.** — The fact that underground waters flow in a well defined channel may be proved by characteristic marks and signs upon the surface.<sup>71</sup>

to be imprisoned, in which event, if the stratum be pierced, water will rise in a tube by hydrostatic pressure, due to the greater height of the intake. The idea that there are vast subterranean channels or caverns, in which artesian waters flow like a river, has been long since abandoned. These are matters of common scientific knowledge. Vol. 1, *Geology of Wisconsin*; Chamberlain, p. 689; U. S. Geological Survey 1885, pp. 125 to 173." Huber v. Merkel, 117 Wis. 355, 94 N. W. 354, 98 Am. St. Rep. 933, 62 L. R. A. 589.

66. *Tampa Water Wks. Co. v. Cline*, 37 Fla. 586, 20 So. 780, 53 Am. St. Rep. 262, 33 L. R. A. 376; *Black v. Ballymena Comrs.*, 17 L. R. Ir. 459.

67. See *Bloodgood v. Ayers*, 108 N. Y. 400, 15 N. E. 433, 2 Am. St. Rep. 443.

In *Tampa Waterworks Co. v. Cline*, 37 Fla. 386, 20 So. 780, 53 Am. St. Rep. 262, 33 L. R. A. 376, the court gave considerable weight to the fact that when water in one well was colored with aniline dyes, it showed soon after in another well.

68. *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 20 So. 780, 53 Am. St. Rep. 262, 33 L. R. A. 376.

69. See *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 20 So. 780, 53 Am. St. Rep. 262, 33 L. R. A. 376; *Wheatly v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721; *Frazier v. Brown*, 12 Ohio St. 294; *Springfield*

*Waterworks Co. v. Jenkins*, 62 Mo. App. 74.

70. *Black v. Ballymena Comrs.*, 17 L. R. Ir. 459.

71. **Row of Bushes.** — In *Hale v. McLea*, 53 Cal. 578, the fact that a row of bushes found ordinarily only near a stream, extended along the surface, was held to prove the existence of a stream of underground water.

But in *Bloodgood v. Ayres*, 108 N. Y. 400, 15 N. E. 433, 2 Am. St. Rep. 443, the fact that the route of water could be traced by the deeper green of the grass was held insufficient to establish the fact of a well defined channel.

**Sound.** — In *Black v. Ballymena Comrs.*, 17 L. R. Ir. 459, a witness testified that he could hear sounds indicating an underground stream.

**Stream Partly on Surface.** — Where a stream after flowing on the surface disappears but later emerges, slight evidence that it is the same stream will be sufficient. *Saddler v. Lee*, 66 Ga. 45, 42 Am. Rep. 62. See *Whetstone v. Bowser*, 29 Pa. St. 59.

"We think the evidence in this case shows that the water flowing from the springs at the mouth of the cañon was furnished through as well defined a subterranean channel as it would ordinarily be practicable to describe. The evidence shows that the waters flowing from complainant's ditch in the upper part of the cañon disappeared at a certain point in the natural gulch and that it again

**3. Diversion or Interference.**—Both direct and circumstantial evidence is admissible to prove the fact and cause of a diversion of subterranean waters.<sup>72</sup>

came to the surface regularly and constantly at the springs at the mouth of the cañon." *Keeney v. Carilla*, 2 N. M. 480, 495.

**72.** "The natural conformation of the soil made it quite certain that the water flowed in the direction of the springs, and the fact that the water ceased to flow from them after the defendants had diverted the water from the ditch of complainants in the upper part of the cañon is almost conclusive evidence that the water of the springs was furnished from the complainants' said ditch." *Keeney v. Corillo*, 2 N. M. 480, 495.

**Sinking of Water Table** may be shown, but in rebuttal it may be

shown that it occurred in a dry season and that many wells were similarly affected. *Yarwood v. W. Los Angeles W. Co.*, 132 Cal. 204, 64 Pac. 275. In that case an engineer who had sunk experimental wells, constructed a profile of the water-table based on his experiments and was allowed to testify that the acts of the defendants could not affect the water-table.

**Geological Formation** is important, where the issue is whether a stream which disappears ever connects with a certain other surface stream for the diversion of the waters of which the action is brought. *Farwell v. Sturgis Water Co.*, 10 S. D. 421, 73 N. W. 916.

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## WAYS.—See Dedication; Highways.

Vol. XIV



# WEIGHT AND EFFECT OF EVIDENCE.

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# CROSS-REFERENCES:

Acknowledgments; Admiralty; Admissions; Adulteration; Adultery; Alibi; Alteration of Instruments;  
 Best and Secondary Evidence; Bribery; Burden of Proof;  
 Cancellation of Instruments; Certificates; Character; Circumstantial Evidence; Compromise and Settlement; Conclusive Evidence; Confessions; Contempt; Contradiction of Witnesses; Corroboration; Credibility; Customs;  
 Death and Survivorship; Demonstrative Evidence; Descent and Distribution; Detectives and Informers; Direct Evidence; Divorce; Documentary Evidence; Duress; Dying Declarations;  
 Elections; Examination Before Committing Magistrate; Expert and Opinion Evidence;  
 Former Testimony; Fraud; Fraudulent Conveyances;  
 Gifts; Grand Jury;  
 Handwriting; Homesteads and Exemptions; Homicide;  
 Identity; Impeachment of Witnesses; Infants; Injunction; Interpreter; Intoxicating Liquors;  
 Legitimacy; Libel and Slander; Lost Instruments;  
 Marriage; Mortality Tables; Mortgages;  
 Negligence;  
 Objections; Officers;  
 Parent and Child; Parol Evidence; Parties and Persons Interested as Witnesses; Patents; Payment; Perjury; Positive and Negative Evidence; Presumptions; Principal and Agent;  
 Rape; Reasonable Doubt; Records; Reformation of Instruments; Refreshing Memory; Res Gestae; Robbery;  
 Sales; Space and Distance; Specific Performance;  
 Title.

## SCOPE NOTE.

No attempt has been made in this article to treat of the degree of proof necessary to recover in various actions; for this matter the reader should refer to the title of the desired article. So also, other articles must be consulted to find a treatment of the value of the various classes of evidence, except as they are incidentally touched upon. It has been the aim of the writer to collect here, in as natural and logical a shape as possible, those general principles dealing with the weight of evidence which, while of great value, are often very difficult to locate and extract from decided cases.<sup>1</sup> No exhaustive citation of authorities to elementary prin-

## I. DEGREE OF PROOF.

**1. Terms Employed.**—Various terms are in use to denote the differing degree of proof required in different cases and under varying circumstances. Among the more common are: *prima facie* evidence,<sup>2</sup> conclusive evidence,<sup>3</sup> satisfactory evidence,<sup>4</sup> a scintilla

1. It should be noticed that many of the subdivisions of the article deal with matters which experience has shown are given weight by the jury in passing upon the value of the evidence, but which, on account of the fundamental principle that the jury is the sole judge of the credibility of the witnesses and the weight of the evidence, cannot properly be referred to as principles of law, in spite of the strong language in which judges often speak of them in weighing the evidence on appeal or in charging the jury. This fundamental principle is overlooked in a recent work (Moore on Facts) to which the writer is indebted for furnishing him many citations.

2. *Emmons v. Westfield Bank*, 97 Mass. 230; *Thomas v. Williamson*, 51 Fla. 332, 339, 40 So. 831; *Lyons v. Williams*, 15 Ill. App. 27; *Kelly v. Jackson*, 6 Pet. (U. S.) 622, 632; *Temple v. Phelps*, 193 Mass. 297, 79 N. E. 482; *Smith v. Gardner*, 36 Neb. 741, 55 N. W. 245; *La Fitte v. Ft. Collins*, 42 Colo. 293, 93 Pac. 1098.

"*Prima facie* evidence is evidence which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favor that it must pre-

vail if it be accredited unless it be rebutted or the contrary proved." *Kirk v. Kirkland*, 7 British Col. 15, 17.

To make a *prima facie* case "the evidence must show the existence of facts which, either alone or aided by other facts presumed to exist from those established by the evidence, warrant a recovery not overcome by counter evidence." *McIntyre v. Ajax Min. Co.*, 20 Utah 323, 60 Pac. 552.

**Varying Weight.**—" *Prima facie* evidence may be very weak, or *prima facie* evidence in the ordinary sense of the words may be very strong." *Smith & Co. v. Bedouin S. Nav. Co.*, (1896) App. Cas. (Eng.) 70, 75.

3. Conclusive evidence is evidence that is incontrovertible. *Wood v. Chapin*, 13 N. Y. 509, 515.

4. *United States v. Lee Huen*, 118 Fed. 442, 458; *Baines v. Ullmann*, 71 Tex. 529, 9 S. W. 543.

"By satisfactory evidence, which is sometimes called sufficient evidence, is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt." *Missouri Pac. R. Co. v. Bartlett*, 81 Tex. 42, 16 S. W. 638.

of evidence,<sup>5</sup> a preponderance of evidence,<sup>6</sup> and proof beyond a reasonable doubt.<sup>7</sup>

**2. Conjectures as Proof.** — Mere surmise or conjecture is never regarded as proof of a fact,<sup>8</sup> and a jury will not be allowed to base a verdict thereon.<sup>9</sup>

5. "A scintilla of evidence is any material evidence that, if true, would tend to establish the issue in the mind of a reasonable juror." *Taylor v. Atlantic C. L. R. Co.*, 78 S. C. 552, 59 S. E. 641. See also *Crosby v. Seaboard A. L. R. Co.*, 81 S. C. 24, 61 S. E. 1064.

6. See *infra*, I, 3, D, a.

7. See article "REASONABLE DOUBT," Vol. X.

8. See *Cumberland Land Co. v. Canter Lbr. Co.* (Tenn. Ch. App.), 35 S. W. 886, 888 (mere speculation is of no probative force); *Wilson's Exrs. v. Cobb's Exrs.*, 28 N. J. Eq. 177, 181; *Guibert v. The George Bell*, 3 Hughes 468, 11 Fed. Cas. No. 5,856.

"It has often been declared prejudicial error to instruct the jury directly or by implication that they may cast loose from the evidence and guess or conjecture that some event occurred as to which evidence is entirely wanting." *Menn v. State*, 132 Wis. 61, 112 N. W. 38.

"The law is moved by material evidence, including proven facts and those presumptions which the law recognizes from motives of public policy and as founded in human experience," and mere surmises cannot take its place. *Crosby v. Seaboard A. L. R. Co.*, 81 S. C. 24, 61 S. E. 1064.

**Boundary Hard to Ascertain.**

"Where the law does not presume the existence of a fact, there must be proof, direct or indirect, before the jury can rightfully find it, and although the boundary between a defect of evidence and evidence confessedly slight be not easily drawn in practice, yet it cannot be doubted that what raises a possibility or conjecture of a fact never can amount to legal evidence of it." *Cobb v. Fogalman*, 23 N. C. (1 Ired. L.) 440.

9. **Conjecture.** — *Canada.* — *Montreal Rolling Mills Co. v. Corcoran*,

26 Can. Sup. 595; *Scott v. Crerar*, 11 Ont. 541, 551.

*United States.* — *King v. Anderson*, 90 Fed. 500; *Morgan Envelope Co. v. Albany Paper Co.*, 40 Fed. 577, 581; *Kern v. Snider*, 145 Fed. 327, 76 C. C. A. 201; *The Nellie Flagg*, 23 Fed. 671; *The Henry Ewbank*, 1 Sum. 400, 11 Fed. Cas. No. 6,376; *The Florence*, 88 Fed. 302, 304; *Manning v. Ins. Co.*, 100 U. S. 693, 697.

*Colorado.* — *Silver Mountain Mine Co. v. Anderson*, 41 Colo. 123, 92 Pac. 226.

*Georgia.* — *Gainesville J. & S. R. Co. v. Edmondson*, 101 Ga. 747, 29 S. E. 213.

*Kentucky.* — *Hughes v. Cincinnati, etc. R. Co.*, 91 Ky. 526, 530, 16 S. W. 275.

*Maine.* — *Russell v. Maine Cent. R. Co.*, 100 Me. 406, 61 Atl. 899; *McTaggart v. Maine Cent. R. Co.*, 100 Me. 223, 60 Atl. 1027.

*Maryland.* — *Cumberland & P. R. Co. v. State*, 73 Md. 74, 20 Atl. 785, 25 Am. St. Rep. 571; *Baltimore & O. R. Co. v. State*, 71 Md. 590, 18 Atl. 969; *Siatick v. Northern Cent. R. Co.*, 92 Md. 213, 48 Atl. 149.

*Massachusetts.* — *Murphy v. Boston & A. R. Co.*, 167 Mass. 64, 44 N. E. 1087.

*Minnesota.* — *Orth v. St. Paul, M. & M. R. Co.*, 47 Minn. 384, 50 N. W. 363; *Minneapolis S. & D. Co. v. Great Northern R. Co.*, 83 Minn. 370, 86 N. W. 451.

*Missouri.* — *Newcomb v. Jones' Admr.*, 37 Mo. App. 475, 479; *Smilie v. St. Bernard Store*, 47 Mo. App. 402, 406.

*New Hampshire.* — *Reynolds v. Burgess Sulphite Fibre Co.*, 73 N. H. 126, 59 Atl. 615; *Gahagan v. Boston & M. R. Co.*, 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426; *Cohn v. Saidel*, 71 N. H. 558, 53 Atl. 800; *Stevens v. Stevens*, 72 N. H. 360, 56 Atl. 916.

*New York.* — *Searles v. Manhattan R. Co.*, 101 N. Y. 661, 5 N. E.

**3. Preponderance Rule.** — A. IN GENERAL. — In civil actions the general rule is that a preponderance of the evidence is necessary

66; *Taylor v. Yonkers*, 105 N. Y. 202, 209, 11 N. E. 642; *Hunter v. New York, O. & W. R. Co.*, 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246; *Bond v. Smith*, 113 N. Y. 378, 385, 21 N. E. 128; *Pauley v. Steam Gauge & L. Co.*, 131 N. Y. 90, 29 N. E. 999; *Weber v. Third Ave. R. Co.*, 12 App. Div. 512, 42 N. Y. Supp. 789, 795; *Shotwell v. Dixon*, 163 N. Y. 43, 52, 57 N. E. 178.

*North Carolina.* — *Matthis v. Matthis*, 48 N. C. (3 Jones' L.) 132; *Sutton v. Madre*, 47 N. C. (2 Jones' L.) 320.

• *Pennsylvania.* — *Smith v. Holmsburg, etc. R. Co.*, 187 Pa. St. 451, 41 Atl. 479; *Snodgrass v. Carnegie Steel Co.*, 173 Pa. St. 228, 234, 33 Atl. 1104.

*Texas.* — *Rogers v. Tompkins* (Tex. Civ. App.), 87 S. W. 379, 384.

*Wisconsin.* — *Cawley v. La Crosse City R. Co.*, 101 Wis. 145, 151, 77 N. W. 179; *Menn v. State*, 132 Wis. 61, 112 N. W. 38; *Finkelston v. Chicago, etc. R. Co.*, 94 Wis. 270, 68 N. W. 1005; *Spencer v. Chicago, M. & St. P. R. Co.*, 105 Wis. 311, 81 N. W. 407; *Hyer v. Janesville*, 101 Wis. 371, 377, 77 N. W. 729; *Sorenson v. Menasha Paper & P. Co.* 56 Wis. 338, 14 N. W. 446; *Smith v. Chicago, M. & St. P. R. Co.*, 42 Wis. 520; *Clark v. Franklin Ins. Co.*, 111 Wis. 65, 68, 86 N. W. 549.

"It was only possible to conjecture that the mounting of the rail (by the engine) might have been caused by the variation from the true of a regular curve in the rails, but it would be at best but a conjecture without any evidence to sustain it and opposed to all the probabilities of the case." *Erie & W. V. R. Co. v. Smith*, 125 Pa. St. 259, 267, 17 Atl. 443.

"The mere concurrence in time of two facts, as in this case, the supposed alleged injury, and that deceased took to her bed shortly thereafter, does not legitimately give rise to the inference that one is the result of the other. It is at most a bare conjecture." *DeMaet*

*v. Fidelity, etc. Co.*, 121 Mo. App. 92, 96 S. W. 1045.

**Surmise.** — *Smith v. Lawrence*, 98 Me. 92, 56 Atl. 455; *Kenneson v. West End St. R. Co.*, 168 Mass. 1, 46 N. E. 114; *Spiro v. St. Louis Transit Co.*, 102 Mo. App. 250, 262, 76 S. W. 684.

**Suspicion.** — *People v. Owens*, 148 N. Y. 648, 651, 43 N. E. 71; *Harrison v. Juneau Bank*, 17 Wis. 340, 351; *Jaeger v. Kelley*, 52 N. Y. 274; *Homeopathic Mut. L. Ins. Co. v. Crane*, 25 N. J. Eq. 418; *Branch v. Com.*, 100 Va. 837, 41 S. E. 862.

**Guess.** — *Kervin v. Canadian Cotton Mills Co.*, 28 Ont. 73, 90; *Robinson v. Gallier*, 2 Woods 178, 20 Fed. Cas. No. 11,951; *Baird v. Abbey*, 73 Mich. 347, 354, 41 N. W. 272; *Brolasky v. Miller*, 9 N. J. Eq. 807; *New Jersey Patent Farming Co. v. Turner*, 14 N. J. Eq. 326; *Conrady v. Loewer's G. Brew. Co.*, 107 N. Y. Supp. 94.

**Speculation.** — *O'Connell v. Clark*, 75 App. Div. 619, 78 N. Y. Supp. 93; *Cumberland Land Co. v. Canter Lbr. Co.* (Tenn. Ch. App.), 35 S. W. 886, 889.

"Physiological speculations, natural probabilities, or mere probable cause are quiet insufficient upon the trial to establish the fact of paternity" in a bastardy case. *Baker v. State*, 47 Wis. 111, 2 N. W. 110.

**Supposition.** — *Wheelan v. Chicago, M. & St. P. R. Co.*, 85 Iowa 167, 175, 52 N. W. 119; *Neal v. Chicago R. Co.*, 129 Iowa 5, 8, 105 N. W. 197, 2 L. R. A. 905; *Bothwell v. Chicago, M. & St. P. R. Co.*, 59 Iowa 192, 13 N. W. 78.

Supposition of an old man 64 years of age that certain persons were his nephews and nieces, he having been long separated from his sisters, was not sufficient upon which to base a judgment dependent upon proof of such relationship. *Keith v. Keith*, 39 Tex. Civ. App. 363, 87 S. W. 384.

**Evidence Must Be Inconsistent With the Negative.** — A case is not proved where the evidence gives ground for surmise only; the evidence adduced must be inconsistent

to prove any fact,<sup>10</sup> but that more than a preponderance is not required.<sup>11</sup>

**B. CASES REQUIRING MORE THAN A PREPONDERANCE.**—Many cases state emphatically that upon certain issues more than a preponderance of evidence is required as proof,<sup>12</sup> and this is undoubtedly true.<sup>13</sup> It should be noticed, however, that this rule is

with the negative of the proposition. *Smith v. Lawrence*, 98 Me. 92, 56 Atl. 455.

**Damages Can Only Be Based on Ascertained Facts.**—*Poels v. Brown*, 78 Neb. 783, 111 N. W. 798.

**Suspicion of Negligence.**—Mere unexplained fact that a stream of water entered a car window is insufficient to raise a presumption of negligence. *Spencer v. Chicago, M. & St. P. R. Co.*, 105 Wis. 311, 81 N. W. 407.

**Conjecture as to Survivorship.** See article "DEATH AND SURVIVORSHIP," Vol. IV.

**Inferences From Evidence.**—As to the extent to which the jury is authorized to draw inferences from facts in evidence, see *infra* II, 3.

10. *McWilliams v. Phillips*, 71 Ala. 80.

**Evidence Equally Balanced.**—In such cases the verdict must be against the party on whom rests the burden of proof.

*United States.*—*Ray v. Donnell*, 4 McLean 504, 20 Fed. Cas. No. 11,590; *United States v. Lee Huen*, 118 Fed. 442.

*Alabama.*—*Pullman P. C. Co. v. Adams*, 120 Ala. 581, 24 So. 921, 74 Am. St. Rep. 53, 45 L. R. A. 767; *McWilliams v. Phillips*, 71 Ala. 80; *Hawes v. Brown*, 75 Ala. 385; *Birmingham U. R. Co. v. Hale*, 90 Ala. 8, 8 So. 142, 24 Am. St. Rep. 748.

*Massachusetts.*—*Broult v. Han-son*, 158 Mass. 17, 32 N. E. 900.

*New York.*—*Whitlatch v. Fidelity & C. Co.*, 149 N. Y. 45, 43 N. E. 405.

*Tennessee.*—*Gage v. Louisville, etc. R. Co.*, 88 Tenn. 724, 14 S. W. 73.

**Few Cases Decided by Burden of Proof.**—"Very few cases are decided by the burden of proof, because the jury usually finds that one side or the other has made out the best case." *United States v. Dry*

*Ox and Cow Hides*, 25 Fed. Cas. No. 14,995.

**Character of the Tribunal** which tries the fact, whether judge or jury, has no bearing upon the amount or degree of proof required; it depends upon the character of the issue to be tried. *Sloan v. Becker*, 34 Minn. 491, 26 N. W. 730.

11. No attempt is made here to collect the cases sustaining this elementary rule. And see article "BURDEN OF PROOF," Vol. II, p. 781, under (1). *Hoffman v. Loud*, 111 Mich. 156, 69 N. W. 231 ("proof to a demonstration is not required"); *Lewis v. Merritt*, 113 N. Y. 386, 390, 21 N. E. 141 (proof beyond a suspicion unnecessary); *Carter v. Gunnels*, 67 Ill. 270 (testimony need not be "irresistible").

12. *California.*—*Hopper v. Jones*, 29 Cal. 18.

*Illinois.*—*Way v. Harriman*, 126 Ill. 132, 138, 18 N. E. 206; *Woods v. Evans*, 113 Ill. 186; *Miner v. Hess*, 47 Ill. 170.

*Iowa.*—*Gardner v. Weston*, 18 Iowa 533; *Knight v. McCord*, 63 Iowa 429, 19 N. W. 310.

*Kansas.*—*Winston v. Burwell*, 44 Kan. 367, 369, 24 Pac. 477, 21 Am. St. Rep. 289.

*Massachusetts.*—*Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290, 316.

*Michigan.*—*McMillan v. Bissell*, 63 Mich. 66, 29 N. W. 737.

*Minnesota.*—*Sloan v. Becker*, 34 Minn. 491, 26 N. W. 730; *Guernsey v. American Ins. Co.*, 17 Minn. 104.

*North Carolina.*—*Sallenger v. Perry*, 130 N. C. 134, 41 S. E. 11.

*Pennsylvania.*—*Cullmans v. Lindsay*, 114 Pa. St. 166, 6 Atl. 332; *Burt v. Burt*, 70 Atl. 710.

*Wisconsin.*—*McClellan v. Sanford*, 26 Wis. 595, 607.

13. See article "BURDEN OF PROOF," Vol. II, p. 784, under (2).

"While courts have recognized

applied almost solely in courts of equity where the decision rests finally in the discretion of the judge, or in courts of law passing upon equitable issues,<sup>14</sup> or in cases where adverse presumptions must be overcome.<sup>15</sup> Moreover, the modern tendency is to regard a preponderance as sufficient in all cases,<sup>16</sup> but also, to recognize the fact that more evidence is required in some cases to generate belief and to create a preponderance than is required in others.<sup>17</sup>

**C. APPLICATIONS OF RULE.** — a. *Where Adverse Presumptions Exist.* — Since to create a preponderance the opposing presumptions as well as the opposing evidence must be overcome,<sup>18</sup> it commonly occurs that in cases where adverse presumptions exist more evidence is required to create a preponderance than is necessary in other cases.<sup>19</sup>

parol agreements which vary the terms of deeds, the quantity and quality of the proof required to establish such agreements is not the mere preponderance required in the ordinary civil action, but that degree of proof required to sustain a conviction in a criminal case." *Enos v. Anderson*, 40 Colo. 395, 93 Pac. 475.

Where a defense of usury is made the defendant can succeed only upon clear and cogent proof since he is "impeaching his own solemn obligations and denying the truth of his former statements and acts." *Homeopathic Mut. L. Ins. Co. v. Crane*, 25 N. J. Eq. 418.

14. See the following articles: "CANCELLATION OF INSTRUMENTS," Vol. II; "FRAUD," Vol. VI; "GIFTS," Vol. VI; "LOST INSTRUMENTS," Vol. VIII; "MORTGAGES," Vol. VIII; "SPECIFIC PERFORMANCE," Vol. XI; "TRUSTS AND TRUSTEES," Vol. XIII.

15. See *infra*, I, 3, C, a.

16. *United States.* — *Miller v. Steele*, 153 Fed. 714, 82 C. C. A. 572.

*Georgia.* — *Atlanta Journal v. Mayson*, 92 Ga. 640, 18 S. E. 1010, 44 Am. St. Rep. 104.

*Iowa.* — *McAnnulty v. Seick*, 59 Iowa 586, 13 N. W. 743.

*Michigan.* — *Fitch v. Vatter*, 143 Mich. 568, 107 N. W. 106; *Aikin v. Weckerly*, 19 Mich. 482, 501.

*Nebraska.* — *Schmuck v. Hill*, 96 N. W. 158; *Stall v. Jones*, 47 Neb. 706, 66 N. W. 653; *Wylie v. Charlton*, 43 Neb. 840, 846, 62 N. W. 220.

17. "Proof may be required to be clear and convincing without transcending the rule of preponderance."

*Roberge v. Bonner*, 184 N. Y. 265, 77 N. E. 1023.

In the case of *Liberty v. Haines*, 103 Me. 182, 68 Atl. 738, the court after an exhaustive review of the cases concludes that while a preponderance of the evidence only is required, yet to establish a preponderance, the proof must sometimes be clear and convincing. This case was a case to enforce a claim against a decedent's estate.

Preponderance only is necessary and "the ordinary rule is not altered because the acts alleged against the defendant are discreditable or even criminal." *Schmuck v. Hill* (Neb.), 96 N. W. 158 (libel case).

18. *Decker v. Somerset Fire Ins. Co.*, 66 Me. 406.

19. *Connor v. Pushor*, 86 Me. 300, 29 Atl. 1083 (presumption in favor of record title); *Doane v. Dunham*, 64 Neb. 135, 89 N. W. 640 (presumptions arising from the express terms of a conveyance).

"If there are no opposing presumptions, a mere preponderance of evidence, however slight, must necessarily turn the scale. . . . But where there is an opposing presumption, a mere preponderance of evidence is not sufficient. The strength of the preponderating evidence must be in proportion to the strength of the presumption to be overcome. Or, perhaps, it is more accurate to say, that there is no preponderance unless the evidence is sufficient to overcome the opposing presumptions as well as the opposing evidence." *Knowles v. Scribner*, 57 Me. 495.

b. *Proof of Probable Facts.* — Although mere probabilities can never take the place of actual evidence of a fact,<sup>20</sup> and a jury is properly charged that it may not base a verdict upon the balance of probabilities,<sup>21</sup> still a less amount of evidence will establish a

"As an allegation of fraud is against the presumption of honesty, it requires stronger proof than if no such presumption existed." *Adams v. Thornton*, 78 Ala. 489.

"In proportion as the crime imputed is heinous and unnatural, the presumption of innocence grows stronger and more abiding, and until such presumption and all counter-vailing evidence are overborne with satisfactory evidence of guilt, it cannot be said there is a preponderance against the party accused." *Continental Ins. Co. v. Jachnichen*, 110 Ind. 59, 10 N. E. 636, 59 Am. Rep. 194. And see *Schmuck v. Hill* (Neb.), 96 N. W. 158.

**Extra Amount Required Varies With Strength of Presumption.**

"To create a preponderance of evidence, the evidence must be sufficient to overcome the opposing presumptions as well as the opposing evidence. Presumptions like probabilities, are of different degrees of strength. To overcome a strong presumption requires more evidence than to overcome a weak one. To fasten upon a man a very heinous or repulsive act requires stronger proof than to fasten upon him an indifferent act, or one in accordance with his known inclinations. To fasten upon a man the act of willfully and maliciously setting fire to his own buildings should certainly require more evidence than to establish the fact of payment of a note, . . . because the improbability or presumption to be overcome in the case is much stronger than it is in the other. Hence it can never be improper to call the attention of the jury to the character of the issue, and to remind them that more evidence should be required to establish grave charges than to establish trifling or indifferent ones. Such an instruction does not violate the rule that in a civil suit a preponderance of evidence is all that is required." *Decker v. Somer-*

*set Ins. Co.*, 66 Me. 406, *approved in Continental Ins. Co. v. Jachnichen*, 110 Ind. 59, 10 N. E. 636, 59 Am. Rep. 194.

20. *Carleton v. Davis*, 2 Ware 225, 5 Fed. Cas. No. 2,408; *Bowman v. Little*, 101 Md. 273, 290, 61 Atl. 223, 657, 1084.

"Quantative probability, however, is only the greater chance. It is not proof nor even probative evidence, of the proposition to be proved. . . . However confidently one in his own affairs may base his judgment on mere probability as to a past event; when he assumes the burden of establishing such event as a proposition of fact, as a basis for a judgment of a court, he must adduce evidence other than a majority of chances." *Day v. Boston & M. R.*, 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335.

"Slight presumptions, although sufficient to excite suspicion or produce an impression in favor of the truth of the facts they indicate, do not, when taken singly, amount to proof, or shift the burden of proof.

. . . They must furnish more than a probability of the fact." *Corner v. Pendleton*, 8 Md. 337, 447.

"A plaintiff must establish his claim with legal certainty. It is not enough that he made it probable." *Holtzman v. Millaudon*, 18 La. Ann. 29.

**Illustration.** — Where it was claimed that a conductor had failed to turn over to his employer all the money he had collected, evidence as to the amount collected by another conductor who had the same run on alternate days, was held properly excluded, as even had it been admitted a verdict based on it would not have been warranted, since it involved nothing but a question of probabilities. *Denver, etc. R. Co. v. Glasscott*, 4 Colo. 270.

21. See *infra*, I, 3, D, c.



fact that is intrinsically probable than one which is more unnatural and unlikely to have occurred.<sup>22</sup>

c. *Proof of Improbable Facts.*—The amount of evidence required to create a preponderance where the fact to be proved is unusual<sup>23</sup> or contrary to ordinary business usage,<sup>24</sup> varies with the degree of improbability of the fact.<sup>25</sup>

22. *People v. Donohue*, 114 App. Div. 830, 100 N. Y. Supp. 202 ("Proof is weighed by probability and is tested by general experience"); *Harris v. Vanderveer's Exr.*, 21 N. J. Eq. 561, 574 ("the rules and probabilities of human conduct should not be disregarded"); *Cass County v. Green*, 66 Mo. 498 ("probability is the chief guide in placing a proper estimate upon evidence"); *Grant v. Bradstreet*, 87 Me. 583, 33 Atl. 165 (probability of carrying out an expressed intention noticed); *Adams v. Adams*, 17 N. J. Eq. 324, 336 (adultery more easily proved where the adulterous disposition is shown). And see *Roberts v. The St. James*, 20 Fed. Cas. No. 11,914; *Healy v. Clark*, 120 N. Y. 642, 24 N. E. 316; *Ashe v. Mutual Lasting Co.*, 42 Fed. 840. *Infra*, III, 9, E.

"In weighing evidence introduced to prove or disprove a given hypothesis, the intrinsic probability of the fact sought to be established is not to be overlooked." *Wood v. Hubbell*, 10 N. Y. 479.

23. "Where the improbability arises from the facts not being in accordance with those we have previously known and believed, it were presumptuous to discredit them, making one's own knowledge and observation the exclusive standard of probability. But in such cases we require much more cogent evidence than for statements that do accord with our previous knowledge." *Armstrong v. Gage*, 25 Grant Ch. (U. S.) 1, 37.

24. "The statement that the chattel mortgage was given to secure the payment of two notes of \$600 and \$1,600, with the understanding that when less than one-third of the debt was paid the mortgage as to more than one-half of the property was to be released, was the statement of a very unusual transaction from a busi-

ness standpoint, and would require strong proof to sustain it." *Fry v. Piersol*, 166 Mo. 429, 434, 66 S. W. 171.

That a widow lady, without money, made improvements upon a poorly cultivated farm to the value of \$2,000 to \$2,500 was said to be highly improbable and to require clear and creditable testimony to sustain it. *Prentiss v. Brennan*, 4 Grant Ch. (U. C.) 148, 156.

"The terms of the agreement . . . import a hard bargain and an improbable one, which should have credence in nothing less than the most convincing proofs." *Vreeland v. Vreeland*, 53 N. J. Eq. 387, 393, 32 Atl. 3.

"A charge of fraudulent conduct so gross, so cunningly devised, so unscrupulously carried out and so long continued, . . . is almost incredible. At least to sustain it, it must necessarily require to be supported by very strong and clear evidence." *Parker v. Kenny*, 5 Russ. & G. (Nova Scotia) 457, 466.

25. *The Florence*, 88 Fed. 302, 304 (proof of existence of an obstruction to navigation in a constantly used channel requires unusually strong evidence); *People v. French*, 119 N. Y. 496, 498, 23 N. E. 1058 (strong proof necessary that brandy was taken as a medicine and not as a beverage); *Gardner v. Gardner*, L. R., 2 App. Cas. (Eng.) 723, 730 (strong corroboration required of statement that the appellant married defendant after being informed by her that she had been ravished, without pursuing an inquiry as to the identity of the culprit); *Sterrett v. Wright*, 27 Pa. St. 259, 261 ("a rich man might easily be supposed to have given to his son-in-law what scarcely any amount of evidence could make us believe a poor man had given to a stranger"). And see—*England*.

d. *Proof of Difficult Facts*.—While facts which are from their very nature difficult of proof must nevertheless be established by evidence, yet they need not be established with that clearness of proof which is required where the situation admits of easy proof.<sup>26</sup>

e. *Proof of Negative*.—The fact that it is often impossible to produce as clear and cogent proof of a negative as it is of an affirmative, and the further fact that negative facts are usually peculiarly within the knowledge of the adverse party,<sup>27</sup> has led to the adoption of the rule that slight evidence only is necessary to establish a *prima facie* case which will authorize a recovery in the absence of countervailing proof.<sup>28</sup>

*M'Carthy v. Judah*, 12 Moore P. C. 47, 70, 14 Eng. Reprint 829.

*Canada*.—*Armstrong v. Gage*, 25 Grant Ch. 1, 37.

*United States*.—*George T. Bisel Co. v. Welsh*, 131 Fed. 564; *The America*, 95 Fed. 191; *Smith v. Davis*, 34 Fed. 783; *The El Dorado*, 27 Fed. 762.

*Michigan*.—*Wallace v. Harris*, 32 Mich. 380, 395.

*New York*.—*Home Ins. Co. v. Western Transp. Co.*, 51 N. Y. 93, 100.

"The measure of proof required to establish any proposition must necessarily vary with its degree of probability." *Haworth v. Stark*, 88 Fed. 512.

26. *Babcock v. Chicago & N. W. R. Co.*, 62 Iowa 593, 13 N. W. 740, 17 N. W. 909; *Gandy v. Chicago & N. W. R. Co.*, 30 Iowa 420; *Gallagher v. Crooks*, 132 N. Y. 338, 30 N. E. 746 (non-existence of distant relatives within the classes specified in the statute of distribution). And see articles "NEGLIGENCE," Vol. VIII, p. 867, note 39; "RAILROADS," Vol. X, p. 542, note 33.

27. "The doctrine is well established that slight proofs make out a *prima facie* case where a negative is to be proved. In all such cases rebuttal is comparatively easy and is consequently of imperative obligation." *Russell v. McDowell*, 83 Cal. 70, 23 Pac. 183.

**Rule Stated**.—"The rule of the common law as laid down by Greenleaf and approved by numerous decisions of this court is that where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the

averment is taken as true unless disproved by that party. This rule is applied to both civil and criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any persons except those who are duly licensed therefor, as for selling liquors, exercising a trade or profession, and the like. *Prentice v. Crane*, 234 Ill. 302, 84 N. E. 916. And see *infra*, I, 3, C, g.

28. *United States*.—*United States v. South C. C. & T. Co.*, 18 Fed. 273.

*Illinois*.—*Cole v. Cole*, 153 Ill. 585, 38 N. E. 703; *Schmisser v. Beatrice*, 147 Ill. 210, 35 N. E. 525; *Behrensmeyer v. Kreitz*, 135 Ill. 591, 627, 26 N. E. 704; *Dorsey v. Brigham*, 177 Ill. 250, 52 N. E. 303, 69 Am. St. Rep. 228, 42 L. R. A. 809; *Rexroth v. Schein*, 206 Ill. 80, 69 N. E. 240; *Vigus v. O'Bannon*, 118 Ill. 334, 8 N. E. 778.

*Indiana*.—*Compton v. Benham* (Ind. App.), 85 N. E. 365.

*Iowa*.—*Barnes v. Barnes*, 90 Iowa 282, 57 N. W. 851.

*Louisiana*.—*King v. Atkins*, 33 La. Ann. 1057; *Phelps v. Hughes*, 1 La. Ann. 320.

*Massachusetts*.—*Com. v. Bradford*, 9 Metc. 268.

*Michigan*.—*Young v. Stephens*, 9 Mich. 500.

*New York*.—*People v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242.

*South Carolina*.—*Information v. Oliver*, 21 S. C. 318.

*Vermont*.—*Thayer v. Viles*, 23 Vt. 494.

And see article "BURDEN OF PROOF," Vol. II, p. 782, under (D).

"Full and conclusive proof, however, where a party has the burden

f. *Evidence Controlled by a Single Party.*—Where all the evidence is for any reason within the exclusive control of one party, more is required to establish a preponderance in his favor, than in the ordinary case.<sup>29</sup> A well known illustration of this rule is often found in the proof of claims against the estate of a decedent.<sup>30</sup>

g. *Facts Peculiarly Within Knowledge of Adverse Party.* Where the facts are peculiarly within the knowledge of the adverse party, slight evidence will establish the fact, at least *prima facie*.<sup>31</sup>

h. *Crime in Civil Actions.*—The amount of proof required where a criminal act is alleged in a civil suit is discussed elsewhere in this work.<sup>32</sup> But we may note here, however, that the decided weight of authority and the general tendency of the later decisions is to require a preponderance of the evidence<sup>33</sup> merely,

of proving a negative, is not required, but even vague proof, or such as renders the existence of the negative probable, is in some cases sufficient to change the burden to the other party." *Beardstown v. Virginia*, 76 Ill. 34, 44.

29. *Wylie v. Charlton*, 43 Neb. 840, 62 N. W. 220 (parol gift by decedent); *Cosnahan v. Grice*, 15 Moore, 215, 223, 15 Eng. Reprint 476 (gift *causa mortis*); *The Java*, 6 Ben. 245, 13 Fed. Cas. No. 7,232 (where in a collision at sea, all on board one vessel are lost, clear proof is required of facts inculcating the lost vessel); *The Columbia*, 27 Fed. 704 (same); *Hamlin v. Stevens*, 177 N. Y. 39, 69 N. E. 118 (oral contract to devise property).

"Where an account of circumstances leading to a loss is entirely within the control of one side of a controversy, there is more of a burden upon such party than where the matter has been open to the other side for an ascertainment of the facts." *The Manitou*, 116 Fed. 60.

"The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove." *Foster v. Mansfield*, etc. R. Co., 146 U. S. 88, 99, and see *Halstead v. Grinnan*, 152 U. S. 412; *Storrs v. Barker*, 6 Johns. Ch. (N. Y.) 166; *Wetzel v. Minnesota R. Trans. Co.*, 65 Fed. 23.

"The defense (of prior use in a patent case) must be established beyond a reasonable doubt. The reason for the rule is obvious. It is so easy to fabricate or color testi-

mony which lies almost wholly in the control of the party producing it." *Young v. Wolfe*, 120 Fed. 956.

30. See article "EXECUTORS AND ADMINISTRATORS," Vol. V, p. 420, under B, *Infra*, III, 6, G, a, (2), (C).

31. *Dederich v. McAllister*, 49 How. Prac. (N. Y.) 351, and see *supra*, I, 3, C, e.

"It must be remembered that the authority of these persons and their powers were facts peculiarly within the knowledge of the defendant, and therefore slight evidence only on the part of the plaintiff was necessary to call upon the defendant to show the true relation they bore to the company." *Nutting v. Kings Co. El. R. Co.*, 21 App. Div. 72, 47 N. Y. Supp. 327.

32. See article "BURDEN OF PROOF," Vol. II, p. 787, under (3).

33. *United States.*—*United States v. Shapleigh*, 54 Fed. 126, 4 C. C. A. 237.

*Colorado.*—*Brown v. Tourtelotte*, 24 Colo. 204, 50 Pac. 195 (forgery); *Smith v. Smith*, 16 Colo. App. 333, 65 Pac. 401 (trespass made a misdemeanor by statute).

*Georgia.*—*Atlanta Journal v. Mayson*, 92 Ga. 640, 18 S. E. 1010, 44 Am. St. Rep. 104.

*Iowa.*—*Riley v. Norton*, 65 Iowa 306, 21 N. W. 649.

*Maine.*—*Knowles v. Scribner*, 57 Me. 495 (*overruling* *Thayer v. Boyle*, 30 Me. 475).

*Massachusetts.*—*Gordon v. Parmelee*, 15 Gray 413.

*Michigan.*—*Baird v. Abbey*, 73

and not as in earlier cases proof beyond a reasonable doubt.<sup>34</sup>

**D. WHAT IS A PREPONDERANCE.**—*a. In General.*—By the term preponderance of the evidence, is merely meant the greater weight of evidence.<sup>35</sup>

Mich. 347, 354, 41 N. W. 272; Elliott v. Van Buren, 33 Mich. 49.

*Missouri.*—Marshall v. Thames Fire Ins. Co., 43 Mo. 586; Rothchild v. American Cent. Ins. Co., 62 Mo. 356; Edwards v. Knapp & Co., 97 Mo. 432, 10 S. W. 54 (slander), *overruling* Polston v. See, 54 Mo. 291.

*New Jersey.*—Blackmore v. Ellis, 70 N. J. L. 264, 57 Atl. 1047.

*New York.*—Kurz v. Doerr, 180 N. Y. 88, 72 N. E. 926, 105 Am. St. Rep. 716; Dean v. Raplee, 145 N. Y. 319, 39 N. E. 952; People v. Briggs, 114 N. Y. 56, 20 N. E. 820.

*Ohio.*—Jones v. Greaves, 26 Ohio St. 2; Lyon v. Fleahmann, 34 Ohio St. 151; Bell v. McGinness, 40 Ohio St. 204, 20 Am. Rep. 673.

*Vermont.*—Currier v. Richardson, 63 Vt. 617, 22 Atl. 625.

*Wisconsin.*—Blaeser v. Milwaukee, etc. Ins. Co. 37 Wis. 31.

**Reason of the Rule.**—"To hold in a civil action where the defendant's liability flows from an act which involved a felony or other criminal offense, a greater degree of certainty is necessary than would be required where crime had not been committed, is to place the greater wrongdoer in a position of greater security, and to deprive the person wronged of the right that would be accorded to him against a less criminal defendant. Against the proposition that there can be such a distinction favorable to the criminal, common sense and natural justice revolt." United States Express Co. v. Donohoe, 14 Ont. 333.

**Presumption of Innocence** obtains however, in the civil action and the evidence must be such as to overcome this presumption. Somerset Co. Mut. F. Ins. Co. v. Usaw, 112 Pa. St. 80, 4 Atl. 355; Sparta v. Lewis, 91 Tenn. 370, 23 S. W. 182. *Contra*, Kurz v. Doerr, 180 N. Y. 88, 72 N. E. 926, 105 Am. St. Rep. 716.

**34.** Fowler v. Wallace, 131 Ind.

347, 31 N. E. 53 (but compare Continental Ins. Co. v. Jachnichem, 110 Ind. 59, 10 N. E. 636, 59 Am. Rep. 194); Merk v. Gelzhaeuser, 50 Cal. 631; Williams v. Dickenson, 28 Fla. 90, 9 So. 847.

"The rule in Illinois, except as modified by statute in actions of slander or libel, is that when a criminal offense is charged in the pleadings, and must be established either to sustain the cause of action or maintain the defense, the presumption of innocence arises, and the crime charged must be proven by evidence which removes every reasonable doubt of guilt." People v. Sullivan, 218 Ill. 419, 75 N. E. 1005.

**35.** *Delaware.*—Weisman v. Commercial F. Ins. Co., 3 Penne. 224, 50 Atl. 93; Heidelbaugh v. People's R. Co., 65 Atl. 587.

*Georgia.*—Supreme Conclave K. of D. v. Wood, 120 Ga. 328, 47 S. E. 940.

*Illinois.*—Ewen v. Wilbor, 208 Ill. 492, 70 N. E. 575.

*Indiana.*—Nickey v. Steuder, 164 Ind. 189, 73 N. E. 117.

*Indian Territory.*—Atoka Coal & M. Co. v. Miller, 7 Ind. Ter. 104, 104 S. W. 555.

*Nevada.*—Devencenzi v. Cassinelli, 28 Nev. 222, 81 Pac. 41.

*Texas.*—Western Union Tel. Co. v. James, 31 Tex. Civ. App. 503, 73 S. W. 79.

*Wisconsin.*—Thomas v. Paul, 87 Wis. 607, 58 N. W. 1031; Button v. Metcalf, 80 Wis. 193, 197, 49 N. W. 809.

**Other Definitions.**—"The term 'preponderance of the evidence' suggests the quality of outweighing in convincing power. So it means preponderance in the convincing power of the evidence." Grotjan v. Rice, 124 Wis. 253, 102 N. W. 551.

"Preponderance is something more than weight. It is a superiority of weight, outweighing." Shinn v. Tuck-er, 37 Ark. 580, 588.

By fair preponderance is meant "such evidence as, when weighed

b. *Limitations on This Definition.* — In a few states, the general rule that a bare preponderance of the evidence, as thus defined, is sufficient,<sup>36</sup> seems not to be in entire accord with the decisions, which require not only that the evidence of the prevailing party must outweigh that of his opponent but must of itself be sufficient to convince the jury of the truth of the alleged fact,<sup>37</sup> but the

with that which is offered to oppose it, has more convincing power in the minds of the jury." *Strand v. C. & W. M. R. Co.*, 67 Mich. 380, 34 N. W. 712.

By preponderance is meant "that the testimony adduced by one side is more creditable and conclusive than that of the other, and that it sufficiently outweighs the opposing evidence to satisfy the jury that a certain fact is true rather than the reverse." *Cartlich v. Metropolitan St. R. Co.*, 129 Mo. App. 721, 108 S. W. 585.

"The capacity of the submitted testimony to enforce belief on the arbiter to whom it is submitted is the touchstone of preponderance, as applied to the testimony of witnesses." *McKee v. Verdin*, 96 Mo. App. 268, 70 S. W. 154.

"Belief generated from the weight of the evidence" creates a preponderance. *Turner v. Hardin*, 80 Iowa 691, 45 N. W. 758; *Goldthorp v. Goldthorp*, 115 Iowa 430, 437, 88 N. W. 944.

"When I say 'preponderance of evidence' I do not mean preponderance in amount; I mean its weight taken in connection with the intrinsic probabilities—the natural course of things under the circumstances." *Lee v. Guardian Life Ins. Co.*, 15 Fed. Cas. No. 8,190.

**"Preponderance" Does Not Refer to the Effect of the Evidence.** — Preponderance merely means the greater weight of evidence and an instruction which defines it as "testimony of such superior weight and convincing force as satisfies the mind of its truth, is erroneous as referring to the effect of the evidence rather than to the quantity. *Bryan v. Chicago, etc. R. Co.*, 63 Iowa 464, 19 N. W. 295.

Instruction that a preponderance of evidence meant more and better evidence inaccurate. "It is a fulfillment of the rule if the evidence

or one side outweighs that of the other without adding the qualities of bulk and quality." *Boyer v. Broffey*, 109 Ill. App. 94.

36. *Jessen v. Donahue* (Neb.), 96 N. W. 639; *Donley v. Dougherty*, 174 Ill. 582, 51 N. E. 714; *Hodges v. Southern R. Co.*, 122 N. C. 992, 29 S. E. 939; *Bergin v. State*, 31 Ohio St. 111; *Chapman v. McAdams*, 1 Lea (Tenn.) 500.

"When the equilibrium of proof is destroyed, it matters not how slightly the jury in a civil action are warranted in rendering a verdict in favor of the side to which the beam tilts." *Bauer Groc. Co. v. Sanders*, 74 Mo. App. 657, 660.

Instruction allowing a recovery "if the evidence 'bearing' upon the plaintiff's case preponderates in his favor, although but slightly," not erroneous, but not strongly approved. *Chicago Union Tract. Co. v. Lawrence*, 113 Ill. App. 269, 273.

"A bare preponderance is sufficient, though the scales drop but a feather's weight in his favor." *Leggett v. Illinois Cent. R. Co.*, 72 Ill. App. 577.

"If the testimony of the plaintiff outweighs that of the defendant, if only enough to turn the scales, your verdict must be for the plaintiff." *Telford v. Frost*, 76 Wis. 172, 44 N. W. 835.

37. *Brooke v. Scoggins*, 4 Fed. Cas. No. 1,936; *Dunbar v. McGill*, 64 Mich. 676, 31 N. W. 578; *Gores v. Graff*, 77 Wis. 174, 180, 46 N. W. 48; *Alabama Min. R. Co. v. Marcus*, 115 Ala. 389, 22 So. 135; *Lexington Ins. Co. v. Paver*, 16 Ohio 324, 332; *Standard Mach. Co. v. Holton*, 84 Ga. 592, 10 S. E. 1016.

"While it is stated that the plaintiff's case must be proved by a fair preponderance of evidence the instruction seems to say that by a fair preponderance is meant only a little more evidence in weight than the defendant's evidence can fairly

answer to this is that if the party having the burden of proof fails to make out a *prima facie* case, there is no question for the jury. These jurisdictions require the evidence to be such as to "satisfy" or "reasonably satisfy" the jury.<sup>38</sup>

c. *Balance of Probabilities*. — A preponderance of the evidence is not necessarily established when the balance of probabilities is ascertained.<sup>39</sup> The jury should not be charged to base their verdict upon the balance of probabilities.<sup>40</sup>

claim, and leaves out of sight or minimizes the important consideration that the plaintiff's evidence must be sufficient in convincing power to satisfy the jury of the existence of the facts which in law justify the plaintiff's recovery before he can be entitled to a verdict. On the idea of this instruction, a case too weak to stand alone when unopposed by a defense may become invigorated and helped out by a still weaker defense." *Guinard v. Knapp-Stout & Co.*, 95 Wis. 482, 70 N. W. 671.

"Proof of a fact may tend to show the existence of a fact, indeed may preponderate over all testimony to the contrary, and yet be entirely insufficient to prove such other fact." *Heath v. Paul*, 81 Wis. 532, 51 N. W. 876.

"Courts and juries should rather weigh than count the testimony of witnesses, and a decree or verdict should never be found by them on a mere preponderance which fails to produce a proper conviction or satisfaction in their minds." *Life Assn. of America v. Neville*, 72 Ala. 517, 521.

38. See *infra*, notes 43 and 46.

39. "Upon weighing probabilities, it might be found that there was the preponderance of a slight probability in favor of one of the parties but not of that decided character to satisfy the mind that the right was with that party. The evidence should so preponderate in favor of the party for whom the verdict is rendered, as to satisfy the jury that he is entitled to it." *Parker v. Johnson*, 25 Ga. 576, 585.

"The jury are not warranted in finding a fact established by a greater probability unless also, the evidence satisfies them that the fact exists. The conclusion that it exists

may be drawn from a preponderance of probabilities in its favor, but the probabilities must be such that the conclusion may be and is drawn, or it is not proved." *Dunbar v. McGill*, 64 Mich. 676, 682, 31 N. W. 578.

40. *Chicago v. Webb*, 102 Ill. App. 232; *Warner v. Crandall*, 65 Ill. 195; *Butler v. Chicago, etc. R. Co.*, 71 Iowa 206, 32 N. W. 262; *King v. Davis*, 61 Hun 627, 16 N. Y. Supp. 427.

But see the following cases:

*United States*. — *The George L. Garlick*, 88 Fed. 553.

*California*. — *Murphy v. Waterhouse*, 113 Cal. 467, 45 Pac. 866, 54 Am. St. Rep. 365.

*Delaware*. — *Green v. Maloney*, 7 Houst. 22, 24.

*Illinois*. — *Crabtree v. Reed*, 50 Ill. 206.

*Michigan*. — *Hoffman v. Loud*, 111 Mich. 156, 69 N. W. 231; *Strand v. Chicago, etc. R. Co.*, 67 Mich. 380, 34 N. W. 712.

*New Hampshire*. — *Felch v. Concord R. Co.*, 66 N. H. 318, 29 Atl. 557.

*New York*. — *Sommer v. Oppenheim*, 19 Misc. 605, 44 N. Y. Supp. 396; *Morris v. Talcott*, 96 N. Y. 100.

*Pennsylvania*. — *Goldstroph v. Stinner*, 155 Pa. St. 28, 25 Atl. 765.

*South Carolina*. — *Groesbeck v. Marshall*, 44 S. C. 538, 545, 22 S. E. 743.

"The phrase 'balance of probabilities,' used by the judge in his instructions as equivalent to the words 'preponderance of proof,' has no well-settled or clearly defined meaning. It is at best a vague and indefinite phrase, and would rather lead the jury to infer that they might form their verdict on a guess at the truth, gathered from the evidence, than on a real solid conviction of it, founded on a care-

d. *Instructions Examined.*—The use of any word to qualify the term "preponderance," in a charge to the jury, has been held error;<sup>41</sup> in any event, the use of new and unfamiliar terms to characterize the degree of preponderance is fraught with great danger and uncertainty.<sup>42</sup> Some cases require the jury to be "satisfied" by a preponderance of the evidence;<sup>43</sup> in others this is re-

ful scrutiny and examination of the proof." *Haskins v. Haskins*, 9 Gray (Mass.) 390.

"We do not understand that it is the province of the court to direct the jury what is or is not probable. It is the duty of the jury to determine as best they can which theory is supported by a preponderance of the evidence, and not which is probably true." *Butler v. Chicago & N. W. R. Co.*, 71 Iowa 206, 32 N. W. 262.

41. *Link v. Campbell*, 72 Neb. 307, 100 N. W. 409, 104 N. W. 939; *Cabell v. Menczer* (Tex. Civ. App.), 35 S. W. 206; *Adams v. Eddy* (Tex. Civ. App.), 29 S. W. 180; *Atkinson v. Reed* (Tex. Civ. App.), 49 S. W. 260; *Lantry Sons v. Lourie* (Tex. Civ. App.), 58 S. W. 837.

**No Degrees of Preponderance.**  
"There are no degrees in preponderance, within the rule under consideration, and the opinion of the jury cannot be fettered by grades in preponderance, or degrees in the weight of the evidence. If it preponderates at all, it is sufficient." *Russell v. Russell*, 6 Ohio C. C. 294.

42. "Efforts to state elementary principles in ways not found in the books are quite liable to work harm. The better way is not to depart from those definitions which have received judicial approval." *Grotjan v. Rice*, 124 Wis. 253, 102 N. W. 551.

"It is usually unfortunate to employ qualifying words when defining the necessity for a preponderance of evidence, when it is possible that the terms employed may lead the jury to draw the inference that something more than a mere preponderance is required." *Hoffman v. Loud*, 111 Mich. 156, 69 N. W. 231.

In *Largeant v. Beard* (Tex. Civ. App.), 53 S. W. 90, the court said: "We think it best that trial judges should merely state the rule as to

the preponderance of evidence and confine themselves to the general rule that the jury are the judges of the weight of the testimony and of the credibility of the witnesses as an elaboration upon these rules is more apt to confuse than to intelligently guide them."

43. *United States.*—*Robinson v. Gallier*, 2 Woods 178, 20 Fed. Cas. No. 11,951.

*California.*—*Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498.

*Missouri.*—*Braddy v. Kansas City, etc. R. Co.*, 47 Mo. App. 519.

*North Carolina.*—*Neal v. Fesperman*, 46 N. C. (1 Jones' L.) 446; *Ripley v. Miller*, 46 N. C. (1 Jones' L.) 479.

*South Carolina.*—*Bodie v. Charleston, etc. R. Co.*, 61 S. C. 468, 487, 39 S. E. 715.

*Wisconsin.*—*Pelietier v. Chicago, etc. R. Co.*, 88 Wis. 521, 60 N. W. 250; *Beery v. Chicago & N. W. R. Co.*, 73 Wis. 197, 40 N. W. 687; *Knopke v. Germantown Ins. Co.*, 99 Wis. 289, 74 N. W. 795; *Thomas v. Paul*, 87 Wis. 607, 613, 58 N. W. 1031.

"The court obviously meant no more than that the defendant should establish that fact by what the jury should deem to be the weight of the evidence." *Lindsley v. Chicago, etc. R. Co.*, 36 Minn. 539, 543, 33 N. W. 7, 1 Am. St. Rep. 692 (*holding* word "satisfied" in an instruction, proper).

**Type of Correct Instruction.**  
"The jury should be told in terms or in effect: you should find according as you shall be satisfied of the truth of the matter in controversy by a preponderance of the evidence. If it is deemed best to give greater definiteness to the term 'satisfied' it is best to say, and if requested to do so the court should say: Before finding in favor of the party on whom the burden of proof rests

garded as requiring too much proof;<sup>44</sup> "reasonably satisfy" has been held improper<sup>45</sup> and in other cases, proper.<sup>46</sup> So the term "fair preponderance" has been held both proper<sup>47</sup> and erroneous.<sup>48</sup> A "clear preponderance" requires too much,<sup>49</sup> as do the terms,

to establish any fact, you should be satisfied of the existence thereof to a reasonable certainty. If it is thought best to explain the meaning of the term 'preponderance of the evidence' or if requested to do so, the court should define it in terms or in effect, as outweighing in convincing force, not merely as 'that evidence which convinces your minds and judgments' though by a deductive process of reasoning that may be true." *Grotjan v. Rice*, 124 Wis. 253, 102 N. W. 551.

**44. Arkansas.**—*Arkansas M. R. Co. v. Canman*, 52 Ark. 517, 523, 13 S. W. 280; *Shinn v. Tucker*, 37 Ark. 580, 588.

**Illinois.**—*Sonnemann v. Mertz*, 221 Ill. 362, 77 N. E. 550; *Brent v. Brent*, 14 Ill. App. 256; *Herrick v. Gary*, 83 Ill. 85; *Stratton v. Cent. City Horse R. Co.*, 95 Ill. 25; *Ruff v. Jarrett*, 94 Ill. 475; *Brady v. Mangle*, 109 Ill. App. 172; *Hoener v. Koch*, 84 Ill. 408.

**Iowa.**—*Frick v. Kabaker*, 116 Iowa 494, 90 N. W. 498; *Jerolman v. Chicago G. W. R. Co.*, 108 Iowa 177, 78 N. W. 855; *Rosenbaum Bros. v. Levitt*, 109 Iowa 292, 80 N. W. 393.

**North Carolina.**—*McMillan v. Baxley*, 112 N. C. 578, 585, 16 S. E. 845.

**Ohio.**—*Kelch v. State*, 55 Ohio St. 146, 153, 45 N. E. 6, 60 Am. St. Rep. 680.

**Texas.**—*Baines v. Ullmann*, 71 Tex. 529, 9 S. W. 543; *Missouri Pac. R. Co. v. Bartlett*, 81 Tex. 42, 16 S. W. 638; *O'Connell v. Storey* (Tex. Civ. App.), 105 S. W. 1174; *Mixon v. Farris*, 20 Tex. Civ. App. 253, 48 S. W. 741; *Collins v. Clark*, 30 Tex. Civ. App. 341, 72 S. W. 97; *Moore v. Stone* (Tex. Civ. App.), 36 S. W. 909; *Emerson v. Mills*, 83 Tex. 385, 18 S. W. 805; *Willis v. Chowning*, 90 Tex. 617, 625, 40 S. W. 395, 59 Am. St. Rep. 842; *Gulf, etc. R. Co. v. Condra*, 36 Tex. Civ. App. 556, 82 S. W. 528.

**45. Ball v. Marquis** (Iowa), 92 N. W. 691.

**46. In Alabama** the standard instruction requires the jury to be "reasonably satisfied and convinced." *Louisville & N. R. Co. v. White*, 100 Fed. 239, 40 C. C. A. 352 (applying Alabama law); *Alabama M. R. Co. v. Marcus*, 115 Ala. 389, 22 So. 135; *Kansas City, M. & B. R. Co. v. Henson*, 132 Ala. 528, 31 So. 590; *Torrey v. Burney*, 113 Ala. 496, 21 So. 348; *Rowe v. Baber*, 93 Ala. 422, 8 So. 864; *Alabama Great So. R. Co. v. Burgess*, 119 Ala. 555, 564, 25 So. 251, 72 Am. St. Rep. 943; *Wilcox v. Henderson*, 64 Ala. 535, 543; *Battles v. Tallman*, 96 Ala. 403, 11 So. 247; *Wilkinson v. Searcy*, 76 Ala. 176; *Arndt v. Cullman*, 132 Ala. 540, 31 So. 478, 90 Am. St. Rep. 922; *McBride v. Sullivan* (Ala.), 45 So. 902; *Morrow v. Campbell*, 118 Ala. 330, 24 So. 852; *Carter v. Fulgham*, 134 Ala. 238, 32 So. 684; *Dorough v. Harrington*, 148 Ala. 305, 42 So. 557; *Eagle Iron Co. v. Baugh*, 147 Ala. 613, 41 So. 663; *Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459.

"Reasonably Certain" approved. *Beery v. Chicago & N. W. R. Co.*, 73 Wis. 197, 40 N. W. 687. But see *Leggett v. Illinois Cent. R. Co.*, 72 Ill. App. 577.

**47. Jamison v. Jamison**, 113 Iowa 720, 84 N. W. 705; *Zonker v. Cowan*, 84 Ind. 395; *Evans v. Montgomery*, 95 Mich. 497, 55 N. W. 362; *Murray v. Baird*, 65 Neb. 427, 91 N. W. 278; *Attschuler v. Coburn*, 38 Neb. 881, 57 N. W. 836; *Dunbar v. Briggs*, 18 Neb. 94, 24 N. W. 449; *Bryan v. Chicago, etc. R. Co.*, 63 Iowa 464, 19 N. W. 295.

**48. Travelers' Ins. Co. v. Rosch**, 23 Ohio C. C. 491, 3 Ohio C. C. (N. S.) 156; *Russell v. Russell*, 6 Ohio C. C. 294; *Effinger v. State*, 9 Ohio C. C. 376; *Kirchner v. Collins*, 152 Mo. 394, 53 S. W. 1081.

**49. Illinois.**—*McDeed v. McDeed*, 67 Ill. 545; *Nelson v. Fehd*,



"abundant proof,"<sup>50</sup> "thoroughly satisfied,"<sup>51</sup> "moral and reasonable certainty,"<sup>52</sup> "clear and positive proof."<sup>53</sup>

e. *Number of Witnesses.* — (1.) *In General.* — There is a maxim that witnesses are to be weighed, not counted.<sup>54</sup> The preponderance of testimony is not necessarily found upon the side producing the greater number of witnesses,<sup>55</sup> and a verdict will not be

203 Ill. 120, 67 N. E. 828; *Lenning v. Lenning*, 176 Ill. 180, 52 N. E. 46.

*Maine.* — *French v. Day*, 89 Me. 441, 36 Atl. 909.

*Michigan.* — *Evans v. Montgomery*, 95 Mich. 497, 55 N. W. 362.

*Nebraska.* — *Western Mattress Co. v. Potter*, 95 N. W. 841; *Search v. Miller*, 9 Neb. 26, 1 N. W. 975.

*Pennsylvania.* — *Coyle v. Com.*, 100 Pa. St. 573.

50. *Swinney v. Booth*, 28 Tex. 113.

51. *O'Donohue v. Simmons*, 58 Hun 467, 12 N. Y. Supp. 843.

52. *Brown Store Co. v. Chattahoochee Lumb. Co.*, 121 Ga. 809, 49 S. E. 839. See *Murphy v. Waterhouse*, 113 Cal. 467, 45 Pac. 866, 54 Am. St. Rep. 365.

53. *Simpson Bank v. Smith* (Tex. Civ. App.), 114 S. W. 445.

54. *Bakeman v. Rose*, 14 Wend. (N. Y.) 105; *Harris v. Harris*, 109 Ill. App. 148; *Chicago, B. & Q. R. Co. v. Presbrey*, 98 Ill. App. 303; *Life Assn. of America v. Neville*, 72 Ala. 517, 521; *Kansas City, etc. R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262; *Crowley v. Burlington, etc. R. Co.*, 65 Iowa 658, 665, 20 N. W. 467, 22 N. W. 918; *Indianapolis St. R. Co. v. Johnson*, 163 Ind. 518, 72 N. E. 571.

55. *England.* — *The Wega* (1895) Prob. 156.

*United States.* — *The City of Naples*, 69 Fed. 794, 16 C. C. A. 421; *Louisville & N. R. Co. v. White*, 100 Fed. 239, 40 C. C. A. 352; *Sibley v. St. Paul F. & M. Ins. Co.*, 22 Fed. Cas. No. 12,830; *Ford v. Taylor*, 140 Fed. 356.

*Alabama.* — *Alabama G. S. R. Co. v. Frazier*, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28; *Alabama Fertilizer Co. v. Reynolds*, 79 Ala. 497.

*California.* — *Grant v. McPherson*, 104 Cal. 165, 37 Pac. 864; *McNeill v. Stitt*, 2 Cal. App. 13, 82 Pac. 1121 (citing Code Civ. Proc. § 2061).

*District of Columbia.* — *Benter v. Patch*, 18 D. C. 590.

*Delaware.* — *Weisman v. Commercial F. Ins. Co.*, 3 Penne. 224, 50 Atl. 93; *Green v. Maloney*, 7 Houst. 22.

*Georgia.* — *Savannah F. & W. R. Co. v. Wideman*, 99 Ga. 245, 25 S. E. 400; *Corniff v. Cook*, 95 Ga. 61, 22 S. E. 47, 51 Am. St. Rep. 55.

*Illinois.* — *St. Louis & O. R. Co. v. Union Bank*, 209 Ill. 457, 70 N. E. 651; *North Alton v. Dorsett*, 59 Ill. App. 612; *La Salle v. Evans*, 111 Ill. App. 69; *North Chicago St. R. Co. v. Wellner*, 206 Ill. 272, 69 N. E. 6; *North Chicago St. R. Co. v. Anderson*, 176 Ill. 635, 52 N. E. 21; *Meyer v. Mead*, 83 Ill. 19; *Heaton v. Hennessey*, 112 Ill. App. 653; *Bishop v. Busse*, 69 Ill. 403; *West Chicago St. R. Co. v. Lieserowitz*, 197 Ill. 607, 64 N. E. 718; *Meyer v. Mead*, 83 Ill. 19; *Totel v. Bonnefoy*, 23 Ill. App. 55; *North Chicago St. R. Co. v. Fitzgibbons*, 180 Ill. 466, 54 N. E. 483.

*Indiana.* — *Indianapolis St. R. Co. v. Johnson*, 163 Ind. 518, 72 N. E. 571; *Fritzing v. State ex rel Eckert*, 31 Ind. App. 350, 67 N. E. 1006; *McLee v. Felt*, 11 Ind. 218.

*Iowa.* — *White v. Hatton*, 113 N. W. 830.

*Michigan.* — *Strand v. C. & W. M. R. Co.*, 67 Mich. 380, 34 N. W. 712.

*Missouri.* — *Turner v. Overall*, 172 Mo. 271, 289, 72 S. W. 644.

*Montana.* — *Lehane v. Butte Elec. R. Co.*, 97 Pac. 1038.

*Nebraska.* — *Fitzgerald v. Richardson*, 30 Neb. 365, 46 N. W. 615; *New Hampshire Sav. Bank v. Dillrance*, 63 Neb. 412, 88 N. W. 653.

*New Jersey.* — *Kulman v. Erie R. Co.*, 65 N. J. L. 241, 47 Atl. 497.

*New York.* — *Ennis v. Dudley*, 22 Misc. 4, 48 N. Y. Supp. 622; *Fried v. Stein*, 16 Misc. 494, 38 N. Y. Supp. 971; *Small v. Brooklyn City & N. R. Co.*, 10 Misc. 266, 30 N. Y. Supp. 1076; *Schick v. Brooklyn City R. Co.*,

set aside because supported by the testimony of the lesser number of witnesses.<sup>56</sup>

(2.) **Instructions.**—The jury may properly be instructed that the mere number of witnesses does not as a rule create a preponder-

10 N. Y. Supp. 528, 32 N. Y. St. 245; *Marcotte v. Sheridan*, 91 N. Y. Supp. 744; *Mullane v. Houston*, etc. R. Co., 20 Misc. 434, 45 N. Y. Supp. 1039.

*Oregon.*—*Huber v. Miller*, 41 Or. 103, 68 Pac. 400 (applying Hill's Ann. Laws, § 845, subd. 2).

*Pennsylvania.*—*Braunschweiger v. Waits*, 179 Pa. St. 47, 36 Atl. 155; *Goldstrohm v. Stinner*, 155 Pa. St. 28, 25 Atl. 765; *Supplee v. Timothy*, 124 Pa. St. 375, 16 Atl. 864.

*Tennessee.*—*Wilcox v. Hines*, 100 Tenn. 524, 45 S. W. 781, 66 Am. St. Rep. 761; *Hill v. Goodyear*, 4 Lea 233, 243.

*Texas.*—*Largent v. Beard* (Tex. Civ. App.), 53 S. W. 90; *El Paso Elec. R. Co. v. Sierra* (Tex. Civ. App.), 109 S. W. 986; *Foley v. Houston B. & T. R. Co.* (Tex. Civ. App.), 110 S. W. 96; *Casey-Swasey Co. v. Treadwell & Co.*, 32 Tex. Civ. App. 480, 74 S. W. 791.

*Virginia.*—*Poague v. Spriggs*, 21 Gratt. 220.

*Wisconsin.*—*Grotjan v. Rice*, 124 Wis. 253, 102 N. W. 551; *Ely v. Tesch*, 17 Wis. 209, 213; *Pelletier v. Chicago*, etc. R. Co., 88 Wis. 521, 60 N. W. 250; *O'Brien v. Chicago & N. W. R. Co.*, 92 Wis. 340, 66 N. W. 363; *Schmitt v. Milwaukee St. R. Co.*, 89 Wis. 195, 61 N. W. 834.

"The weight of evidence in these days is measured by more delicate tests than a simple count of witnesses." *Trager v. Webster*, 174 Mass. 580, 55 N. E. 318.

"The weight of evidence is not a question of mathematics but depends on its effect in inducing belief." *Braunschweiger v. Waits*, 179 Pa. St. 47, 36 Atl. 155.

"Money has purchased—power sometimes overawes—and it will not do to weigh testimony by the multiplicity of the witnesses." *The Nabob*, 17 Fed. Cas. No. 10,002.

"Preponderance does not mean the number of witnesses—nor the mere volume of testimony, but refers to

the impression made upon the minds of the jury by the entire evidence, taking into consideration the character and demeanor of the witnesses, their interest or bias, and means of knowledge and other attending circumstances." *Hodges v. Southern R. Co.*, 122 N. C. 992, 29 S. E. 939.

"A rule which places all witnesses upon the same arbitrary plane, which ignores all actual distinctions between the honest and the dishonest, between the veracious and the mendacious, upon the witness stand . . . robs the jury of their most important function." *Hubbard v. Rankin*, 71 Ill. 129.

**Illustration.**—"Let us take an illustration, not of the conditions met with in this case, but the reliability of preponderance of evidence (witnesses) in some cases. Suppose that a small child should tell you that he saw a large wolf run away with an unusually small lamb. As against this ten adults testified that this was not the case at all, but that the real fact was that this very small lamb was actually running away with the large wolf. It would not take a jury very long to determine where the truth lies notwithstanding ten against one." *Evans v. Philadelphia Bourse*, 215 Pa. St. 652, 64 Atl. 463.

56. *Colorado.*—*McClelland v. Bullis*, 34 Colo. 69, 81 Pac. 771.

*Illinois.*—*Grace v. Moseley*, 112 Ill. App. 100; *Shevalier v. Seager*, 121 Ill. 564, 13 N. E. 499; *Chicago Union Tract. Co. v. O'Donnell*, 113 Ill. App. 259; *Keokuk N. Line Packet Co. v. True*, 88 Ill. 608.

*Kentucky.*—*Lexington R. Co. v. Herring*, 29 Ky. L. Rep. 794, 96 S. W. 558.

*Minnesota.*—*Colvill v. St. Paul & C. R. Co.*, 19 Minn. 283.

*Montana.*—*Story v. Maclay*, 6 Mont. 492, 13 Pac. 198.

*Nebraska.*—*Fremont, E. & M. V. R. Co. v. French*, 48 Neb. 638, 67 N. W. 472.

*New Jersey.*—*Campbell v. Dela-*

ance<sup>57</sup> but that the number of witnesses testifying is one element to be considered;<sup>58</sup> but great care is necessary to so frame the instruction as not to invade the province of the jury in passing upon all phases of the credibility of the witness.<sup>59</sup>

ware & A. Tel. & T. Co., 70 N. J. L. 195, 56 Atl. 303; Kulman v. Erie R. Co., 65 N. J. L. 241, 47 Atl. 497.

*New York.*—Schick v. Brooklyn City R. Co., 10 N. Y. Supp. 528, 32 N. Y. St. 245; Wright v. Saunders, 65 Barb. 214; Manning v. Atlantic Ave. R. Co., 91 Hun 279, 36 N. Y. Supp. 201; Latham v. Delaney, 15 N. Y. Supp. 146, 39 N. Y. St. 369.

*Ohio.*—Cleveland, etc. R. Co. v. Richerson, 19 Ohio C. C. 385.

*Oregon.*—Huber v. Miller, 41 Or. 103, 68 Pac. 400.

*Pennsylvania.*—Bamford v. Pittsburgh & B. T. Co., 194 Pa. St. 17, 44 Atl. 1068; Hale & Kilburn Co. v. Norcross, 199 Pa. St. 283, 49 Atl. 80.

*Texas.*—Casey, Swasey Co. v. Treadwell & Co., 32 Tex. Civ. 480, 74 S. W. 791; Stewart v. Hamilton, 19 Tex. 96; Simpson v. State, 47 Tex. Crim. 578, 85 S. W. 16; White v. State (Tex. Crim.), 50 S. W. 1015.

*Wisconsin.*—Adams v. Chicago & N. W. R. Co., 89 Wis. 645, 62 N. W. 525; Van Doran v. Armstrong, 28 Wis. 236, 242; Bading v. Milwaukee Elec. R. & L. Co., 105 Wis. 480, 81 N. W. 861.

57. Sibley v. St. Paul F. & M. Ins. Co., 9 Biss. 31, 22 Fed. Cas. No. 12,830. And see Indianapolis St. R. Co. v. Johnson, 163 Ind. 518, 72 N. E. 571.

An instruction that a preponderance of the testimony is not determined alone by the number of the witnesses is not erroneous as excluding the number of witnesses as one element to be considered by the jury. Chicago City R. Co. v. Enroth, 113 Ill. App. 285.

A charge that by a preponderance of evidence is meant the greater weight and not the greater number of witnesses, is misleading, since a preponderance may or may not come from the greater number. Lamb v. Cedar Rapids, 108 Iowa 629, 79 N. W. 366; Garske v. Ridgeville, 123 Wis. 503, 102 N. W. 22.

58. West Chicago St. R. Co. v. Lieserowitz, 197 Ill. 607, 64 N. E. 718; Georgia N. R. Co. v. Hutchins, 119 Ga. 504, 46 S. E. 659; Gage v. Eddy, 179 Ill. 492, 53 N. E. 1008; Hodder v. Philadelphia R. T. Co., 217 Pa. St. 110, 66 Atl. 239.

A charge that the number of witnesses has nothing to do with the question of the preponderance of evidence, is erroneous. Dupuis v. Saginaw Valley T. Co., 146 Mich. 151, 109 N. W. 413. And see Gilmore v. Seattle & R. R. Co., 29 Wash. 150, 60 Pac. 743; Garske v. Ridgeville, 123 Wis. 503, 102 N. W. 22; West Chicago St. R. Co. v. Lieserowitz, 197 Ill. 607, 64 N. E. 718; Chicago & A. R. Co. v. Fisher, 141 Ill. 614, 31 N. E. 406.

A charge that "the jury may also consider the number of witnesses although the preponderance is not necessarily with the greater number" was held not to be erroneous. Georgia W. R. Co. v. Hutchins, 119 Ga. 504, 46 S. E. 659.

Number of witnesses is one element to be considered and an instruction which enumerates the other elements and omits this one would be harmful in a case where the numbers were important. Elgin, etc. R. Co. v. Lawlor, 229 Ill. 621, 82 N. E. 407.

Refusal to instruct as to the superiority of numbers on account of less liability to mistake, held error. Bisewski v. Booth, 100 Wis. 383, 76 N. W. 349.

59. *Alabama.*—Childs v. State, 76 Ala. 93.

*Connecticut.*—Lillibridge v. Barber, 55 Conn. 366, 11 Atl. 850.

*Georgia.*—Wilson v. Burr, 97 Ga. 250, 22 S. E. 991.

*Illinois.*—Gage v. Eddy, 179 Ill. 492, 53 N. E. 1008.

*Indiana.*—Indianapolis & E. R. Co. v. Bennett, 39 Ind. App. 141, 79 N. E. 389.

*Pennsylvania.*—Braunschweiger v. Waits, 179 Pa. St. 47, 36 Atl. 155.

(3.) **When Numerical Preponderance Is Important.** — The numerical preponderance of the witnesses in favor of one party may always be considered by the jury,<sup>60</sup> and they will not be allowed capriciously to disregard the testimony of the greater number of witnesses.<sup>61</sup> In cases where all the other factors appear to be equal

*Wisconsin.* — *Bierbach v. Good-year Rubber Co.*, 54 Wis. 208, 11 N. W. 514; *Schmitt v. Milwaukee St. R. Co.*, 89 Wis. 195, 61 N. W. 834.

Instruction that if the witnesses were of equal credibility and the circumstances proved were equally consistent with the testimony of each witness, then the number of witnesses would fairly determine the preponderance of the evidence, was held improper as invading the province of the jury, since "while witnesses may be equally worthy of belief, the value which is ultimately to be placed upon the testimony of each witness can alone be determined by the jury." *Madden v. Saylor Coal Co.*, 133 Iowa 699, 111 N. W. 57.

A charge that if the witnesses are of equal credit the preponderance is with the side having the greater number, is erroneous, since "it is the sole province of the jury under the law to determine the credibility of witnesses and the weight to be given to their testimony. The preponderance of the evidence is not determined in any case solely by the number of the witnesses, however credible the witnesses may be." *Wastl v. Montana U. R. Co.*, 17 Mont. 213, 42 Pac. 772.

An instruction that the preponderance of evidence was not necessarily upon the side of the greater number of witnesses, but that if they were of equal credibility and had equal means of knowing the facts about which they testify then the preponderance would be determined by the greater number, was held erroneous as leaving out of view the reasonableness of the conflicting statements. *Whitaker v. Brown*, 42 Iowa 585.

"Other Things Being Equal," the greater number of witnesses would carry the greater weight, held a proper instruction. *Spensley v. Lancashire Ins. Co.*, 62 Wis. 443, 22 N.

W. 740, and see *Lillibridge v. Barber*, 55 Conn. 366, 11 Atl. 850; *Dowdell v. Neal*, 10 Ga. 148. Compare *Amis v. Cameron*, 55 Ga. 449; *Madden v. Saylor Coal Co.*, 133 Iowa 699, 111 N. W. 57.

"If such a remarkable situation of exact equipoise in the character, credibility, candor, intelligence, and fairness of the witnesses as is described in this instruction could by any possibility exist, it would be difficult to find another or safer method of deciding the question of the existence or non-existence of the facts." *Indianapolis St. R. Co. v. Schmidt*, 163 Ind. 360, 71 N. E. 201.

60. See *Russell & Erwin Mfg. Co. v. Mallory*, 10 Blatchf. 140, 21 Fed. Cas. No. 12,166. And see *supra*, I, 3, D, e, (2).

The judge in his charge should not dwell repeatedly upon cases where one witness is contradicted by more than one and yet is to be believed; at least in a case where there is nothing intrinsically more impossible or more improbable upon one side than on the other. *Lendberg v. Brotherton Iron Min. Co.*, 75 Mich. 84, 42 N. W. 675.

61. *Gage v. Eddy*, 179 Ill. 492, 53 N. E. 1008.

While the jury are the judges of witnesses' credibility, they ought not to be permitted capriciously to disregard the testimony of five unimpeached witnesses and rely solely on the testimony of two little boys, aged respectively seven and eleven years, . . . simply because they desired to find a verdict in accordance with their testimony." *Chicago B. & Q. R. Co. v. Stumps*, 69 Ill. 409.

"Where many witnesses who are in a position to know the facts as to which they testify, concur in their testimony, and are only disputed by a few who have had no better opportunities to know the facts, a jury should not act from mere will or caprice but should have some

the preponderance in numbers will be given controlling weight<sup>62</sup>

tangible and substantial reason for so doing, before rejecting the testimony of the many and accepting instead that of the few witnesses." *Chicago & R. I. R. Co. v. Givens*, 18 Ill. App. 404, 408.

**62.** *Katzenbach v. Holt*, 43 N. J. Eq. 536, 12 Atl. 383; *Gribble v. Ford* (Tenn. Ch. App.), 52 S. W. 1007; *The Queen*, 8 Blatchf. 234, 20 Fed. Cas. No. 11,502; *Allen v. Public Adm.*, 1 Bradf. (N. Y.) 378. See *Minhinick v. Jolly*, 29 Ont. 238; *Wilber v. New York C. & H. R. Co.*, 17 App. Div. 623, 45 N. Y. Supp. 761; *The Hasbrouck*, 13 Fed. Cas. No. 7,323; *Delafield v. Sherwood*, 15 La. 271; *Dalrymple v. Craig*, 149 Mo. 345, 50 S. W. 884.

**In an Admiralty Case.**—"All the witnesses are equally positive and equally credible and one story is as probable as the other. If there be any difference in probability it is in favor of the libellant. In such a case the party presenting two witnesses must prevail over the party presenting but one." *The Dale*, 46 Fed. 670.

"Unless circumstances control, when witnesses are equally entitled to credit the greater number must control." *Katzenbach v. Holt*, 43 N. J. Eq. 536, 542, 12 Atl. 383.

"I perceive no reason to doubt that every man has sworn conscientiously according to his impressions and where they are of like intelligence and probity, and there is no means supplied for reconciling discordant statements of facts by witnesses. I know of no other way for courts and juries to ascertain the truth than by reposing faith in the greater number." *Crawford v. The Buffalo*, 6 Fed. Cas. No. 3,365a.

**On Appeal.**—"If there were any grounds whatever upon which the testimony of these many witnesses could be discredited it might be said that a mere comparison of numbers is not conclusive as to preponderance of conflicting evidence. But there is no such ground apparent upon this record." *Chicago City R. Co. v. Maloney*, 99 Ill. App. 623, reversing trial court.

### **Evidence Suspicious on Both Sides.**

Where the evidence is irreconcilable and confused and suspicious on both sides "the numerical superiority of witnesses with the libellant ought to be regarded as at least neutralizing the evidence of the respondent on this defence of payment." *The Napoleon*, Olc. 208, 17 Fed. Cas. No. 10,015.

**Depositions** of five witnesses prevailed over oral testimony of two. *Vaughan v. Parr*, 20 Ark. 600, 607.

**Expert Testimony.**—Preponderance in numbers would seem to be especially valuable where experts are testifying. See *Spensley v. Lancashire Ins. Co.*, 62 Wis. 459, 22 N. W. 574.

*In Land Mortg. Inv. & Ag. Co. v. Preston*, 119 Ala. 290, 24 So. 707, the authenticity of certain handwriting was held not to be established where seventeen expert witnesses denied its authenticity and only eight supported it. And see *Bell v. Shields*, 19 N. J. L. 93.

"In respect to the abstract professional opinions of the witnesses, which I shall not attempt to reconcile, I will remark that, if they be irreconcilable, they balance each other, as the witnesses are equal in number, and nothing appears in the record to entitle the witnesses of one party to more credit than the other." *Parker v. Johnson*, 25 Ga. 576, 589.

**But Compare** the following opinion: "In reference to a fact the jury might depend upon the number of witnesses and in that case the evidence of the greater number would be a safe criterion to judge by; but in a mere matter of opinion the jury are to found their judgment on the intelligence of the respective witnesses and their manner of giving testimony, and by that means ascertain whether they could place more confidence on one side than on the other." *Cochrane v. Swartout*, 5 Fed. Cas. No. 2,928.

**Affidavits.**—The rule that a preponderance of the evidence cannot be determined from the mere number of the witnesses has been said to be especially true where the evidence is

since the greater number of witnesses are less likely to have been mistaken<sup>63</sup> or to have wilfully committed perjury.<sup>64</sup>

(4.) **When Verdict in Favor of Less Number Not Capricious.**—In most cases, since the jury is entitled to consider the whole evidence and is the sole judge of the credibility of the witnesses, the element of numbers is of comparatively slight importance,<sup>65</sup> and a verdict in favor of the party producing the smaller number of witnesses will not be regarded as unwarranted<sup>66</sup> where the facts of the case made by the prevailing party appear the more natural and probable,<sup>67</sup>

presented by affidavits. *Ford v. Taylor*, 140 Fed. 356.

**Where a Party Is Contradicted by Several Witnesses** the element of numbers is of more than ordinary importance and verdicts in favor of the party are frequently set aside as being against the weight of evidence. *Haycraft v. Davis*, 49 Ill. 455; *Feuer v. Brooklyn Q. C. & S. R. Co.*, 49 Misc. 629, 97 N. Y. Supp. 293; *O'Neill v. Interurban St. R. Co.*, 86 N. Y. Supp. 208; *Peaslee v. Glass*, 61 Ill. 94.

In a personal injury case where the plaintiff was her only witness and was contradicted by four other witnesses, it was held error for the court, in his charge, to minimize the importance of the question of numbers. *Hodder v. Philadelphia R. Tr. Co.*, 217 Pa. St. 110, 66 Atl. 239. See also article "Parties and Persons Interested as Witnesses," Vol. IX.

63. "Undoubtedly if all the witnesses are equally intelligent, and equally truthful and free from influence or bias and have the same opportunities for knowing the facts testified to, and testify from such knowledge, a court could safely and ought to credit the greater number, on the ground that none are presumed to have testified falsely and the many would be less likely to be mistaken than a less number." *Graham v. State*, 92 Ala. 55, 9 So. 530.

"Where the evidence of several witnesses giving positive testimony to the same fact stands in irreconcilable conflict, the question of numbers, if the witnesses are of equal credit, becomes one of the highest importance; for as a general rule the evidence of the greater number is more

likely to be true than that of the smaller number. And the reason this is so is that it is much easier for one person to get a wrong impression about a fact, or to fall into a mistake concerning it, than it is for three, or even two, and if two or more persons do become mistaken about a fact it is highly improbable that they will all fall into the same mistake. And it is also much more improbable that two or more persons will commit perjury than that one will. . . . So that in a case like the present, where the testimony of three witnesses stands in direct contradiction of a single witness the probabilities are so overwhelmingly in favor of the truth of the evidence of the three that it must be believed." *Kentner v. Kline*, 41 N. J. Eq. 422, 4 Atl. 781.

"Individual witnesses might, of course, be mistaken or testify untruthfully, but it is in the highest degree improbable that the large number of witnesses arrayed against the plaintiff in this case, many of them disinterested, and testifying in respect to disconnected transactions and fortified by peculiar, admitted facts, should all be mistaken or untruthful, and the plaintiff alone, discredited by the inherent improbability of his story should be deemed to have disclosed the truth." *Thompson v. Pioneer Press Co.*, 37 Minn. 285, 33 N. W. 856.

64. *Culhane v. New York Cent. R. Co.*, 67 Barb. (N. Y.) 562; *Kentner v. Kline*, 41 N. J. Eq. 422, 4 Atl. 781.

65. See *Mullane v. Houston*, etc. R. Co., 20 Misc. 434, 45 N. Y. Supp. 1039.

66. See *supra*, note 55.

67. *Farley v. Hill*, 150 U. S. 572, 576; *Gardner v. Weston*, 18 Iowa

or his witnesses the more credible,<sup>68</sup> or where any other circumstance tends to support the verdict rendered.<sup>69</sup>

(5.) **Number of Witnesses Equally Balanced.**—The fact that the witnesses on either side of the issue are equally balanced in numbers does not prevent the jury, after considering their credibility<sup>70</sup> and the surrounding circumstances,<sup>71</sup> from finding that a preponderance exists in favor of one side or the other,<sup>72</sup> though a few

533; *West Chicago St. R. Co. v. Dean*, 112 Ill. App. 10.

68. "Mere numbers alone, it is true, are not to control where the less number are more intelligent, more reliable or in any material respect superior as witnesses to the others." *English v. Porter*, 109 Ill. 285.

69. **Lesser Number Corroborated by Documentary Evidence.**—Where fifteen witnesses testified to the fact that a certain person survived the revolutionary war and was discharged forty-eight years before, but one witness testified that he fell in battle and he was corroborated by documentary evidence in the form of the payroll which contained a statement of his death, a verdict finding his death was not set aside. *Jackson v. Loomis*, 12 Wend. (N. Y.) 27.

**Evidence Less Negative in Character.**—Where the defendant produced the most witnesses, but the plaintiff's evidence was of a less negative character, the court refused to set aside a verdict for the plaintiff. *Stewart v. Hamilton*, 19 Tex. 96.

70. "One witness may affirm a fact, and another deny, and yet the weight of evidence may be clearly on the one side or the other. Facts may exist which will turn the scale on the one side,—interest, motive prejudice, manner of testifying. These or other kindred things are to be considered in determining which of the two witnesses in the case supposed is entitled to the greater credit." *Boylston v. Bain*, 90 Ill. 283.

"When the circuit judge said to the jury in substance that when two witnesses directly contradict each other the evidence is balanced unless there is some other witness or circumstance in evidence corroborating one

side or the other, he was plainly in error. . . . This instruction took no account of the manner of the witness, his interest, intelligence, knowledge of facts, apparent bias or prejudice, or the reasonableness or probability of his story, all of which facts are entitled to be considered in judging where the truth lies when two witnesses directly contradict each other." *Sickle v. Wolf*, 91 Wis. 396, 64 N. W. 1028.

71. *Georgia.*—*Killorin v. Bacon*, 57 Ga. 497; *Salter v. Glenn*, 42 Ga. 64; *Cleghorn v. Janes*, 68 Ga. 87.

*Illinois.*—*West Chicago St. R. Co. v. Lieserowitz*, 197 Ill. 607, 64 N. E. 718; *Gowen v. Kehoe*, 71 Ill. 66; *Durant v. Rogers*, 87 Ill. 508; *Ennor v. Welch*, 48 Ill. 353.

*New York.*—*Sherry v. Proal*, 125 App. Div. 508, 109 N. Y. Supp. 1008; *Simmons Co. v. Piercy & Co.*, 109 N. Y. Supp. 730.

In *Layson v. Wilson*, 37 Mo. App. 636, an instruction that if the only two opposing witnesses were of equal credibility the verdict should be for the defendant was held properly refused. "The jury in determining the weight of evidence, and settling conflicts of testimony are not confined alone to the mere credibility of the witnesses adduced at the trial. It is equally the province of these triers of the facts to consider the evidence as given by the witnesses, in the light of all the circumstances—to consider the same in the light of reason—which story better consists with experience and the ordinary transactions of men—to observe the conduct of the witnesses on the stand, etc., and by these determine where the truth resides. Juries are not bound in settling such conflicts in the evidence 'to count noses'."

72. *Alabama.*—*Howard v. Taylor*, 99 Ala. 450, 13 So. 121.

decisions are to be found which do not support this proposition.<sup>78</sup>

**4. Proof Beyond Reasonable Doubt.**—The rule which requires

*Colorado.*—Fleetford *v.* Barnett, 10 Colo. App. 77, 52 Pac. 293.

*Illinois.*—Norton Bros. *v.* Eastman, 83 Ill. App. 303; West Chicago St. R. Co. *v.* Lieserowitz, 197 Ill. 607, 614, 64 N. E. 718; Dickinson *v.* Gray, 72 Ill. App. 55; Herring *v.* Poritz, 6 Ill. App. 208; Chicago B. & Q. R. Co. *v.* Presbrey, 98 Ill. App. 303; Flower *v.* Peterson, 25 Ill. App. 81; Hubbard *v.* Rankin, 71 Ill. 129; Stampofski *v.* Steffens, 79 Ill. 303.

*Indiana.*—Howlett *v.* Dilts, 4 Ind. App. 23, 30 N. E. 313; Rudolph *v.* Lane, 57 Ind. 115; Riley *v.* Butler, 36 Ind. 51.

*Iowa.*—Murphy *v.* De Haan, 116 Iowa 61, 89 N. W. 100.

*Maine.*—Sweetser *v.* Lowell, 33 Me. 446.

*Missouri.*—Layson *v.* Wilson, 37 Mo. App. 636.

*Nebraska.*—Grand Island Mercantile Co. *v.* McMeans, 60 Neb. 373, 83 N. W. 172.

*New Jersey.*—Swain *v.* Edmunds, 53 N. J. Eq. 142, 32 Atl. 369.

*Nevada.*—Devencenzi *v.* Cassinelli, 28 Nev. 222, 81 Pac. 41.

*New York.*—New York Journal Pub. Co. *v.* Simpson Adv. Co., 110 N. Y. Supp. 391; Bakeman *v.* Rose, 14 Wend. 105.

*Rhode Island.*—Kelley *v.* Brennan, 18 R. I. 41, 25 Atl. 346.

**Physical Facts May Control** where the testimony is evenly balanced. Bourque *v.* New Orleans C. & L. R. Co., 50 La. Ann. 24 So. 622.

**Incredible Nature of the Testimony** may determine the preponderance. Proudfoot *v.* Wightman, 78 Ill. 553.

**More Minute and Circumstantial Recollection** of one witness may lead to his being believed rather than an opposing witness. Dinet *v.* Reilly, 2 Ill. App. 316.

**Ordinary Rules for Determining a Preponderance Apply.**—"The testimony is not necessarily balanced because one witness swears one way and one another, but ordinarily unless there is some great discrepancy between the testimony and the estab-

lished facts which necessarily shows that one or the other witness is mistaken or is not telling the truth, the question must be determined precisely as though there were more than one witness on each side." Felbel *v.* Kahn, 29 App. Div. 270, 51 N. Y. Supp. 435, approved in Schilling *v.* M'Gary, 25 Misc. 745, 55 N. Y. Supp. 673.

**73.** Sanborn *v.* Babcock, 33 Wis. 400; Broughton *v.* Smart, 59 Ill. 440; Adsit *v.* Smith, 52 Ill. 412; Joseph *v.* Seward, 91 Ala. 597, 8 So. 682.

"Neither is corroborated and as both stand before the court on an equal footing as to interest and credibility, the testimony of the one exactly balances that of the other." The John Martin, 2 Abb. N. S. 172, 13 Fed. Cas. No. 7,357.

"Where a fact alleged in a petition or bill of equity is at issue and is testified to by one witness—the petitioner—and an equally credible witness positively denies the fact or transaction, he being a party of it, and there is no other evidence, it is error to find that the fact is proved." Coker *v.* Dawkins, 20 Fla. 141.

**An Improbable Version** of the transaction was held enough to justify a reversal and new trial where the only two witnesses contradicted each other. Marcotte *v.* Sheridan, 91 N. Y. Supp. 744.

**Contradictory Depositions.**—The rule that there is no preponderance where the deposition of the plaintiff is contradicted by the deposition of the defendant, may well be supported, as in such case neither witness is present before the court in person. Smith *v.* Griswold, 6 Or. 440.

**Where the Only Two Witnesses Are the Adverse Parties,** it has been held that a verdict for the plaintiff was unwarranted. Losee *v.* Morey, 57 Barb. (N. Y.) 561; Smith *v.* Gunn, 59 Hun 616, 12 N. Y. Supp. 808; Stevens *v.* Trask, 18 N. Y. Supp. 117, 44 N. Y. St. 649; Campbell Prtg. Press Co. *v.* Yorkston, 11 Misc. 340, 32 N. Y. Supp. 263; Lummas *v.* Van Dyke, 17 App. Div. 621, 45 N. Y.



proof beyond a reasonable doubt in criminal cases, is discussed elsewhere in this work.<sup>74</sup>

## II. SUFFICIENCY.

**1. In General.**—No general rule as to the sufficiency of the evidence can be laid down which is determinative of all cases.<sup>75</sup> The only test is its sufficiency to satisfy the mind and conscience of the jury<sup>76</sup> to a reasonable certainty.<sup>77</sup>

Supp. 489; *Marinelli v. Ferrand*, 17 Misc. 373, 40 N. Y. Supp. 151. See *Cooper v. Skeel*, 14 Iowa 578; *Bonnell v. Wilder*, 67 Ill. 327; *M'Manus v. Davitt*, 94 App. Div. 481, 88 N. Y. Supp. 55; *Schwarzwaelder & Co. v. Detroit*, 77 Fed. 886.

Where the testimony of the plaintiff and defendant conflicts, and the plaintiff's character for truth and veracity is proved to be bad, a verdict for him is against the weight of evidence. *Enright v. Seymour*, 4 Misc. 597, 24 N. Y. Supp. 704.

<sup>74.</sup> See article "REASONABLE DOUBT," Vol. X.

<sup>75.</sup> "It is impossible, from the nature of things, for the law to provide rules which shall determine the quality or amount of evidence necessary to establish a fact in judicial proceedings. There can be devised no standard—no unit of measurement, whereby we may determine just what measure of evidence shall be required to prove a fact in issue." *Callanan v. Shaw*, 24 Iowa 441.

"In civil causes there is no particular amount or weight of evidence required to warrant the jury in determining a controverted fact." *Felch v. Concord R. Co.*, 66 N. H. 318, 29 Atl. 557.

"There is no standard for the sufficiency of evidence to induce belief, and the various degrees of more and less, must, ordinarily, be left to the unprejudiced consideration of the jury." *Means v. Means*, 5 Strobb. L. (S. C.) 167, 189.

<sup>76.</sup> *Carter v. Gunnels*, 67 Ill. 270.

"The circumstances which will amount to sufficient proof of a disputed fact, can never be previously defined. In their nature they can never be matter of general definition. The only legal test of which they are susceptible is their sufficiency to

satisfy the mind and conscience of the jury." *Burrell v. State*, 18 Tex. 713, 734.

There must not only be the presentation of evidence of a fact by a witness or witnesses, but its acceptance by the jury before proof can be said to have been made complete upon any given point, and if what has been uttered or said by a witness or witnesses fails to convince the mind or intelligence addressed, has not been accepted by them, then no sufficient proof has been made, however positive or unqualified the utterance of the witnesses." *Gannon v. Laclede Gas Co.*, 145 Mo. 502, 517, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505.

<sup>77.</sup> "As in all human affairs there is an element of uncertainty the law must deal with conditions in a practical way, and it demands only reasonable certainty as the basis of a civil claim, that degree of certainty which reasonable men will rely upon when dealing with the ordinary affairs of life." *Garretson v. Tacoma R. & P. Co.*, 50 Wash. 24, 96 Pac. 511.

"What shall be accepted as satisfactory proof is evidence that satisfies the judicial mind. The defendant is not required to satisfy the prejudiced, the capricious, the unreasonable or the arbitrary mind; but he must satisfy the judgment of a reasonable man acting honestly and with good judgment, and without prejudice or bias." *United States v. Lee Huen*, 118 Fed. 442, 457.

Evidence which meets the requirements of clearness, certainty and convincing force is sufficient although it is conflicting. *Peck v. Farnham*, 24 Colo. 141, 49 Pac. 364.

**Illustration.**—Testimony that there were five or six families at a certain

**Uncontradicted Evidence** may be sufficient although it is very slight.<sup>78</sup>

**2. Distinction Between Relevancy and Sufficiency.**—The sufficiency of evidence is a question entirely separate and independent from its relevancy, and the principles governing the two subjects have no connection.<sup>79</sup>

**3. Inferences.**—A. IN GENERAL.—A fact need not be proved by direct evidence but it may be inferred from other facts in evidence.<sup>80</sup>

place will support a finding that there were six there. *Mikael v. Equitable Sec. Co.*, 32 Tex. Civ. App. 182, 74 S. W. 67.

In Civil Cases absolute belief is unnecessary. *Shinn v. Tucker*, 37 Ark. 580; *French v. Day*, 89 Me. 441, 36 Atl. 909.

**Doubt of Plaintiff's Case Arising From Evidence of Defendant.**—"The rule that . . . where the plaintiff's evidence leaves the mind in doubt as to whether his injury was due to the defendant's act or to some other cause, there can be no recovery, cannot be applied where this doubt arises upon the proof introduced by the defendant; for the credibility of the witnesses is for the jury and they may believe the plaintiff's evidence and have no doubt of the cause of the injury." *Illinois Cent. R. Co. v. Bom*, 25 Ky. L. Rep. 709, 76 S. W. 352.

**78.** *Crebbin v. Farmers' Nat. Bank* (Tex. Civ. App.), 50 S. W. 402.

**Evidence Tending To Prove Fact Sufficient if Unrebutted.**—"An allegation which the evidence tends to prove must in a civil case be taken as made out where there is no evidence to the contrary," and the court intimated that even some slight improbability in the case would not affect it. *Dunlap v. Smith*, 20 Ill. App. 288, and see *Yarbrough v. Arnold*, 20 Ark. 592.

**79.** See article "CIRCUMSTANTIAL EVIDENCE," Vol. III, p. 113, n. 75; p. 115, n. 84; "RELEVANCY," Vol. XI, p. 181, under 3.

"The probative force of the facts is not the matter of inquiry, that is for the consideration of the jury; the relevancy and sufficiency of evidence are distinct inquiries." *Nelms v. Steiner*, 113 Ala. 562, 574, 22 So.

"The evidence tendered to prove any point may be perfectly inadequate to prove that point. . . . Yet the same evidence might be perfectly well admitted and received for such purposes to which it was strictly and correctly applicable." *Irish Society v. Bishop of Derry*, 12 Cl. & F. (Eng.) 641, 673.

In *Mayor of New York v. Pentz*, 24 Wend. (N. Y.) 668, 676, the court speaks of "the distinction between admissibility and credibility which our jurisprudence has always maintained."

"Questions respecting the admissibility of evidence are entirely distinct from those which respect its sufficiency or effect. They arise in different stages of the trial and cannot with strict propriety be propounded at the same time." *Columbian Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 25, 44, holding that the blending of an objection to the admissibility of evidence in the same application which questions its sufficiency is not only unusual but calculated to embarrass the court.

"Evidence relative to the issue is admissible, though it be insufficient unless followed and supported by other evidence." *Marshall v. Haney*, 4 Md. 498; *Carroll's Admr. v. Quynn*, 13 Md. 379.

**80.** *Indiana.*—*Rauh v. Waterman* (Ind. App.), 61 N. E. 743; *Riehl v. Evansville F. Assn.*, 104 Ind. 70, 3 N. E. 633; *Indianapolis G. & F. R. Co. v. Hubbard*, 36 Ind. App. 166, 74 N. E. 535; *Indianapolis, etc. R. Co. v. Collingwood*, 71 Ind. 476; *Evansville, etc. R. Co. v. Mosier*, 101 Ind. 597.

*Missouri.*—*Spiro v. St. Louis Transit Co.*, 102 Mo. App. 250, 262, 76 S. W. 684; *Winkle v. Peck Dry Goods Co.*, 132 Mo. App. 656, 112 S. W. 1026.

**B. WHAT INFERENCES PERMISSIBLE.** — It is often hard to draw the line between legitimate inference and bare conjecture;<sup>81</sup> it may be said in general that only such inferences may be drawn as are rational,<sup>82</sup> and natural.<sup>83</sup> and are more than mere possibil-

*Montana.* — *Lehane v. Butte Elec. R. Co.*, 97 Pac. 1038.

*Nebraska.* — *Union Stock-Yards Co. v. Goodwin*, 57 Neb. 138, 77 N. W. 357; *Chicago, B. & Q. R. Co. v. Hildebrand*, 42 Neb. 33, 60 N. W. 335.

*Texas.* — *St. Louis S. W. R. Co. v. Cleland* (Tex. Civ. App.), 110 S. W. 122; *Railway v. Curry*, 64 Tex. 85. And see article "CIRCUMSTANTIAL EVIDENCE," Vol. III, p. 65, under 4.

"A fact proved by a legitimate inference is proved no less than when it is directly sworn to." *Doyle v. Boston & A. R. Co.*, 145 Mass. 386, 14 N. E. 461; *Clark v. Manchester*, 64 N. H. 471, 13 Atl. 867.

"It is familiar law that it is the right, and sometimes the duty of the trier to infer what a man has actually done from his conduct, beyond the positive testimony in a case." *C. & C. Elec. M. Co. v. Frisbi & Co.*, 66 Conn. 67, 77, 33 Atl. 604.

**Identity May Be Inferred.** — "It is not essential, before a fact is made evident that its existence be established by positive or conclusive evidence, especially when it pertains, as here, only to the identity of a thing. If such were the case, the rule of evidence permitting the drawing of inferences and the deducing of facts from other facts is rendered useless." *Dearden v. San Pedro, etc. R. Co.*, 33 Utah 147, 93 Pac. 271.

**On Appeal**, the judge, although he will not ordinarily reverse on any disputed question of fact, may differ from the trial judge as to the inferences to be drawn from undisputed facts and the appellant is entitled to the benefit of his opinion. *Booth v. Moffatt*, 11 Manitoba 25.

**Evidence Colored by Witness' Inferences.** — "Legal testimony, especially in controversies involving the virtue of women whose environments are easily susceptible of wrong construction does not consist alone

in the statement of facts that are obvious to the senses of the witness, but is made up to a very large extent of the impressions and inferences which the witness' friendly or unfriendly disposition has led him or her to draw from facts. An unfriendly witness has the power to give to many acts, however innocent of wrong intent, a false coloring of criminality." *Brown v. Brown*, 63 N. J. Eq. 348, 50 Atl. 608.

81. *Tailer v. Murphy Furn. Co.*, 24 Mo. App. 420. And see *supra*, I, 2.

82. "Certain facts being established, other facts may be and often are ascertained by inference. While rein must be sometimes put on the imagination of juries, the process of reasoning in respect to inference is largely a matter of free logic." *McCarty v. State ex rel. Boone*, 162 Ind. 218, 70 N. E. 131.

"A presumption of any fact is properly an inferring of that fact from other facts that are known; it is an act of reasoning; and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference, but if no fact could thus be ascertained by inference in a court of law very few offenders could be brought to punishment." *Rex v. Burdette*, 4 B. & Ald. (Eng.) 314.

**Ordinary Consequences of Act May Be Inferred.** — "It is also part of the common experience of all, that many facts are so intimately connected with and dependent upon each other that the proof of one necessarily establishes the other, or at least affords so strong a presumption of the latter's existence that no additional proof of it will be required until such presumption is overcome by countervailing testimony. . . . To satisfactorily prove a given act, also establishes at least, *prima facie*, the ordinary and probable consequences of such act." *Chicago, B. & Q. R. Co. v. Warner*, 108 Ill. 538, 546.

83. "All reasonable influences

ities.<sup>84</sup> The fact upon which the inference is based need not be

may be indulged from proved facts, but no inference may be upheld which is contrary to reason, to physical laws or the course of nature." *Lowery v. San Joaquin, etc. Co.*, 134 Cal. 185, 66 Pac. 225.

"A presumption is the inference of one fact from another fact that is admitted or proven, and can only arise where the fact to be inferred necessarily or unusually accompanies the one from which the inference is to be made." *Duncan v. Littell*, 2 Bibb (Ky.) 424. And see the following cases:

*Connecticut*. — *Breed v. Hillhouse*, 7 Conn. 523 (acceptance of indorsed guaranty of note and forbearance were held to prove agreement to forbear, "on a principle of probable presumption, which harmonizes with common sense and is conformed to experience").

*Illinois*. — *North Chicago St. R. Co. v. Rodert*, 203 Ill. 413, 67 N. E. 812 (degree of care exercised by persons in an accident may be inferred from circumstances).

*Maryland*. — *McLaughlin v. McLaughlin*, 80 Md. 115, 30 Atl. 607 (that person was over sixty years of age may be inferred from fact that he was married forty-six years before); *Phelps v. Georges' Creek R. Co.*, 60 Md. 536, 553 (receipt of letter may be inferred from subsequent conduct and relations of parties).

*New Hampshire*. — *Clark v. Manchester*, 64 N. H. 471, 13 Atl. 867 (death proved by drowning — inference that it was not instantaneous and that deceased suffered pain was warranted).

*New Jersey*. — *Edgeworth v. Wood*, 58 N. J. L. 463, 33 Atl. 940 (inference that wagon which ran over plaintiff was owned by defendant warranted where witnesses testify that it was painted as were the wagons of the defendant and had on it defendant's name and device).

*Texas*. — *Pullman Palace Car Co. v. Nelson*, 22 Tex. Civ. App. 223, 54 S. W. 624 (receipt of reply message authorizes inference that it was sent by person to whom original letter was addressed).

*Wisconsin*. — *West v. City of Eau Claire*, 89 Wis. 31, 61 N. W. 313 (legitimate inference for the jury to find that person who fell on icy sidewalk, caught her foot in hole there and that this caused the fall).

84. "In matters of proof we are not justified in inferring from mere possibilities the existence of facts." *Baltimore & O. R. Co. v. State*, 71 Md. 590, 18 Atl. 969.

"The law requires an open and visible connection between the principal and evidentiary facts, and the deductions from them, and does not permit a decision to be made on remote inferences." *Xenia Bank v. Stewart*, 114 U. S. 224; *Jolivet v. Estate of Young*, 103 Ill. App. 394; *Cole v. Boardman*, 63 N. H. 580, 4 Atl. 572; *Hobbs v. Blanchard & Sons Co.* (N. H.), 70 Atl. 1082.

"While the jury is entitled to draw inferences, they must be deduced from the testimony, not from conjecture." *Felver v. Central Elec. R. Co.* (Mo.), 115 S. W. 980.

"It is not enough that the facts proven permit an inference, but it is held that the inference sought must be the only one which can fairly and reasonably be drawn from those facts." *O'Reilly v. Brooklyn Heights R. Co.*, 82 App. Div. 492, 81 N. Y. Supp. 572.

"Whatever inferences fair-minded men can rationally deduce from testimony, juries are at liberty to adopt as the basis of a decision, but not some speculation conceivably true, but which can as well be false for aught that appears." *Spiro v. St. Louis Transit Co.*, 102 Mo. App. 250, 262, 76 S. W. 684.

*Illustration*. — The theft of certain letters, by a person is not proved by evidence that during the period of time while these letters disappeared he was stealing. *United States v. American Surety Co.*, 161 Fed. 149.

In Criminal Cases "the inferences to be drawn by the jury from the circumstances proved must be such as to satisfy their minds of the guilt of the defendant beyond only reasonable doubt. The conclusion that the defendant is guilty beyond rea-

proved itself by direct evidence, though there is a well recognized rule that a presumption cannot be based upon a presumption.<sup>85</sup>

**C. ACT INFERRED FROM HABITUAL PERFORMANCE.**—That an act was performed may sometimes be sufficiently proved by showing that it was customary for the person to perform the act and that he has no remembrance of not performing it in the particular instance.<sup>86</sup>

**4. All Material Facts.**—Before the evidence in a case can be regarded as sufficient, every material fact in issue which is not self-evident,<sup>87</sup> must be proved<sup>88</sup> in substance.<sup>89</sup>

**5. Evidence Equal to Testimony of One Unimpeached Witness.** There is no rule of law that the evidence necessary to support a fact must be equal to the testimony of one unimpeached witness.<sup>90</sup>

sonable doubt, may not follow *necessarily* from the proven circumstances but may be obtained therefrom by probable deduction." *Gannon v. People*, 127 Ill. 507, 520, 21 N. E. 525, 11 Am. St. Rep. 147.

**Rules Governing Jury.**—"A jury is bound to exercise judgment in accordance with correct and common modes of reasoning. It cannot adopt an inference from a few of the proven facts, when that inference is absolutely inconsistent with and is repelled by other equally proven facts." *Cunard S. S. Co. v. Kelley*, 126 Fed. 610, 617, 61 C. C. A. 532.

**85. United States.**—*Cunard S. S. Co. v. Kelley*, 126 Fed. 610, 61 C. C. A. 532; *United States v. Ross*, 92 U. S. 281.

*Illinois.*—*Globe Acc. Ins. Co. v. Gerisch*, 163 Ill. 625, 45 N. E. 563, 54 Am. St. Rep. 486.

*Maine.*—*Seavey v. Laughlin*, 98 Me. 517, 57 Atl. 796.

*New Hampshire.*—*Deschenes v. Concord & M. R. Co.*, 69 N. H. 285, 46 Atl. 467; *Cole v. Boardman*, 63 N. H. 580, 4 Atl. 572.

*New York.*—*Weber v. Third Ave. R. Co.*, 12 App. Div. 512, 42 N. Y. Supp. 789.

*Pennsylvania.*—*Douglass v. Mitchell's Exr.*, 35 Pa. St. 440, 446; *McAleer v. McMurray*, 58 Pa. St. 126, 135.

*Texas.*—*Rogers v. Tompkins* (Tex. Civ. App.), 87 S. W. 379, 384; *International & G. N. R. Co. v. Valledo* (Tex.), 113 S. W. 4.

**86.** See article "NEGLIGENCE," Vol. VII, p. 950, under B. a.

Where an attorney testified that it was his usual custom to obtain blank summons, signed by a justice and fill them up as he needed them, but he had no remembrance of the particular instance in question, it was held that there was sufficient proof that the custom was followed from the facts that he did not remember doing otherwise and that the blanks were filled in in his own handwriting. *Johnson v. Turnell*, 113 Wis. 468, 89 N. W. 515.

**87.** "The law does not require proof of that which is self evident." *Younger v. State*, 80 Neb. 201, 114 N. W. 170. (In a rape case it was alleged that no proof was made that defendant was not the daughter or sister of prosecutrix. Defendant was a negro—prosecutrix was a white person. *Held*, no proof was necessary.)

**88.** "The evidence in a law suit, like a line of battle or a chain of military defences, is no stronger than its weakest point. And so, where there is a point entirely undefended it may be said there is an entire failure of evidence." *Bennett v. Rogers*, 12 Neb. 382, 11 N. W. 314.

Allegations in a complaint which are not necessary to authorize a recovery need not be proven. *Gannon v. Laclede Gas Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505.

**89.** *Gueble v. La Falette*, 121 La. 909, 46 So. 917. And see article "VARIANCE," Vol. XIII.

**90.** A requested "instruction that 71 N. C. 451, contains a strong and

**6. Conclusion of Witnesses.**—A fact cannot be considered as proved where all that is before the court is the conclusion of a witness, upon the point in issue.<sup>91</sup>

**7. Matters Collaterally in Issue.**—Less evidence is required to establish a fact collateral to the issues than one which is directly in issue.<sup>92</sup>

**8. Proof of Conversation.**—A witness need not be able to repeat the entire conversation which he is alleged to have overheard, in order to justify a finding that the conversation actually took place.<sup>93</sup>

**9. Evidence Sufficient To Be Submitted to Jury.**—The old rule was that the evidence should be submitted to the jury even though there were but a scintilla.<sup>94</sup> Under the modern rule as it is applied

every material fact must be proved by testimony equal to the testimony of one unimpeached witness," was held properly refused, the court saying: "There is no rule of evidence in civil cases that we are aware of, requiring any particular quantum or weight of evidence to warrant the jury in determining a controverted fact." *Fuller v. Rounceville*, 29 N. H. 554.

"There must be then, in most cases, to establish a fact, a witness, whether that fact be important or unimportant. But this rule gives no measure for the quantity of evidence for knowledge, intelligence, qualities of memory, and all other attributes that make up ability, together with those moral qualities which constitute credibility, are most unequally united in men, so that one possessing all the attributes of ability and credibility in the highest degree, and so known to the tribunal before whom he testifies, would, in his evidence, outweigh an indefinite number of witnesses who possess the same attributes in the lowest degree." *Callanan v. Shaw*, 24 Iowa 441.

<sup>91</sup>. *Bowen v. Bull*, 58 Hun 609, 12 N. Y. Supp. 325.

"A mere statement by a witness that the defendant owes the plaintiff without proof of any consideration or promise . . . or of any antecedent fact would not be sufficient." *Chicago Gen. R. Co. v. Kluczynski*, 79 Ill. App. 221.

Where the only evidence is the opinion of a witness that a certain understanding existed between the parties, a verdict for the plaintiff

cannot be sustained. *First Nat. Bank v. Bullard*, 20 Mont. 118, 49 Pac. 658.

**Established Facts Contrary to Conclusion.**—"While a conclusion may, under certain circumstances, constitute sufficient evidence to support a finding and judgment, this cannot be so in cases . . . where the facts established at the trial are clearly contrary to the conclusion relied upon." *Foulger v. McGrath (Utah)*, 95 Pac. 1004.

<sup>92</sup>. "When a fact arises collaterally, the rules of evidence never exact as cogent proof in affirmation of its verity, as where it is directly in issue." *Life Assn. of America v. Neville*, 72 Ala. 517.

**For Example** the "best evidence" rule does not apply to documents collaterally in issue. See article "BEST AND SECONDARY EVIDENCE," Vol. II.

<sup>93</sup>. Instruction that in order to render testimony to a conversation heard by the witness worthy of consideration, it is necessary that the witness be able to give the substance of the whole conversation is erroneous, as he may recollect a portion of it and not the rest and the weight of his testimony is for the jury. *Voorheis v. Bovell*, 20 Ill. App. 538.

**Former Testimony**, proof of by oral testimony, see article "FORMER TESTIMONY," Vol. V, p. 956, under E. And see *infra*, III, 9, I, t, (2).

<sup>94</sup>. *Gray v. Fussell (Tex. Civ. App.)*, 106 S. W. 454, citing *Joske v. Irvine*, 91 Tex. 574, 44 S. W. 1059.

The dissenting opinion of Bynum, J., in *Wittkowsky v. Wasson*,

in most states, however, the evidence need not be so submitted unless it be such that fair minded men might reasonably base a verdict upon it.<sup>95</sup>

logical defense of the former rule in such cases.

"The rule is that where there is any evidence the case is for the jury. . . . While a scintilla of evidence is sufficient to take the case to the jury it does not follow that a scintilla is sufficient to support a verdict." Louisville, etc. R. Co. v. Hall, 29 Ky. L. Rep. 584, 94 S. W. 26.

In Pennsylvania, the evidence must be submitted to the jury, whenever there is a conflict caused by the testimony of even one witness, no matter how fully he may be contradicted. Weaver v. Craighead, 104 Pa. St. 288; Philadelphia, etc. R. Co. v. Alvord, 128 Pa. St. 42, 18 Atl. 391. But see Holland v. Kindergarten, 155 Pt. St. 156, 25 Atl. 1077.

<sup>95</sup> *England*.—Toomey v. L. B. & S. C. R., 3 C. B. (N. S.) 146, 27 L. J. C. P. 39; Ryder v. Wombwell, 38 L. J. Ex. 8, L. R. 4 Ex. 32, 19 L. T. 491; Metropolitan R. Co. v. Jackson, 3 App. Cas. 193, 47 L. J. C. P. 303, 37 L. T. 679.

*Canada*.—Garland v. Toronto, 23 Ont. App. 238; Storey v. Veach, 22 U. C. C. P. 164, 176.

*United States*.—Ewing v. Goode, 78 Fed. 442; United States v. Lee Huen, 118 Fed. 442; United States v. American Surety Co., 161 Fed. 149; Pleasants v. Fant, 22 Wall. 116; Parks v. Ross, 11 How. 362; Randall v. Baltimore & O. R. Co., 109 U. S. 478; Improvement Co. v. Munson, 14 Wall. 442; Manning v. Insurance Co., 100 U. S. 693.

*Georgia*.—Georgia R. & E. Co. v. Harris, 1 Ga. App. 714; 57 S. E. 1076; Hankerson v. Southwestern R. Co., 59 Ga. 593.

*Illinois*.—Offutt v. World's Columbian Expo., 175 Ill. 472, 51 N. E. 651; Bartelott v. International Bank, 119 Ill. 259, 9 N. E. 898; Frazer v. Howe, 106 Ill. 563.

*Iowa*.—Skellenger v. Chicago & N. W. R. Co., 61 Iowa 714, 17 N. W. 151.

*Maine*.—Connor v. Giles, 76 Me. 132.

*Maryland*.—Baltimore & O. R. Co. v. State, 71 Md. 590, 18 Atl. 969; Corner v. Pendleton, 8 Md. 337, 345.

*Massachusetts*.—Reed v. Inhabitants of Deerfield, 8 Allen 522.

*Minnesota*.—Minneapolis S. & D. Co. v. Great Northern R. Co., 83 Minn. 370, 86 N. W. 451.

*Nebraska*.—New Orleans Coffee Co. v. Cady, 69 Neb. 412, 95 N. W. 1017.

*New York*.—Ruppert v. Brooklyn H. R. Co., 154 N. Y. 90, 47 N. E. 971.

**Character of Motion for a Verdict.** Motion for an instruction to find against the party having the burden of proof on the ground that the evidence with all justifiable inferences, is insufficient to warrant a verdict for the other party, does not involve a determination of the weight of the evidence nor the credibility of witnesses. Offutt v. World's Columbian Expo., 175 Ill. 472, 51 N. E. 651.

**Rule Stated.**—"It is often said in jury cases that if there is any evidence to establish the existence of a disputed fact, and a conflict in that regard, the question respecting it is for the jury. That rule should be construed as calling for evidence worthy of belief in regard to the subject. If the truth or the proposition be not within the range of probabilities in the light of reason and common sense, in view of facts of common knowledge or facts established in the case beyond reasonable controversy then evidence of the existence of the fact involved does not prove such existence or tend to prove it. It is not evidence tending to establish the allegation of fact, because there can be no tendency that way so long as all reasonable probabilities are opposed to it. It is often said that if different unbiased minds may draw different inferences from the evidence, it is for the jury to draw the proper inferences. Just so,—but only within the range of reasonable probability.

**10. Number of Witnesses Required.** — **A. IN GENERAL.** — It may be stated as a general rule that the direct evidence of a single witness is sufficient basis for the verdict of a jury.<sup>96</sup>

**B. AT CIVIL LAW.** — Under the civil law two witnesses were required to prove any controverted fact.<sup>97</sup>

**C. RULES DEPENDING ON KIND OF WITNESS.** — **a. In General.** On grounds of policy the testimony of various kinds of witnesses is held insufficient to sustain a verdict unless corroborated by other

Evidence or an inference therefrom showing a bare possibility of the existence of a fact in issue will not do. Verdicts can be based only on reasonable probabilities. Mere possibility cannot establish probability.

. . . In short, before the plaintiff in any case is entitled to have the issues made by the pleadings submitted to the jury, he must do more than merely produce evidence of the facts upon which his cause of action rests. He must produce credible evidence in that regard, — evidence from which sensible men of unbiased minds can reasonably decide the issues in his favor." *O'Brien v. Chicago*, etc. R. Co., 102 Wis. 628, 78 N. W. 1084.

96. *Standard L. & A. Ins. Co. v. Thornton*, 97 Tenn. 1, 40 S. W. 136; *Gordon v. Ashley*, 191 N. Y. 186, 83 N. E. 686; *Albro v. Lawson*, 17 B. Mon. (Ky.) 642; *Bourda v. Jones*, 110 Wis. 52, 85 N. W. 671; *Engmann v. Estate of Immell*, 59 Wis. 249, 18 N. W. 182.

"Under the rules of the common law the testimony of a single witness where there is no ground for suspecting either his ability or his integrity, is a sufficient legal ground for belief even in criminal cases." *Gould v. Safford's Estate*, 39 Vt. 498, 505.

"The uncontradicted testimony of one credible witness is sufficient proof of any fact in this case." *United States v. Brown*, 24 Fed. Cas. No. 14,662.

"If the jury believe the statement of a witness there is no rule of law forbidding them to found their verdict upon it, though the witness stands alone, and his testimony is opposed to that of others." *Fengar v. Brown*, 57 Conn. 60, 17 Atl. 321. But see *Southwest V. & M. Co. v. Chase*, 95 Va. 50, 27 S. E. 826 (one

witness sufficient if uncontradicted).

**Not Valuable as Rule of Sufficiency.** — "To say that one credible witness is necessary, is a very unsatisfactory and indefinite rule, indeed." *Callanan v. Shaw*, 24 Iowa 441.

**Sufficient Though Witness Contradicts Himself.** — The direct testimony of a witness may be sufficient to support a verdict though the witness contradict himself on his cross-examination. *Lindley v. Blumberg*, 7 Cal. App. 140, 93 Pac. 894.

**Rule Incorporated in Statutes.** "The direct evidence of one witness who is entitled to full credit is sufficient proof of any fact except perjury and treason." California Code Civ. Proc. § 1844; Oregon Code Civ. Proc. § 681 (same except that usage is added to the exceptions); Montana Code Civ. Proc. § 7861 (same); *Story v. Maclay*, 6 Mont. 492, 13 Pac. 198. And see *State ex rel. Zehnter v. Tipton*, 15 Mont. 74, 38 Pac. 222.

"In order for the direct evidence of one witness to be sufficient to prove a fact, the witness must be one who is entitled to full credit. (Rev. Code Civ. Proc. § 3120)." *Bowen v. Webb* (Mont.), 97 Pac. 839.

**The Exclusion of the Testimony** of one witness as to a fact which has been proved by the uncontradicted evidence of another witness is not a prejudicial error for the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact except perjury and treason. C. C. P. Sec. 1844." *People v. Westlake*, 62 Cal. 303.

97. "Under the rules of the civil law a controverted fact must be established by the testimony of at least two witnesses." *Gould v. Safford's Estate*, 39 Vt. 498, 505. And see ar-



witnesses or by circumstances in the case. Most of these rules are noticed and discussed elsewhere in this work.<sup>98</sup>

b. *Child Under Twelve Years*.—In some jurisdictions testimony of a child under twelve years of age may sometimes be received in a criminal action without administering an oath to the witness, but no person can be convicted upon such testimony unsupported by other evidence.<sup>99</sup>

c. *Divorce Actions*.—There is no rule of law which requires the corroboration of the testimony of either party in an action for divorce<sup>1</sup> though it is sometimes required in practice, or by statute.<sup>2</sup>

title "CORROBORATION," Vol. III, p. 671.

Rule in Louisiana is stated, *infra*, II, 10, D, d.

98. See articles "ACCOMPLICES," Vol. I; "BASTARDY," Vol. II; "CONFESSIONS," Vol. III; "CORROBORATION," Vol. III.

99. New York.—§392 N. Y. Code Cr. Proc. Amend. §1892, ch. 279; *People v. Johnson*, 185 N. Y. 219, 77 N. E. 1164; *People v. Sexton*, 187 N. Y. 495, 80 N. E. 396; *People v. Pustolka*, 149 N. Y. 570, 43 N. E. 548; *People v. Gralleranzo*, 54 App. Div. 360, 66 N. Y. Supp. 514; *People v. Donohue*, 114 App. Div. 830, 100 N. Y. Supp. 202.

Corroboration is not required where the child knows the obligation of an oath and it is actually administered. *People v. O'Brien*, 74 Hun 264, 26 N. Y. Supp. 812.

Statute Constitutional.—N. Y. Code Cr. Proc. §392, requiring other evidence to support conviction than testimony of child under twelve years not unconstitutional. *People v. Johnson*, 185 N. Y. 219, 77 N. E. 1164.

England.—By Stat. 48 & 49 Vict. (1885) ch. 69, §4, a similar provision is made, but it is here limited to actions for carnally knowing a girl.

1. Flattery *v.* Flattery, 88 Pa. St. 27; *Lee v. Lee*, 3 Wash. 236, 28 Pac. 355; *Rosecrance v. Rosecrance*, 127 Mich. 322, 86 N. W. 800. And see articles "DIVORCE," Vol. IV; "CORROBORATION," Vol. III, p. 722 under 3.

"The rule upon which the judges have usually acted in these cases, of not granting a divorce upon the uncorroborated testimony of the libel-

ant, is merely a general rule of practice, and not an inflexible rule of law. . . . There is no law to prevent the finding of a fact upon the testimony of a party whose credibility and good faith are satisfactorily established." *Robbins v. Robbins*, 100 Mass. 150.

2. California.—*Evans v. Evans*, 41 Cal. 103; *Wolff v. Wolff*, 102 Cal. 433, 36 Pac. 767, 1037; *Smith v. Smith*, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183.

*District of Columbia*.—*Lenoir v. Lenoir*, 24 App. Cas. 160 (applying Code §964).

Maryland.—Gen. Laws, Vol. 1, art. 35, §4.

Michigan.—*Emmons v. Emmons*, Walker's Ch. 532.

Minnesota.—*Westphal v. Westphal*, 81 Minn. 242, 83 N. W. 988.

New Jersey.—*Garcin v. Garcin*, 62 N. J. Eq. 189, 50 Atl. 71; *Grover v. Grover*, 63 N. J. Eq. 771, 50 Atl. 1051; *Sabin v. Sabin* (N. J. Eq.) 59 Atl. 627; *Hunt v. Hunt* (N. J. Eq.), 59 Atl. 642; *Wood v. Wood* (N. J. Eq.), 62 Atl. 429; *Woodworth v. Woodworth*, 21 N. J. Eq. 251; *Cummins v. Cummins*, 15 N. J. Eq. 138.

Texas.—*Simons v. Simons*, 13 Tex. 468.

Wisconsin.—*Sanborn & S., Ann. ch. 113, §2431*, rule 28.

"No rule is more inexorable than that which forbids the court to make a decree of divorce on the uncorroborated evidence of the party seeking it." *Cotter v. Cotter* (N. J. Eq.), 58 Atl. 73.

Divorce for Desertion.—"The account of the libellant must either be corroborated by other testimony or if no other person have knowledge respecting the facts of the case,

So, also, particular facts are sometimes required to be proved by the testimony of more than one witness.<sup>3</sup>

D. RULES DEPENDING ON THE NATURE OF THE ACTION. — a. *Perjury and Treason*. — The requirement of two witnesses in actions of perjury and treason will be found discussed elsewhere in this work.<sup>4</sup>

b. *Answer in Chancery*. — To overcome an answer under oath in equity the testimony of two witnesses was formerly required, or one witness with corroborating circumstances.<sup>5</sup> But in many jurisdictions, under the modern procedure, this practice has been discontinued.<sup>6</sup>

there must be evidence that the libellant sustains a good general character, in order to . . . rebut any supposition that the desertion was caused by his or her misconduct." *Kimball v. Kimball*, 13 N. H. 222.

**Confession of the Defendant**, alone is insufficient to base a divorce decree upon *Rosecrance v. Rosecrance*, 127 Mich. 322, 86 N. W. 800.

3. **Kentucky**. — Under the Kentucky statutes, 1900, § 2119, a charge of adultery or lewdness in a divorce suit must be proved by two witnesses or one witness corroborated. *Barnett v. Barnett*, 23 Ky. L. Rep. 1117, 64 S. W. 844 (not off.).

**New Jersey**. — "The testimony of a single witness may be sufficient proof of adultery to sustain a decree of divorce, though denied by the defendant upon oath." *Brown v. Brown*, 63 N. J. Eq. 348, 50 Atl. 608.

4. See articles "PERJURY," Vol. IX, and "TREASON," Vol. XIII.

The law as to the sufficiency of a single witness "is uniform in principle and practice, with the single exception of the case of perjury, as there is oath against oath." *Erskine, S. C.*, in *Clifford v. Brooke*, 13 Ves. Jr. 131, 33 Eng. Reprint 244.

5. **Canada**. — *Powell v. Lea*, 20 Grant Ch. 621; *Moberly v. Brooks*, 27 Grant Ch. 270.

**United States**. — *Vigel v. Hopp*, 104 U. S. 441; *Conley v. Nailor*, 118 U. S. 127; *Monroe Cattle Co. v. Becker*, 147 U. S. 47; *Jacobs v. Van Sickle*, 127 Fed. 62, 61 C. C. A. 598.

**Alabama**. — *Moyler v. Moyler*, 11 Ala. 620.

**District of Columbia**. — Northwest

*Eckington Imp. Co. v. Campbell*, 28 App. Cas. 483.

**Florida**. — *White v. Walker*, 5 Fla. 478, 491; *Carr v. Thomas*, 18 Fla. 736; *Parken v. Safford*, 48 Fla. 290, 37 So. 567; *Pinney v. Pinney*, 46 Fla. 559, 35 So. 95.

**Pennsylvania**. — *Sylvius v. Kosek*, 117 Pa. St. 67, 11 Atl. 392; *Phillips v. Meily*, 106 Pa. St. 536; *Kane v. Fire Ins. Co.*, 199 Pa. St. 198, 48 Atl. 989.

**Tennessee**. — *Humphreys v. Blevins*, 1 Overt. 177.

**Vermont**. — *Helps v. Root*, 78 Vt. 493, 63 Atl. 941.

**Virginia**. — *Love v. Braxton*, 5 Call. 537.

See articles "ANSWERS," Vol. I, p. 907, under 3, and "CORROBORATION," Vol. III, p. 729, under 5.

**Reason for Rule**. — "The rule in chancery proceedings was said to have been established upon the ground that the answer of the defendant being sworn to and there being the oath of but one witness, it amounted to simply an oath against another oath and therefore a chancellor could not undertake to say which was to be credited. The conscience of the defendant being appealed to, his answer was as much entitled to credence as the oath of any one witness." Attorney's argument in *Albro v. Lawson*, 17 B. Mon. (Ky.) 642.

**Answer Must Be Under Oath**. *Patterson v. Gaines*, 6 How. (U. S.) 550, 588; *Union Bank v. Geary*, 5 Pet. (U. S.) 99.

6. *Shapleigh v. Hull*, 21 Colo. 419, 41 Pac. 1108; *Enders v. Williams*, 1 Met. (Ky.) 346; *Cornet v. Bertelsmann*, 61 Mo. 118; *Rush v.*

c. *Customs.* — A custom or usage may be established, in most jurisdictions,<sup>7</sup> by the testimony of a single witness.<sup>8</sup>

d. *In Louisiana.* — A contract or agreement in reference to movable property above five hundred dollars in value cannot be proved in Louisiana except upon the testimony of more than one witness or one witness with corroborating circumstances.<sup>9</sup>

e. *Miscellaneous Civil Cases.* — In the notes are collected cases in which in various localities, the testimony of more than one witness is required to justify a verdict.<sup>10</sup>

Landers, 107 La. 549, 32 So. 95, 57 L. R. A. 353; *Thibodeaux v. Thibodeaux*, 112 La. 906, 36 So. 800.

7. *Aldrich v. Columbia R. Co.*, 39 Or. 263, 64 Pac. 455 (applying Hill's Ann. Laws, § 778, which requires two witnesses).

8. *Jones v. Hoey*, 128 Mass. 585; *Southwest V. & M. Co. v. Chase*, 95 Va. 50, 27 S. E. 826; *Partridge v. Forsyth*, 29 Ala. 455; *Penland v. Ingle*, 138 N. C. 456, 50 S. E. 850 (but "the testimony of that witness must be sufficiently convincing and patent to create in the minds of the jurors a full conviction of the existence of the custom"); *McDonough v. Boston El. R. Co.*, 191 Mass. 509, 78 N. E. 141. And see *Briggs & Co. v. Langhammer*, 103 Md. 94, 63 Atl. 198; article "CUSTOMS AND USAGES," Vol. III, p. 959, under 3.

**Testimony Must Be Explicit.** "It seems now to be settled that a jury may be justified in regarding the usage as established by one witness where it appears that he has full knowledge and long experience on the subject about which he speaks, and testifies explicitly to the duration and universality of the usage, and is not contradicted." *Southwest V. & M. Co. v. Chase*, 95 Va. 50, 27 S. E. 826.

9. *Louisiana Rev. Civ. Code*, 1888, § 2277; *State v. Judge*, 37 La. Ann. 380; *Succession of Piffet*, 37 La. Ann. 871; *Sprowl v. Stewart*, 19 La. Ann. 433; *Hannay v. New Orleans Cotton Exch.*, 112 La. 998, 36 So. 831.

Although a contract over \$500 must be proved by one witness and corroborating circumstances, yet if the respective items are amply proved the rule does not apply. *Harliss v. Drews*, 119 La. 206, 43 So. 1008.

**Exception.** — By Art. 244, an exception is made in those cases where there is a "beginning of proof" in writing. *Muse v. Rogers' Heirs*, 12 Mart. (La.) 350.

"A beginning of proof in writing is said of any act proceeding or emanating from him against whom the demand is made." *Lazare's Exrs. v. Peytavin*, 9 Mart. O. S. (La.) 566.

10. *In Texas* a trust in a bill of sale based upon the verbal declarations of the alleged trustee can be proved only by two witnesses. *Grace v. Hanks*, 57 Tex. 14; *Neil v. Keese*, 5 Tex. 23; *Cuney v. Dupree*, 21 Tex. 211; *McClenny v. Floyd*, 10 Tex. 159; *Pierce v. Fort*, 60 Tex. 464.

*In Pennsylvania* two witnesses are required to impeach a written instrument (*Brawdy v. Brawdy*, 7 Pa. St. 157; *Pyroloem Appliance Co. v. Hardware Co.*, 169 Pa. St. 440, 32 Atl. 458; *Keystone Axle Co. v. Leyda*, 188 Pa. St. 322, 41 Atl. 477; *Thomas v. Loose*, 114 Pa. St. 35, 6 Atl. 326) and also to reform it. *Cooper v. Potts*, 185 Pa. St. 115, 39 Atl. 824; *Sutch's Estate*, 201 Pa. St. 305, 50 Atl. 943. "A chancellor invariably refuses to reform a written instrument on the uncorroborated testimony of a single witness." *Pioso v. Bitzer*, 209 Pa. St. 503, 58 Atl. 891; *Phillips v. Meily*, 106 Pa. St. 536; *Hamory v. Sargent*, 25 Pa. Co. Ct. 191; *North & W. Branch R. Co. v. Swank*, 105 Pa. St. 555; *Van Voorhis v. Rea*, 153 Pa. St. 19, 25 Atl. 800. And see *Hoffman v. Bloomsburg R. Co.*, 157 Pa. St. 174, 27 Atl. 564.

**Reformation of Deed.** — It is doubtful whether a deed should ever be reformed upon the sole testimony of the grantor. *McClellan v.*

f. *Miscellaneous Criminal Cases.* — It is quite common in several classes of criminal cases for statutes to expressly require more than one witness to convict a defendant.<sup>11</sup>

Sanford, 26 Wis. 595; *Kent v. Lasley*, 24 Wis. 654; *Meiswinkel v. St. Paul Ins. Co.*, 75 Wis. 147, 43 N. W. 669. But see *Godwin v. Yonge*, 22 Ala. 553.

**Surety's Notice to Creditors** to sue the principal must be proved by more than one witness in Tennessee. *Jackson v. Huey*, 10 Lea (Tenn.) 184 (applying §§ 1968, 1969 Code Tenn.; § 3518, Code 1896); *Simpson v. State*, 6 Baxt. (Tenn.) 440.

**Plea of the Truth** to a charge of slander must be supported by the testimony of two witnesses or one witness and corroborating circumstances in Alabama. *Spruill v. Cooper*, 16 Ala. 791; *Hereford v. Combs*, 126 Ala. 369, 28 So. 582.

**Application by Chinamen** to re-enter the United States only granted on proof by two credible witnesses other than Chinese, that he was formerly a merchant here. Act of Nov. 3, 1893, ch. 14, 28 stat. 7. *Li Sing v. United States*, 180 U. S. 486, 492.

In cases arising under the Chinese exclusion acts (Act 1892, § 6), it is expressly provided that proof of residence in the United States prior to May 5, 1892, can only be made "by at least one credible witness other than Chinese." *Quong Sue v. United States*, 116 Fed. 316, 54 C. C. A. 652; *Fong Yue Ting v. United States*, 149 U. S. 698, 729.

**Certificate of Acknowledgment** of an officer as to the execution of a deed will prevail over the unsupported testimony of the party grantor that it is a forgery. See the following cases:

*United States.* — *Insurance Co. v. Nelson*, 103 U. S. 544.

*Illinois.* — *O'Donnell v. Kelliher*, 62 Ill. App. 641; *Warrick v. Hull*, 102 Ill. 280; *McPherson v. Sanborn*, 88 Ill. 150; *Knowles v. Knowles*, 86 Ill. 1.

*Iowa.* — *Bailey v. Landingham*, 53 Iowa 722, 6 N. W. 76.

*Michigan.* — *Johnson v. Van Velsor*, 43 Mich. 208, 5 N. W. 265.

*Nebraska.* — *Phillips v. Bishop*, 35 Neb. 487, 53 N. W. 375.

*Pennsylvania.* — *Heeter v. Glasgow*, 79 Pa. St. 79.

*Wisconsin.* — *Smith v. Allis*, 52 Wis. 337, 9 N. W. 155.

**To Impeach an Officer's Return** more than one witness is necessary, for that would be only oath against oath. *Driver v. Cobb*, 1 Tenn. Ch. 490. And see *Devant v. Carlton*, 53 Ga. 491; *Davis v. Dresback*, 81 Ill. 393. *Contra*, *Loeb v. Maller*, 110 Ala. 487, 18 So. 268 (sheriff's return).

**To Convert a Deed Into a Mortgage**, the uncorroborated testimony of one witness has been held insufficient. *Muckelroy v. House*, 21 Tex. Civ. App. 673, 52 S. W. 1038; *Kent v. Lasley*, 24 Wis. 654. *Compare*, *Pierce v. Fort*, 60 Tex. 464.

**Various Statutes Requiring More Than One Witness.** — Relinquishment of dower of insane married women. Florida Rev. Stat. 1892, § 1962.

**Residence of Applicant for Divorce.** — Colorado Stat. 1893, p. 239, § 6.

**Committal to Insane Asylum.** South Dakota Stat. 1899, § 3567.

11. **Capital Crimes.** — Connecticut Gen. Stat. § 1508 ("testimony of at least two witnesses or that which is equivalent thereto"); *State v. Smith*, 49 Conn. 376, 385; *State v. Kelly*, 77 Conn. 266, 274, 58 Atl. 705; *State v. Marx*, 78 Conn. 18, 60 Atl. 690 (but the two witnesses need not testify to the same part of the transaction); *State v. Washelesky*, 70 Atl. 62 (the testimony of two witnesses is not required but it is enough if there is an equivalent thereto; neither need there be two witnesses to every important fact).

**Sexual Crimes.** — 1885 Stats. 48 & 49 Vict. ch. 69, § 2 (procuring for prostitution); § 3 (defilement by fraud); Canada Criminal Code, 1892, § 684 (fraudulent marriage, seduction); Massachusetts, Stat. 1186, ch. 329, Rev. Laws 1902, ch. 212, § 7 (enticing for prostitution);

## III. WEIGHT.

**1. In General.** — Although evidence always varies in its weight,<sup>12</sup> no arbitrary rule can be laid down by which to determine its weight in all cases.<sup>13</sup> The only general test may be said to be its probab-

Ontario Criminal Code § 684 (seduction); *Rex v. Daun*, 12 Ont. 227.

**Proof of Genuineness of Alleged Forged Note or Bill.** — *Indiana Burns Ann. Stat. Vol. I, § 1870*, and *Burns Ann. Supp. 1905, § 1879*; *Kansas Gen. Stat. 1897, ch. 102, § 226*; *State v. Foster*, 30 Kan. 365, 2 Pac. 628 (refers only to proof by expert evidence).

**Bribery.** — Number of witnesses required for a conviction. See article "BRIBERY," Vol. II, p. 769, under 2.

**Offences Under Election Law.** *Kentucky Stats. 1899, § 1594*; *Com. v. Hart*, 98 Ky. 7, 32 S. W. 138.

**Commitment to Reform School for Incorrigibles.** — *Minnesota Gen. Stat. 1894, § 3525*.

**Breach of Verbal Contract for Labor.** — *South Carolina, 1897, ch. 22, p. 457*; *State v. Easterlin*, 61 S. C. 71, 39 S. E. 250.

**False Pretenses.** — *Arizona, P. C. 1881, § 1659*; *California P. C. 1872, § 1110*, amended stat. 1905, ch. 532; *Idaho Rev. Stat. 1887, § 7870*; *North Dakota Rev. C. 1895, § 8186*; *Okla. Stat. 1893, § 5210*; *South Dakota Stat. 1899, § 8654*; *Utah Rev. Stat. 1898, § 4861*.

**12.** "The attributes of the human mind are such as to enable it to draw a distinction in giving weight and value to the declarations of individuals." *Harmon v. Territory*, 15 Okla. 147, 79 Pac. 765.

**Varies With Liability to Mistake of Perjury.** — "The weight of evidence varies with the greater or less liability of the witnesses, in the first place to mistake, and in the second place to perjury." *Boylan v. Meeker*, 28 N. J. L. 274, 333.

**13.** "There is no artificial rule of belief to control the minds of a jury." *Trott v. Wolfe*, 35 Ill. App. 163; *Clevenger v. Curry*, 81 Ill. 432; *Sibley v. St. Paul Ins. Co.*, 9 Biss. 31, 22 Fed. Cas. No. 12,830; *Huchberger v. Merchants Ins. Co.*, 4 Biss. 265, 12 Fed. Cas. No. 6,822.

"Nothing is more difficult than to

prescribe rules of faith, perhaps every man has one peculiar to himself." *State v. Jim*, 12 N. C. (1 Dev. L.) 508.

"There is no standard by which the weight of conflicting evidence can be ascertained." *People v. Superior Court*, 5 Wend. (N. Y.) 114, 126.

"It is certainly true as shown by our every day experience that artificial or arbitrary rules for determining the truth or falsity of testimony must be unsatisfactory and misleading." *Childs v. State*, 76 Ala. 93. And see *Dunlap v. Hearn*, 37 Miss. 471.

"It is one of the difficulties attending all tribunals passing upon facts, that the reasons for believing particular witnesses or particular testimony in preference to others cannot be defined." *Matter of Wool*, 36 Mich. 299.

"In fact, gentlemen, the rules upon this subject are the dictates of common sense, and your judgment will teach you better what testimony to believe and what to disbelieve than any rule which can be laid down by the court." *United States v. Fifty Barrels of Whiskey*, 25 Fed. Cas. No. 15,091.

**Principle Applies to Both Direct and Circumstantial Evidence.** — "It is impossible, therefore to fix any uniform value upon direct or positive testimony, as such. It is equally impossible to fix a uniform value on circumstantial evidence, as such. In many cases the one justly outweighs the other, while in many others the preponderance is precisely reversed." *Bowie v. Maddox*, 29 Ga. 285. See also *Hudson v. Best*, 104 Ga. 131, 30 S. E. 688.

**Uselessness of Any Rule.** — It is for the jurors to determine whether they believe a witness or not. "This belief is personal, individual and depends upon an infinite variety of circumstances; any attempt to regulate or control it by a fixed rule is, impracticable, worse than useless,

ity<sup>14</sup> in the light of observation, experience, and general knowledge.<sup>15</sup>

**2. Province of Court and Jury.**—The province of the court and jury in respectively commenting upon and weighing testimony is elsewhere discussed.<sup>16</sup>

**3. Legislative Control.**—The legislature may, by statutory enactment, prescribe rules of evidence which shall establish a *prima facie* case,<sup>17</sup> but it cannot arbitrarily declare that that shall be deemed

inconsistent and repugnant to the nature of a trial by jury and calculated to take from it the chief excellence on account of which it is preferred by the common law to any other mode of trial, and to adopt in its place, the chief objection to a fixed tribunal." *State v. Williams*, 47 N. C. (2 Jones' L.) 257, 269.

14. "Proof is weighed by probability and is tested by general experience." *People v. Donohue*, 114 App. Div. 830, 100 N. Y. Supp. 202.

"Probability is the chief guide in placing a proper estimate upon evidence." *Cass County v. Green*, 66 Mo. 498, 506.

"The observations and experience of daily life, as well as in the administration of justice in the courts of law, must be applied by judges and jurors to enable them to decide to what extent the mind should be influenced by evidence submitted to them." *Whitaker v. Parker*, 42 Iowa 585.

In deciding that a will should not have been admitted to probate the court said: "This conclusion is undoubtedly in conflict with some of the direct evidence, but in examining that, with all the legitimate facts and circumstances of the case, the rules and probabilities of human conduct should not be disregarded." *Harris v. Vandervere's Exr.*, 21 N. J. Eq. 561, 574.

The jury "should not act rashly or arbitrarily but deliberately and according to the dictates of reason and the teachings of experience." *United States v. Brown*, 24 Fed. Cas. No. 14,662.

15. "The effect then which all evidence has upon the mind is determined by observation and experience, the only original instructors of wisdom." *Whitaker v. Parker*, 42 Iowa 585.

"How shall we estimate its weight? We cannot mark it as so many ounces,

pounds or tons, and yet we know that it may have all degrees of weight from the lightest feather to the most absolute moral certainty. All we can do is to note all the facts and circumstances carefully and estimate its absolute and relative weight by the lights of conscience and experience. This weight varies with the greater or less liability of the witnesses, in the first place to mistake and in the second, to perjury." *Boyland v. Meeker*, 28 N. J. L. 274, 333.

"Evidence to be believed must not only proceed from the mouth of a creditable witness, but it must be creditable in itself—such as the common experience and observation of mankind can approve as probable under the circumstances. We have no test of the truth of human testimony, except its conformity to our knowledge, observation and experience. Whatever is repugnant to these belongs to the miraculous and is outside of judicial cognizance." *Daggers v. Van Dyck*, 37 N. J. Eq. 130; *Second Nat. Bank v. O'Rourke*, 40 N. J. Eq. 92.

16. See article "CREDIBILITY," Vol. III, pp. 752 to 755.

17. A state has general power to prescribe the rules of evidence which shall be observed and can determine what shall constitute a *prima facie* case, and such a law is not void as having an extra territorial effect when it is applied to causes of action arising without the state. *Pennsylvania Co v. McCann*, 54 Ohio St. 10, 17, 42 N. E. 768, 56 Am. St. Rep. 695, 31 L. R. A. 651; *Com. v. Williams*, 6 Gray (Mass.) 1. And see *Richmond & D. R. Co. v. Mitchell*, 92 Ga. 77, 18 S. E. 290.

A statute which provides that the records of a county clerk's office shall be *prima facie* evidence of the existence or non-existence of a

to be conclusive evidence of a fact which is not necessarily so.<sup>18</sup>

**4. Maxim as to Weight.**—There is a maxim "that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted."<sup>19</sup>

**5. As Affected by Method of Presentation.**—A. WRITTEN AND ORAL EVIDENCE.—a. *In General.*—The superiority of written, over oral evidence<sup>20</sup> has long been recognized by the courts and is

license to a physician is not unconstitutional, as declaring an arbitrary and illogical rule of law. *State v. Lawson*, 40 Wash. 455, 82 Pac. 750. And see *Ex parte Milecke* (Wash.), 100 Pac. 743.

**18.** An act declaring any circumstance or any evidence, however slight, *prima facie* proof of a fact is valid; but "a law that should make evidence conclusive, which was not so necessarily in and of itself, would be void as indirectly working a confiscation of property or a destruction of vested rights." *Howard v. Moot*, 64 N. Y. 262. And see article "CONCLUSIVE EVIDENCE," Vol. III, p. 291, under 1.

**19. England.**—*Blatch v. Archer*, 1 Cowp. 65.

*United States.*—*Kirby v. Tallmadge*, 160 U. S. 379, 385; *Sauntry v. United States*, 117 Fed. 132, 55 C. C. A. 148; *Missouri, etc. R. Co. v. Elliott*, 102 Fed. 96, 42 C. C. A. 188.

*Connecticut.*—*Throckmorton v. Chapman*, 65 Conn. 441, 32 Atl. 930.

*Massachusetts.*—*Smith v. Whitman*, 6 Allen 562.

*Michigan.*—*Wallace v. Harris*, 32 Mich. 380, 394.

*Missouri.*—*Kirk v. Middlebrook*, 201 Mo. 245, 100 S. W. 450.

*Pennsylvania.*—*Haverstick v. Pennsylvania R. Co.*, 171 Pa. St. 101, 32 Atl. 1128.

*South Dakota.*—*Gates v. Chicago, etc. R. Co.*, 4 S. D. 433, 57 N. W. 200.

And see *Fisher v. Carter*, 1 Wall. Jr. 69, 9 Fed. Cas. No. 4,815.

"When the proof tends to establish a fact and at the same time, discloses that it is within the power and to the interest of the opposing party to disprove it if false, the silence of the opposing party not only strengthens the probative force of the affirmative proof but of itself

is clothed with a certain probative force." *Pullman Palace Car Co. v. Nelson*, 22 Tex. Civ. App. 223, 54 S. W. 624. And see *Nutting v. Kings Co. El. R. Co.*, 21 App. Div. 72, 47 N. Y. Supp. 327.

**Failure to Produce Strongest Evidence.**—The fact that an inferior class of evidence is produced when it was within the power of the party to submit stronger proof, is to be considered by the jury in weighing the evidence before it. *Schwartz v. Germania Life Ins. Co.*, 21 Minn. 215; *Goodrich v. Weston*, 102 Mass. 362. And see article "PRESUMPTIONS," Vol. IX, p. 958.

"No rule of law is better settled than that a party having it in his power to prove a fact if it exist, which if proven, would benefit him, his failure to prove it must be taken as conclusive that the fact does not exist." *Wells-Stone Merc. Co. v. Truax*, 44 W. Va. 531, 29 S. E. 1006.

**Failure To Corroborate.**—Plaintiff's testimony that a witness made a certain remark to him, in the presence of a third person, which the witness denied is weakened by failure to call the third person. *Galveston, H. & S. A. R. Co. v. Walker*, 38 Tex. Civ. App. 76, 85 S. W. 28.

**Failure To Rebut.**—Where the plaintiff sued for his commission as a broker, and testified that the customary commission was five per cent. and the defendant offered no evidence on this point, the court was justified in charging the jury that if they found for the plaintiff to find for the amount sued for. The witness was testifying to a fact which could have been readily disproved and may therefore be considered as undisputed. *Hansen v. Williams* (Tex. Civ. App.), 113 S. W. 312.

**20.** See "DOCUMENTARY EVIDENCE," Vol. IV.

the basis of many very important rules in the law of evidence.<sup>21</sup>

b. *Weakness of Oral Testimony.*—The intrinsic weakness of oral testimony in relation to past events is matter of common<sup>22</sup> as well as judicial comment.<sup>23</sup>

c. *Superiority of Written Evidence.*—Where there is a conflict in the evidence<sup>24</sup> the written evidence will control,<sup>25</sup> especially when

21. See "BEST AND SECONDARY EVIDENCE," Vol. II; "PAROL EVIDENCE," Vol. IX; "STATUTE OF FRAUDS," Vol. XII.

"The danger of relying upon the memory of witnesses was the cause and justification of the statute of frauds, itself." *Walmsley v. Griffith*, 10 Ont. App. 327.

22. Whether part of a written contract which is not produced at the trial was omitted is a question of fact for the jury. "In this class of cases it is common experience that the lay mind takes a different view from the legal one. Juries nearly always give more weight to the words of the living witness before them, than they do to the writings made even by the same witness at another time." *Jessop v. Ivory*, 172 Pa. St. 44, 52, 33 Atl. 352.

23. *Thomas v. Paul*, 87 Wis. 607, 58 N. W. 1031. And see *infra*, III, 9, I, a.

"Many memories are mere sieves. And I would sooner trust the smallest slip of paper for truth, than the strongest and most retentive memory ever bestowed on mortal man." *Miller v. Cotten*, 5 Ga. 341, 349.

"The memory of men as to facts is not as satisfactory to the mind as a writing in an investigation involving past events." *Whitaker v. Parker*, 42 Iowa 585.

"It was observed, by Archdeacon Paley in his *Horae Paulinae* that amidst the obscurities, the silence, or the contradictions of history, if a letter can be found, we regard it as the discovery of a landmark by which we can correct, adjust, or supply the imperfections and uncertainties of other accounts." *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62, 82.

In refusing to alter a written contract on the parol evidence submitted, the court said: "Recollections

are sometimes vague, and impressions deceitful and illusory, but the written word stands, and speaks a uniform language." *Kent v. Manchester*, 29 Barb. (N. Y.) 595.

"Parol evidence of the contents of a document claimed to have been lost or destroyed is the weakest character of evidence, and should be received with caution and weighed with care." *Kinney v. Bryan's Admr.*, 13 Ky. L. Rep. 784.

**Newly Discovered Oral Evidence** is ground for a new trial, "though testimony of this kind, as it is much more easily fabricated ought to be examined with more strictness." *Jessup v. Cook*, 6 N. J. L. 434, 443.

24. "Where there is a direct conflict in the oral testimony, documentary evidence, like the correspondence between the parties becomes of paramount importance. Such evidence, if pertinent, is controlling, since it is the best evidence, and in every way more satisfactory and convincing than the recollection of witnesses as to conversations which occurred more than two years before." *J. S. Toppan Co. v. McLaughlin*, 120 Fed. 705.

"When the parties contradicted each other so flatly, it appears to me that the written evidence should have had more weight." *Beer v. McLeod*, 22 Nova Scotia 535, 541. And see *Walmsley v. Griffith*, 10 Ont. App. 327, 331, 338.

25. *United States.*—*Foster v. Ohio C. R. & M. Co.*, 17 Fed. 130 (business letters); *Anderson v. Monroe*, 55 Fed. 407; *Llado v. The Tritone*, 15 Fed. Cas. No. 8,427 (ship's delivery books).

*Illinois.*—*First Nat. Bank v. Myers*, 83 Ill. 507 (certificate of deposit); *Lieb v. Henderson*, 91 Ill. 282 (sworn answer); *Rosenmueller v. Lampe*, 89 Ill. 212 (receipt);



the writing was made at the time of the transaction in question.<sup>23</sup>

d. *Instructions*.—It has been held proper to instruct the jury as to the superiority of written evidence.<sup>27</sup>

*Winchester v. Grosvenor*, 44 Ill. 425 (receipt).

*New Hampshire*.—*Minot v. Boston & M. R. Co.*, 74 N. H. 230, 66 Atl. 825 (train sheets and records).

*New York*.—*People v. Dick*, 82 N. Y. Supp. 719 (election tally sheets); *Horenburger v. Levy*, 31 Misc. 773, 64 N. Y. Supp. 448 (receipt).

*Pennsylvania*.—*Chapman v. Railroad Co.*, 7 Phila. 204 (receipt).

In *Atwood v. Small*, 8 L. J. Ch. 145, 6 Cl. & Fin. 232, 301, 7 Eng. Reprint 684, this test was laid down: "In the first place to try and test the accuracy of the case made on the part of the plaintiffs and of the defendant, not by reference to what any witness may state as to what he heard pass in conversation with different parties, but to what I find in writing passing between the plaintiffs or their agents and the defendant. . . . I need hardly say that I should not think it safe to give any credit to a witness who should be called for the purpose of stating something that had passed in conversation inconsistent with the result of such documents."

**Corporation Proceedings**.—"It is a matter of the gravest importance in all dealings with or by a corporate body that its actions shall be evidenced not by verbal statements or admissions of its directors or other officers, but by the records of their proceedings kept by the appointed officers." *Thorold v. Neelon*, 18 Ont. App. 658, 665.

**Testamentary Capacity** may be shown by business letters of deceased, although the oral testimony is conflicting. *Wilcoxson v. Wilcoxson*, 165 Ill. 454, 46 N. E. 369, *In re Bolles' Will*, 37 Misc. 562, 75 N. Y. Supp. 1062; *In re De Vaugrigneuse's Will*, 46 Misc. 49, 93 N. Y. Supp. 364. See *In re Ely's Estate*, 16 Misc. 228, 39 N. Y. Supp. 177, 186. So also incapacity may be established. *Williams v. Lee*, 47 Md. 321, 326.

**Conflicting Theories**.—Where a case is tried on conflicting theories which are not entirely inconsistent, that theory which is proved by record evidence must prevail over the theory which is established by parol proof. *Dickenson v. State*, 20 Neb. 72, 79, 29 N. W. 184.

**Written Testimony**.—As to the weight of written testimony contained in affidavits and depositions, as distinguished from written evidence, see *infra*, III, 5, B, and C.

26. *State Bank v. McGuire*, 14 Ark. 530, 536; *Madison Av. Bapt. Church v. Baptist Church*, 2 Abb. N. S. (N. Y.) 254, 257; *Miller v. Cohen*, 173 Pa. St. 488, 34 Atl. 219; *Jackson v. Loomis*, 12 Wend. (N. Y.) 27.

Written evidence made at a time when no interest to fabricate it existed "would be more persuasive evidence than any amount of oral statements verified by the oaths of the parties interested or of verbal declarations proved to have been made by those parties." *Guy v. Meade*, 22 N. Y. 462, 467.

In *Miller v. Cohen*, 173 Pa. St. 488, 494, 34 Atl. 219, the court speaks of the "judicial value given to testimony reduced to writing at the time the facts stated in it occurred," referring to a written report of a police officer to his superior.

"The written admissions of a party before any controversy has arisen as to the meaning and affect of a contract, manifestly outweigh oral testimony in contradiction of same, given after the controversy has arisen." *Moore v. Grayson*, 132 Cal. 602, 64 Pac. 1074.

**Shorthand Notes**.—"Competent shorthand reporters are much more likely to be correct when taking down the statement of a witness when made, than one who merely relies upon his recollection to state what was said months before." *Chicago, etc., R. Co. v. Harmon*, 16 Ill. App. 31. And see article "FORMER TESTIMONY." Vol. V.

27. *Anderson v. Tribble*, 66 Ga.

B. AFFIDAVITS.—a. *In General*.—In those cases in which proof is allowed to be made by affidavits,<sup>28</sup> they are recognized as being a very weak<sup>29</sup> and unsatisfactory species of evidence<sup>30</sup> and this is

584; *Buford v. McGetchie*, 60 Iowa 298, 14 N. W. 790.

"It is not improper for me to say that the letters that are written by a business man, in the course of a business transaction, at the time that the events are transpiring if they bear upon the question that you have to consider, are often very satisfactory evidence,—much more satisfactory than the statements of parties after they have come into the conflict, and after a controversy has arisen, and they have become biased and heated and excited by that controversy." *Foster v. Ohio*, C. R. & M. Co., 17 Fed. 130.

28. See articles "AFFIDAVITS," Vol. I, p. 726; "INJUNCTIONS," Vol. VII, p. 346.

29. *Fanning v. Doan*, 139 Mo. 392, 414, 41 S. W. 742 ("the weakness which naturally belongs to such evidence"); *Rusk v. The Freestone*, 2 Bond 234, 21 Fed. Cas. No. 12,143.

"*Ex parte* statements, though under oath, are among the lowest kinds of evidence, in courts . . . and much more caution should be exercised in accepting as true what they attempt to establish than evidence regularly taken under rules authorized for that purpose where both sides are represented at the time the matter proposed to be offered in evidence is put into the case." *Jones v. United States*, 35 Ct. Cl. 36.

An *ex parte* deposition "is calculated to elicit only such a partial statement of the truth as may have the effect of entire falsehood." *Walsh v. Rogers*, 13 How. (U. S.) 283.

"A voluntary affidavit ranks in equal grade with hearsay testimony in the scale of evidence, and in no case is received where better testimony can from the nature of the case be had." *Patterson v. Maryland Ins. Co.*, 3 Har. & J. (Md.) 71.

In *Hay v. Gordon*, 9 Moore N. S. 102, 17 Eng. Reprint 452, 456, the court declares that a general denial in an affidavit which was filed in a case was not equivalent to what

might have been a circumstantial denial by the person if his testimony had been taken by commission, as he had requested.

**Oral Testimony** in an action for malicious prosecution tending to show probable cause was held to outweigh affidavits tending to prove a want of probable cause. *Dorendinger v. Tschehtelin*, 12 Daly (N. Y.) 34.

**Proof Beyond Reasonable Doubt**, "is not often attained upon testimony in the form of affidavits." *Edison Elec. Light Co. v. Columbia Co.*, 56 Fed. 496.

**Weight of Sworn Answer**.—If a "defendant on the stand furnishes the means of destroying his own answer and corroborating complainant's case, his testimony is preferable to his answer, for the same reason which makes oral examination and cross-examination more favorable for eliciting the truth than a statement where the affiant is not pressed to answer questions too rapidly to enable him to deliberate how he can best shape his response to secure his own ends." *Roberts v. Miles*, 12 Mich. 297, 305.

**Weight on Appeal**.—"While we might not feel so firmly bound by a finding of fact made by a trial judge on proof consisting solely of *ex parte* affidavits as we would by a finding of fact made where the witnesses are examined and cross-examined in his presence, yet the rule is well established in this state that even in disputed questions of fact tried on affidavits in support of a motion to dissolve an attachment the findings of the trial court will not be disturbed unless clearly against the weight of the evidence." *Fremont Brew. Co. v. Pekarek* (Neb.), 95 N. W. 12.

30. "*Ex parte* affidavits are a most unsatisfactory mode of establishing any fact in a case." *Hughes v. People*, 116 Ill. 330, 6 N. E. 55.

Proof by affidavits "is a very unsatisfactory method of determining

undoubtedly the reason that their use is not more generally allowed.<sup>31</sup>

b. *Sources of Weakness.* — (1.) *Lack of Cross-Examination.* — The voluntary nature of an affidavit and the lack of all opportunity for cross-examination is one of the principal sources of weakness of this class of evidence.<sup>32</sup>

(2.) *Opportunity for Error.* — Affidavits are easily obtained,<sup>33</sup> and being ordinarily drawn up by counsel<sup>34</sup> they cannot be relied upon

disputed questions of facts." Jones v. Subera, 150 Fed. 462.

**Affidavit Based Upon Information** merely is entitled to but little weight. People v. Smith, 1 Cal. 9.

"For purposes of evidence no weight at all can be accorded to an affiant's denial based on the want of any information whatever." Menke v. Lyndon, 124 Cal. 160, 56 Pac. 883.

31. *Ex parte* affidavits are at best but a very weak kind of evidence, and generally form but the ground of some preliminary or interlocutory action, but are never, unless it be specifically so provided by Act of Assembly or rule of court, the foundation for final judgment or decree." Pittsburg's Appeal, 79 Pa. St. 317.

'Affidavits and counter affidavits are customarily received on a motion for a new trial although they are regarded as loose and unsatisfactory evidence. Burr v. Palmer, 23 Vt. 244; Burlingame v. Cowee, 16 R. I. 40, 12 Atl. 234.

"Affidavits are the poorest kind of evidence and should probably never be used, except upon the hearings of motions or for the verification of pleadings or other papers." Fullenwider v. Ewing, 30 Kan. 15, 23, 1 Pac. 300.

32. Morley v. Morley, 5 De G., M. & G. 610, 627, 25 L. J. Ch. 1, 1 Jur. (N. S.) 1097, 43 Eng. Reprint 1007; Becker v. Quigg, 54 Ill. 390; Hughes v. People, 116 Ill. 330, 6 N. E. 55; State v. Mickle, 25 Utah 179, 70 Pac. 856. And see Keillor v. Charters, 23 N. Bruns. 493; Kiely v. Morrison, 24 Nova Scotia 327; Mendell v. Kimball, 85 Ill. 582.

In State v. Mickle, 25 Utah, 179, 70 Pac. 856, it was held that *ex parte* affidavits were insufficient to set aside a verdict of guilty in a criminal case on the ground that a

juror had previous to his voir dire examination made statements which showed a preconceived opinion. "Such affidavits are a most unsatisfactory mode of establishing any fact in a case. The parties making them are subject to no cross-examination—one of the most potent methods ever adopted to elicit truth and detect falsehood."

On a motion to dissolve a preliminary injunction the court said: "It is evident that the weight and credibility of the respective witnesses whose affidavits have been presented can be much better determined at the trial, where the right to test the truth or falsity of their statements by cross-examination can be fully exercised." Ford v. Taylor, 140 Fed. 356.

33. "The facility with which affidavits are procured, and the readiness with which a party will swear to a statement of facts drawn up by counsel, are crying evils." Vandervere v. Reading, 9 N. J. Eq. 446, 453.

"The readiness with which they (*ex parte* affidavits) are made is proverbial." Ingram v. Robbins, 33 N. Y. 409.

34. Matter of Eldridge, 82 N. Y. 161, 171. See Kipp v. Chamberlin, 20 N. J. L. 656; People v. Cameron, 89 App. Div. 141, 85 N. Y. Supp. 63; Whitney v. Jasper Land Co., 119 Ala. 497, 24 So. 259; Alexander v. McAllister, 34 N. Bruns. 163.

"An *ex parte* affidavit shaped, perhaps by the person pressing the prosecution will always be viewed with some suspicion and acted upon with some caution." United States v. Burr, 25 Fed. Cas. No. 14,692c.

**Direct Statements** of facts in an affidavit will be considered as the statements of the affiant and not of

as expressing with entire accuracy what affiant intended to state.<sup>35</sup>

c. *Counter-Affidavits*.—While it has been said that the last affidavit will outweigh an earlier one since the facts were more likely to have been accurately remembered by the person swearing to the facts at the earlier date,<sup>36</sup> ordinarily some particular feature will be found in the instruments themselves which will determine which is entitled to the greater weight.<sup>37</sup>

d. *Contradiction by Affidavit*.—The fact that the testimony of a witness on the stand is contradicted by an affidavit previously made, is not conclusive proof of a want of veracity, especially where the witness is ignorant.<sup>38</sup>

e. *Impeachment by Affidavit*.—Where it is attempted to impeach a witness by evidence produced in the form of an affidavit, such evidence will have little effect<sup>39</sup> even though the witness' testimony was given by affidavit.<sup>40</sup>

his counsel. *Douglass v. Ward*, 11 Grant Ch. (U. C.) 39, 50.

35. "An affidavit prepared for a man to swear to will not always disclose the whole facts, and will oftentimes, and without design, incorrectly describe without the deponent detecting it, some of the occurrences narrated." *Severn v. Severn*, 14 Grant Ch. (U. C.) 150.

"I do not distrust the sheriff himself, but I distrust his affidavit. I think I see traces of skill in the affidavit." *Keillor v. Charters*, 23 N. Bruns. 493, 507.

36. "The affidavits are undoubtedly contradictory, and in such case greater credence is to be given to the last affidavit unless there are circumstances in the case to throw discredit on it." *Johnston v. Roe*, 5 N. Bruns. 400.

37. Counter affidavit which is loosely and equivocally phrased is of little value. *Bank of Minnesota v. Page*, 14 Ont. App. 347; *Bowman v. Bowman*, 24 Ill. App. 165.

*Affidavits of Disinterested Persons* are entitled to more weight than counter-affidavits of persons who are interested. *Malcolm v. Perth Mut. Ins. Co.*, 29 Ont. 717.

38. "I do not think that the veracity or even the accuracy of an ignorant and illiterate person, is to be conclusively tested by comparing an affidavit which he has made, with his testimony given upon an oral examination in open court. We have too much experience of the great

infirmity of affidavit evidence. When the witness is illiterate and ignorant, the language presented to the court is not his; it is and must be the language of the person who prepares the affidavit and it may be and too often is, the expression of that person's erroneous inference as to the meaning of the language used by the witness himself, and however carefully the affidavit may be read over to the witness, he may not understand what is said in language so different from that which he is accustomed to use," adding that evidence taken *ex parte* is almost always incomplete and inaccurate, sometimes from partial suggestions and sometimes from want of suggestions without the aid of which the witness may be unable to recall the connected collateral circumstances necessary for the correction of the first suggestions of memory. *Johnston v. Todd*, 5 Beav. 597, 600, 49 Eng. Reprint 710.

39. *Matter of Wool*, 36 Mich. 299; *Carr v. Gale*, 5 Fed. Cas. No. 2,433.

40. "There may often be difficulty in deciding against the truth of a statement made in an affidavit merely upon the affidavit of another or other persons that he or they would not believe a statement made by that person upon oath where nothing is known of the characters of any of the parties." *Inch v. Flewelling*, 30 N. Bruns. 19, 35.

f. *Opinion Evidence*. — Opinion evidence given in affidavits is of very little weight.<sup>41</sup>

C. DEPOSITIONS. — a. *In Law*. — Probably there is no rule of law which accords to depositions a less degree of weight than the oral testimony of the witness would be entitled to receive.<sup>42</sup>

b. *In Practice*. — (1.) *In General*. — In many cases statements will be found which go to show that the courts in actual practice regard evidence given by deposition as unsatisfactory;<sup>43</sup> and some

41. In *Van Hook v. Wood*, 28 Fed. Cas. No. 16,855, the court refers to "the hazard of determining important interests in the statements of affidavits taken *ex parte*, especially where the witness is called to give only impressions or opinions and not facts passing under his own observation."

"An opinion or conclusion expressed in an *ex parte* affidavit, which does not disclose the facts upon which the conclusion is founded, has no probative force, in the absence of statute." *Schwenck v. Strang*, 59 Fed. 209, 8 C. C. A. 92.

**Expert Opinions.** — When the opinions of experts "are expressed in *ex parte* affidavits and there is no opportunity for the court to ascertain in what sense they use important words nor what facts they take into view, nor what standard of comparison they assume, their opinions are of comparatively little use in guiding the court." *Sargent v. Carter*, 21 Fed. Cas. No. 12,362.

42. Unimpeached and uncontradicted testimony of a deponent must be believed. *Barkley v. Bradford*, 100 Ky. 304, 38 S. W. 432.

"These depositions are by law admissible to the jury as evidence and although they would be entitled to greater weight if taken upon notice to the other party, and with an opportunity for cross-examination they are nevertheless entitled to credit unless otherwise impeached." *Jolly v. Terre Haute Co.*, 6 McLean 337, 13 Fed. Cas. No. 7,441.

**Instruction Held Proper.** — "In arriving at your verdict in this case you should take into consideration all the evidence before you, and you should give the same weight and consideration to the testimony of the plaintiff contained in depositions as you would give to said testimony

if the same had been given by the witness in open court before you instead of by deposition." *Olcese v. Mobile F. & T. Co.*, 112 Ill. App. 281.

**Contrary View.** — Testimony taken by deposition "is regarded in point of law of a secondary nature to *viva voce* testimony where witnesses are subjected to the ordeal of cross-examination, and such depositions are inferior and weaker in point of force and effect to testimony delivered *ore tenus*. And the obvious reason given is that a witness will frequently depose that in private which he would be ashamed to certify before a public tribunal." *State v. Howard*, 118 Mo. 127, 143, 24 S. W. 41.

"The testimony of a witness given in open court, in the presence of the opposing party and the other witnesses, and where the witness is subjected to a thorough cross-examination, and where the court or jury have the opportunity of observing the manner, appearance and conduct of the witness, is entitled to greater weight than the evidence of a witness embodied in a deposition taken in private, and remote from the court and jury and where all the ordinary tests of truth cannot be applied." *Carver v. Louthain*, 38 Ind. 530. But this early case was substantially overruled in *Milner v. Eglin*, 64 Ind. 197, and *Voss v. Prier*, 71 Ind. 128, and *Works v. Stevens*, 76 Ind. 181, where the court says that "the law does not as a rule recognize the inferiority of testimony embodied in depositions to testimony given orally at the trial."

43. "It is a self-evident proposition to every court and lawyer that the personal presence and testimony of a witness is preferable in every instance, and that depositions, on

courts have even gone so far as to declare them unreliable.<sup>44</sup>

(2.) **Reasons for This View.**—The basis of this view is that the court or jury has no opportunity to judge of the witness' manner or conduct while testifying;<sup>45</sup> furthermore the same chance does

the other hand, are very unsatisfactory." *Anderson v. Ferguson-Bach Sheep Co.*, 12 Idaho 418, 86 Pac. 41.

"It is (to be) recollected that depositions are admitted only from the necessity of the case; that they are an unsatisfactory species of evidence not known to the common law, and in derogation of it, that it is but of a secondary nature, . . . that the oral testimony of the witness in the presence of the court and jury is much better evidence than his deposition can be." *Hammock v. McBride*, 6 Ga. 178, 183.

Answers to interrogatories were described by Lord Erskine as "a frail and imperfect mode of examining into facts." See *Powell v. Lea*, 20 Grant Ch. (U. C.) 621, 624.

"How well do courts and counsel know that taking of testimony by deposition is at best but a very imperfect way of arriving at the truth." *Glanton v. Griggs*, 5 Ga. 424. And see to a similar effect, *Summers v. McKim*, 12 Serg. & R. (Pa.) 405, 410.

44. "Every lawyer and court knows from observation and experience the importance and advantage, and sometimes the necessity of the personal presence of the witness at the trial. It is sometimes difficult and impossible to get so full, explicit and perspicuous a statement of facts from the witness through a deposition as it is by his examination before court and jury." *Pinson v. Atchison*, etc. R. Co., 54 Fed. 464.

"The best evidence of course, is the testimony of the witness himself, given in the presence of the jury. A deposition is not a full equivalent, and especially if much time has elapsed or the litigation has taken another turn." *Thornton v. Britton*, 144 Pa. St. 126, 22 Atl. 1048.

**Answers in Depositions Framed by Persons other than the witness** are to be received with great caution. *Commercial Bank v. Union Bank*, 19 Barb. (N. Y.) 391; *Hargraves v.*

*Miller's Admx.*, 16 Ohio 338; *King v. Dale*, 2 Ill. 513; *Robinson v. Cathcart*, 3 Cranch C. C. 377, 20 Fed. Cas. No. 11,947.

**Leading Questions.**—Answers in depositions given in answer to leading questions will be given little weight. *Adams v. Adams*, 17 N. J. Eq. 324; *Garey v. Union Bank*, 3 Cranch. C. C. 233, 10 Fed. Cas. No. 5,241a.

**Deposition To Prove Oral Admission.**—Deposition containing evidence in relation to an oral admission or declaration of a decedent is especially weak. *Wales v. Newbould*, 9 Mich. 45, 90.

**Weight on Appeal.**—"Where a finding is based largely upon depositions or written testimony as to which the trial judge has no special advantage over the reviewing court, the rule that his findings will be adhered to unless clearly wrong does not apply with the same force." *Faulkner v. Simms*, 67 Neb. 295, 89 N. W. 171, 94 N. W. 113.

Where one of the parties gives evidence only by deposition, a verdict in favor of the other will not ordinarily be set aside, since his witnesses were before the jury who were entitled to consider their appearance and manner. *Hubbard v. Ranklin*, 71 Ill. 129. And see *McGinley v. United States Life Ins. Co.*, 8 Daly (N. Y.) 390, 398. *Infra*, III, 11.

45. *Untermeyer v. Freund*, 37 Fed. 342; *The Penobscot*, 103 Fed. 205; *The Alhambra*, 33 Fed. 73.

"Where the testimony of the witnesses is taken before commissioners or by deposition, as in the present case, the court is deprived of the opportunity of seeing them, of judging the weight to be given them by their manner and appearance upon the witness stand, and the opportunity afforded of asking questions concerning doubtful matters which always materially aids a court or jury in determining the reasonableness of their statements and affords

not exist to exhaustively cross-examine the witness and correct mistakes in the testimony.<sup>46</sup>

**D. EVIDENCE GIVEN THROUGH INTERPRETER.** — The great difficulty of getting the true meaning of a foreign witness who testifies through an interpreter is well recognized;<sup>47</sup> such testimony is also untrustworthy because of the inability to give the witness any adequate cross-examination.<sup>48</sup>

**6. As Affected by Nature of the Evidence.** — **A. TESTIMONY AND CIRCUMSTANCES.** — There is a tendency, often seen, to give too much weight to the oral testimony of witnesses as compared with their conduct and the surrounding circumstances.<sup>49</sup>

safe guides for arriving at the probability or improbability of the story they tell." *The Lakme*, 118 Fed. 972, 55 C. C. A. 466.

"The testimony has been wholly taken by deposition, and this decision is rendered without the court's seeing or hearing any witness, and therefore without the great advantage always gained therefrom." *The Monterey*, 153 Fed. 935.

46. Speaking of the defects of depositions the court said: "Many are stuffed with impertinent matter and very frequently the parties, by not apprehending the point of the case omit, upon the examination or cross-examination, to ask the very questions which bear upon the important facts." *Fisher v. Carroll*, 41 N. C. (6 Ired. Eq.) 485.

"All the evidence in the case was taken by deposition, which does not afford the same opportunities for correcting mistakes in testimony as in case of testimony given before the court when the parties and witnesses are all present." *The Jeremiah*, 13 Fed. Cas. No. 7,289.

"In an examination upon a commission, counsel representing an adverse interest are generally at a disadvantage as they have not the same opportunity of changing or discrediting the statements of the witness which an examination before the court would afford them." *In re Buchan's Will*, 16 Misc. 204, 38 N. Y. Supp. 1124.

47. *Haines v. People*, 82 Ill. 430.

"Her testimony was delivered in a foreign tongue and reached the jury only through the medium of an interpreter, and in that process it may have lost much of the fulness and force which a narrative always

derives from being transmitted directly to the court and jury in their own language." *People v. Barberi*, 149 N. Y. 256, 269, 43 N. E. 635, 52 Am. St. Rep. 717.

Expressions used by an interpreter to give his idea of what the foreign witness means "cannot be too implicitly relied on." *The Steamship Oder*, 8 Fed. 172.

Where a witness testifying through an interpreter stated that a certain epithet was applied to the defendant by another person, the court refused to believe it, saying: "It is not impossible that his saying the old lady used the epithet was merely his way of saying that she spoke angrily, and that his vocabulary, more than his untruthfulness is to blame for the statement." *Fatjo v. Seidel*, 109 La. 699, 33 So. 737.

On appeal, the testimony at the trial having been given through an interpreter, and appearing somewhat confused on the record, the court will seldom interfere with the findings of fact. *Kessel v. Kessel*, 79 Wis. 289, 295, 48 N. W. 382.

48. "In our courts a witness who does not understand or who cannot speak our language, but who speaks through an interpreter, if at all, has the time and opportunity to prepare his answers to each question with care, and hence the force of a cross-examination is broken if not destroyed." *United States v. Lee Huen*, 118 Fed. 442, 463.

49. "There is, perhaps, a proneness . . . to give overmuch weight to oral testimony and too little weight to conduct and to circumstances. The tendency of almost all minds is to place faith in witnesses whose appear-

**B. ADMITTED FACTS.**—Evidence which tends to reconcile other conflicting evidence<sup>50</sup> or which is in accord with admitted or unquestioned facts in the case is entitled to peculiar weight.<sup>51</sup> This

ance and bearing indicate truthfulness; but circumstances may show that witnesses apparently truthful are really false. . . . Conduct and circumstances are crucial tests of the truthfulness of testimony and should be very carefully considered." *Day v. Brown*, 18 Grant Ch. (U. C.) 681.

50. "The grounds for these conclusions will now be stated. We may premise generally that they best accord with the probabilities arising from indisputable facts, and they reconcile as nearly as they can be reconciled, the conflicting evidence." *Mitchell Transp. Co. v. Green*, 120 Fed. 49, 54, 56 C. C. A. 455.

"The nature and result of the accident are consistent with this state of facts but not easily reconciled with the story told by the plaintiff's driver." *Foley v. Interurban St. R. Co.*, 88 N. Y. Supp. 932.

**Duty of Jury To Reconcile Testimony**, see *infra*, V, 2, B, a.

51. See *Koepke v. Milwaukee*, 112 Wis. 475, 88 N. W. 238; *Chamberlain v. Ward*, 21 How. (U. S.) 548, 562 (statement rejected as incredible when in conflict with admitted facts); *Hoguet v. Berkman*, 53 Hun 636, 6 N. Y. Supp. 214 ("a jury is apt to be guided by the broad general features of a case"); *Ward v. Cooke*, 17 N. J. Eq. 93; *Zimmerman v. Bannon*, 101 Wis. 407, 77 N. W. 735 ("admitted facts are sometimes just as potential to impeach a witness as positive testimony"); *Dalrymple v. Craig*, 149 Mo. 345, 356, 50 S. W. 884 ("but there are some facts in this case that are heavier than the mere breath of a witness").

Where the evidence was in conflict the court said: "It will be proper to examine the evidence a little further for the purpose of seeing how far the defendant's narrative is consistent with the admitted facts." *Rosenberger v. Thomas*, 4 Grant Ch. (U. C.) 473.

"The wife's account is the more probable, is absolutely consistent

with all the established facts of the case, and especially with deceased's conduct and remarks." *Sutcliffe v. Traveling Men's Assn.*, 119 Iowa 220, 226, 93 N. W. 90, 97 Am. St. Rep. 298.

"The very fact that a non-perishable article weighing from three hundred to five hundred pounds should be sent by express instead of by freight," was held to be such a circumstance as to warrant a finding over the conflicting evidence of the shipper and the agent of the carrier, that the latter had notice of the necessity for haste in the shipment. *Elzy v. Adams Exp. Co. (Iowa)*, 119 N. W. 705.

**Overlapping Facts.**—"Therefore, on the strength of the testimony of these two witnesses disclosing a fact which speaks for itself, and overlaps all the other facts in the record, and which stands absolutely uncontradicted either directly, indirectly or by inference, we are compelled to grant defendant's motion for a new trial." *Morse v. St. Paul Ins. Co.*, 124 Fed. 451.

"The Broad Daylight Facts of the case show beyond doubt that plaintiff is mistaken. Actual conditions and physical facts surrounding the accident are conclusive that he did not look." *Medcalf v. St. Paul City R. Co.*, 82 Minn. 18, 84 N. W. 633.

**Conceded Physical Fact, Controls.** *Keys v. The Ambassador*, 1 Bond 237, 14 Fed. Cas. No. 7,747. And see *Highfill v. Missouri Pac. R. Co.*, 93 Mo. App. 219, 222.

**Unquestioned Integrity of Witness.**—"The concessions made by all parties as to the integrity of the chief engineer seem to present an insuperable barrier to the imputation of the use of improper influences in securing the selection of the Navarro meter by the department of public works." *Baird v. Mayor, etc.*, 96 N. Y. 567, 596.

**Testimony Contrary to Conceded Facts Discredited.**—"The jury will not be warranted in finding the existence of a fact on the positive testimony of a witness which is con-



rule is often applied by the federal courts in admiralty cases.<sup>52</sup>

C. UNCONTRADICTED TESTIMONY. — a. *In General*. — While the fact that the jury are the sole judges of the credibility of the witnesses is universally recognized (and they are not bound by the mere swearing of witnesses),<sup>53</sup> it is equally well established that they will not be allowed capriciously to disregard the unimpeached<sup>54</sup> and uncontradicted testimony of witnesses.<sup>55</sup>

trary to conceded facts or matters of common knowledge, or to all reasonable probabilities." *Badger v. Janesville Cotton Mills*, 95 Wis. 599, 70 N. W. 687. And see *Wonderlich v. Palatine Fire Ins. Co.*, 104 Wis. 382, 80 N. W. 467.

**Admitted Facts Which Establish Another Fact.** — "When facts are admitted which conclusively establish another fact, the mere denial by a witness of the existence of the fact so established, does not and should not create that material conflict in the evidence which would require a submission of the issue to the jury." *Peters v. Southern R. Co.*, 135 Ala. 533, 540, 33 So. 832.

52. *The William Chisholm*, 153 Fed. 704, 711, 82 C. C. A. 562; *The Chatham*, 52 Fed. 396, 3 C. C. A. 161. See *Goslee v. Shute's Exr.*, 18 How. (U. S.) 463, 465; *The Great Republic*, 23 Wall. (U. S.) 20, 29; *The North Star*, 43 Fed. 807, 811; *The Karoo*, 49 Fed. 651, 652; *Wolf v. Schooner Bertie Calkins*, 2 Fed. 793, 796; *The Manitoba*, 2 Flip. 241, 16 Fed. Cas. No. 9,029. *The Scotia*, 7 Blatchf. 308, 21 Fed. Cas. No. 12,513; *Wyman v. Babcock*, 2 Curt. 386, 30 Fed. Cas. No. 18,113.

After speaking of the great conflict which is apt to be found in cases where there has been a collision at sea, the court said: "The difficulty can only be overcome in a satisfactory manner by a critical analysis of the testimony, and a careful comparison of the respective conflicting statements of the witnesses with the undisputed or well established facts and circumstances developed in the testimony." *The Nichols*, 7 Wall. (U. S.) 656.

The truth in admiralty collision cases is to be ascertained "by taking certain conceded or well-proved facts, or facts established by disinterested witnesses, and from them deducting such conclusion as seems

best to accord with the probabilities of the case." *The Margaret B. Roper*, 103 Fed. 886.

"The two stevedores . . . tell a story about the stowage of the iron that is so flatly contrary to the admitted facts of the case, that they are either mistaken about the vessel they loaded, or intentionally false in a very material matter concerning the same." *The Nith*, 36 Fed. 86, 89.

**Testimony in the Face of Unquestioned Facts** must be disregarded. *The John Craig*, 66 Fed. 596; *The Joseph Stickney*, 50 Fed. 624, 627; *The Ralph M. Hayward*, 12 Fed. 794, 796.

53. "It is a wild conceit that any court of justice is bound by mere swearing; it is the swearing credibly that is to conclude its judgment." *Per Sir William Scott, The Odin*, 1 C. Rob. Adm. 252, quoted in *The Dolphin*, 7 Fed. Cas. No. 3,975.

"If everything or anything had to be believed in court simply because there is no witness to contradict it, the administration of justice would be a pitiable affair." *Punsky v. City of New York*, 129 App. Div. 558, 114 N. Y. Supp. 66.

"The jury are not obliged to receive evidence which is laid before them, passively and follow it blindly, because it is not controlled or contradicted by counter evidence. They are to examine it with care, subject it to the scrutiny of their judgment and experience, and act on it only so far as it seems to them to be reasonable and true." *Bee Printing Co. v. Hichborn*, 4 Allen (Mass.) 63.

54. *Penfield Inv. Co. v. Bruce*, 132 Mo. App. 257, 111 S. W. 888.

55. *Murphey v. Virgin*, 47 Neb. 692, 66 N. W. 652; *Lionberger v. Pohlman*, 16 Mo. App. 392; *Kingsbury v. Joseph*, 94 Mo. App. 298, 68 S. W. 93.

b. *Disinterested Witness*. — It is a general rule that when a disinterested witness who is in no way discredited, testifies to a fact within his own knowledge,<sup>56</sup> which is not of itself improbable or in conflict with other evidence, the witness is to be believed, and the fact is to be taken as legally established<sup>57</sup> so that it cannot be disregarded by court or jury.<sup>58</sup>

Where "the witness is unimpeached the facts, sworn to by him, uncontradicted, either directly or indirectly by other witnesses, and there is no intrinsic improbability in the relation given by him, neither a court nor jury can, in the exercise of a sound discretion, disregard his testimony. It is no less the duty of a court than of a jury, to decide according to evidence. But it is mockery to talk of evidence, if it is discretionary with the tribunal to which it is addressed to disregard it upon the vague suggestion, unsupported by proof, of the bias of a witness." *Newton v. Pope*, 1 Cow. (N. Y.) 109 (leading case).

"The jury might as well in their arbitrary and sovereign pleasure, render a verdict without evidence as against evidence." *Engmann v. Estate of Immel*, 59 Wis. 249, 18 N. W. 182.

"The rights of the people would have no safeguard, and the courts of justice would afford no forum for the redress of wrongs, if the unimpeached and uncontradicted testimony of a witness can be overthrown without reason." *Lewis v. New York City R. Co.*, 50 Misc. 535, 99 N. Y. Supp. 462.

"On what meats has this our jury fed, that it has grown so great' that they may disregard the clearest and most indisputable and uncontradicted evidence, and their act passed unchallenged and without remedy, and then the unsuccessful suitor though justly entitled to a verdict be blandly told, 'The jury had the right to disbelieve your witnesses.'" *Oglesby v. Missouri Pac. R. Co.*, 150 Mo. 137, 229, 37 S. W. 829, 51 S. W. 758, 779.

**Test of Limitation.** — After stating that the power of a jury to judge of the credibility of witnesses is not to be lightly restricted, the court said: "That there is, nevertheless,

legally a limit to the power of the jury or court to ignore such (uncontradicted) testimony is apparent. The power of a judge to direct a verdict where upon one side there is a proven case and upon the other side none, or a mere scintilla of evidence, illustrates the limitation." *Cooley v. Barcroft*, 43 N. J. L. 363.

56. "The witness must be credible and it must appear that he knows whereof he speaks. This may be shown by his own testimony in many and probably in most cases." *United States v. Lee Huen*, 118 Fed. 442, 457.

57. *Kavanaugh v. Wilson*, 70 N. Y. 177.

58. *United States*. — *United States v. Lee Huen*, 118 Fed. 442; *Northwestern Pac. R. Co. v. Hayes*, 87 Fed. 129, 30 C. C. A. 576; *McCarthy v. Traveler's Ins. Co.*, 8 Biss. 363, 15 Fed. Cas. No. 8,682; *United States v. Fifty Barrels of Whisky*, 25 Fed. Cas. No. 15,091; *In re Jew Wong Loy*, 91 Fed. 240; *United States v. Jue Wy*, 103 Fed. 795.

*California*. — *Hayward v. Rogers*, 62 Cal. 348.

*Colorado*. — *Colorado & S. R. Co. v. Thomas*, 33 Colo. 517, 81 Pac. 801, 70 L. R. A. 681; *Moyle v. Hocking*, 10 Colo. App. 446, 51 Pac. 533.

*Florida*. — *Levy v. Cox*, 22 Fla. 546.

*Georgia*. — *Western & Atl. R. Co. v. Beason*, 112 Ga. 553, 37 S. E. 863; *Morris v. Orient Ins. Co.*, 106 Ga. 472, 33 S. E. 430.

*Illinois*. — *Clark v. Gotts*, 1 Ill. App. 454; *Larson v. Glos*, 235 Ill. 584, 85 N. E. 926; *Chicago & A. R. Co. v. Gretzner*, 46 Ill. 74; *Smith v. Slocum*, 62 Ill. 354; *St. Louis, A. & T. H. R. Co. v. Manly*, 58 Ill. 300; *Robertson v. Dodge*, 28 Ill. 161; *Chicago, B. & Q. R. Co. v. Stumps*, 55 Ill. 367; *Hartford Life Ins. Co. v. Gray*, 80 Ill. 28, 31; *Evans v. George*, 80 Ill. 51.

c. *Interested Witness.* — (1.) *Early New York Rule.* — It was held

*Iowa.* — *White v. Hatton*, 113 N. W. 830.

*Kentucky.* — *Barkley v. Bradford*, 100 Ky. 304, 38 S. W. 432; *Sinclair's Admr. v. Illinois Cent. R. Co.*, 112 S. W. 910.

*Louisiana.* — *City of New Orleans v. Gauthreaux*, 32 La. Ann. 1126; *Lussee v. Hays*, 22 La. Ann. 307.

*Massachusetts.* — *Wait v. McNeil*, 7 Mass. 261; *Harding v. Brooks*, 5 Pick. 244. But see *Com. v. McNeese*, 156 Mass. 231, 30 N. E. 1021; *Com. v. Hyland*, 155 Mass. 7, 28 N. E. 1055.

*Minnesota.* — *Hawkins v. Sauby*, 48 Minn. 69, 50 N. W. 1015; *Schwartz v. Germania Ins. Co.*, 21 Minn. 215; *Anderson v. Liljengren*, 50 Minn. 3, 52 N. W. 219; *Second Nat. Bank v. Donald*, 56 Minn. 491, 58 N. W. 269; *Daly v. Chicago, etc. R. Co.*, 43 Minn. 319, 45 N. W. 611.

*Mississippi.* — *Mobile, etc. R. Co. v. Jackson*, 46 So. 142.

*Nebraska.* — *Dunbier v. Day*, 12 Neb. 596, 12 N. W. 109, 41 Am. Rep. 772.

*New Jersey.* — *Cooley v. Barcroft*, 43 N. J. L. 363; *Lillis v. Gallagher*, 39 N. J. Eq. 93.

*New York.* — *Block v. Galitzka*, 114 App. Div. 799, 100 N. Y. Supp. 173; *Littlefield v. Lawrence*, 83 App. Div. 327, 82 N. Y. Supp. 25; *Kapiloff v. Feist*, 91 N. Y. Supp. 27; *Spring v. Millington*, 44 Misc. 624, 90 N. Y. Supp. 152; *Johnson v. New York C. & H. R. Co.*, 173 N. Y. 79, 65 N. E. 946; *Seibert v. Erie R. Co.*, 49 Barb. 583.

*North Dakota.* — *Nokken v. Avery Mfg. Co.*, 11 N. D. 399, 92 N. W. 487.

*Oregon.* — *Smith v. Griswold*, 6 Or. 440; *Coughanour v. Hutchinson*, 41 Or. 419, 69 Pac. 68. *In re Miller's Will*, 49 Or. 452, 90 Pac. 1002.

*Pennsylvania.* — *Lonzer v. Lehigh Val. R. R. Co.*, 196 Pa. St. 610, 46 Atl. 937. *Compare Lehigh Coal & N. Co. v. Evans*, 176 Pa. St. 28, 34 Atl. 999; *Dawson v. Shaw*, 28 Pa. Supp. 563; *Reel v. Elder*, 62 Pa. St. 308; *Colonial Trust Co. v. Getz*, 28 Pa. Super. 619, 634; *Lautner v. Kann*, 184 Pa. St. 334, 39 Atl. 55; *Troxell v. Malin*, 9 Pa. Super. 483.

*Texas.* — *Clark v. McGrath* (Tex. Civ. App.), 22 S. W. 527.

*Wisconsin.* — *Engmann v. Estate of Immel*, 59 Wis. 249, 18 N. W. 182.

**Jury May Be so Instructed.**

"You are instructed that the uncontroverted testimony of a credible witness ought not to be lightly regarded, and you have no right to substitute a fanciful hypothesis to account for facts which are explained by direct testimony." *Card v. Fowler*, 120 Mich. 646, 652, 79 N. W. 925. And see *Engmann v. Estate of Immel*, 59 Wis. 249, 18 N. W. 182. But the court may also charge the jury that they may disbelieve a witness though there was no direct contradiction. *Cantlon v. Eastern R. Co.*, 45 Minn. 481, 48 N. W. 42.

**Written Testimony** given in a deposition, and uncontradicted and unimpeached, cannot be disregarded. *Barkley v. Bradford*, 100 Ky. 304, 38 S. W. 432.

**In a Patent Case** where all the evidence was taken and submitted in writing the court said: "The court will assume that the witness speaks the truth unless there be impeaching testimony, contradictory testimony, inherent improbabilities in the statements or circumstances surrounding the action testified to tending to throw discredit upon the statements made." *Bradley v. Eccles*, 138 Fed. 911.

**In Missouri.** — Where the testimony is uncontradicted, "and it is made manifest to the judge presiding at the trial by the manner of the examination of the witnesses by counsel engaged in the cause that such facts are not to be treated as a real disputed question in controversy," the court in instructing the jury may assume the existence of such facts. *Davidson v. St. Louis Trans. Co.*, 211 Mo. 320, 357, 109 S. W. 583. And see *Taylor v. Iron Co.*, 133 Mo. 349, 34 S. W. 581; *Fullerton v. Fordyce*, 121 Mo. 1, 25 S. W. 587, 42 Am. St. Rep. 516; *Sotebier v. St. Louis Trans. R. Co.*, 203 Mo. 702, 102 S. W. 651. But where there is any real contest over a fact, on the trial, the court cannot take the question from the jury who are entitled to judge

in an early New York case<sup>59</sup> that the bare fact that the witness was a party or interested in the action, required that his uncontradicted evidence be submitted to the jury, who were at liberty to disregard it if they so desired, and this rule has been sanctioned by many later cases.<sup>60</sup>

(2.) **General Rule.** — The general practice at the present time<sup>61</sup> even in New York,<sup>62</sup> is to make no arbitrary distinction between

of the credibility of the witnesses although the actual testimony is uncontradicted. *Gannon v. Laclede Gas Co.*, 145, Mo. 502, 46 S. W. 968, 47 S. W. 907, explained in *Davidson v. St. Louis Trans. Co.*, 211 Mo. 320, 360, 109 S. W. 583; *Hunter v. Wethington*, 205 Mo. 284, 293, 103 S. W. 543; *Schroeder v. Chicago & A. R. Co.*, 108 Mo. 322, 18 S. W. 1094, 18 L. R. A. 827; *Kingsbury v. Joseph*, 94 Mo. App. 298, 68 S. W. 93. But compare the dissenting opinion of Marshall J., in *Gannon v. Laclede Gas Co.*, *supra*; *Oglesby v. Missouri Pac. R. Co.*, 150 Mo. 137, 228, 37 S. W. 829, 51 S. W. 758, 778; *Reichenbach v. Elerbe*, 115 Mo. 588, 22 S. W. 573.

59. *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549.

60. *United States.* — *Sonnentheil v. Moerlin Brew. Co.*, 172 U. S. 401; *Felton v. Newport*, 105 Fed. 332, 44 C. C. A. 530; *Grand Trunk R. Co. v. Cobleigh*, 78 Fed. 784, 24 C. C. A. 342; *In re Jew Wong Loy*, 91 Fed. 240; *United States v. Sing Lee*, 125 Fed. 627; *Robinson v. New York C. & H. R. Co.*, 9 Fed. 877.

*New York.* — *Roberts v. Gee*, 15 Barb. 449; *Nicholson v. Conner*, 8 Daly 212; *Becker v. Koch*, 104 N. Y. 394, 10 N. E. 701, 58 Am. Rep. 515; *Newman v. Clapp*, 20 Misc. 67, 44 N. Y. Supp. 439; *Vickery v. Interborough R. Tr. Co.*, 126 App. Div. 781, 111 N. Y. Supp. 205; *Wimbleberg v. Yonkers R. Co.*, 83 App. Div. 19, 81 N. Y. Supp. 963; *Woolsey v. Brooklyn H. R. Co.*, 123 App. Div. 631, 108 N. Y. Supp. 16; *Munoz v. Wilson*, 111 N. Y. 295, 18 N. E. 855; *Saranac & L. P. R. Co. v. Arnold*, 167 N. Y. 368, 60 N. E. 647; *Mendoza v. Levy*, 111 App. Div. 449, 97 N. Y. Supp. 753; *Wilcox v. Selleck*, 92 Hun 37, 36 N. Y. Supp. 633; *Dorsett v. Doubleday, Page & Co.*, 103 N. Y. Supp. 792; *Volkmar v.*

*Manhattan R. Co.*, 134 N. Y. 418, 31 N. E. 870; *Bloomington v. Southern Nat. Bank*, 63 App. Div. 72, 71 N. Y. Supp. 306; *Sipple v. State*, 99 N. Y. 284, 1 N. E. 892, 3 N. E. 657; *Wohlfahrt v. Beckert*, 92 N. Y. 490; *Kingsland Land Co. v. Newman*, 1 App. Div. 1, 36 N. Y. Supp. 960; *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676.

*Pennsylvania.* — *Lamb v. Irwin*, 69 Pa. St. 436; *Troxell v. Malin*, 9 Pa. Super. 483; *Kircher v. Sprenger*, 4 Pa. Super. 38.

*South Dakota.* — *McGill v. Young*, 16 S. D. 360, 92 N. W. 1066; *Blount v. Medbery*, 16 S. D. 562, 94 N. W. 428.

*Texas.* — *Franklin Life Ins. Co. v. Villeneuve*, 29 Tex. Civ. App. 128, 68 S. W. 203; *International & G. N. R. Co. v. Johnson*, 23 Tex. Civ. App. 160, 55 S. W. 772; *Coast v. Elliott*, 23 Tex. 606, 613; *Dryer v. Bassett*, 63 Tex. 274; *Stitzle v. Evans*, 74 Tex. 596, 12 S. W. 326; *Gonzales v. Adoue* (Tex. Civ. App.), 56 S. W. 548; *McCracken v. Langtry-Sharpe Con. Co.* (Tex. Civ. App.), 101 S. W. 520; *Dubinski Elec. Wks. v. Lang Elec. Co.* (Tex. Civ. App.) 111 S. W. 169.

*Washington.* — *Gosline v. Dryfoos*, 45 Wash. 396, 88 Pac. 634; *Coey v. Darknell*, 25 Wash. 518, 65 Pac. 760; *Keene v. Behon*, 40 Wash. 505, 82 Pac. 884.

61. See article "PARTIES AND PERSONS INTERESTED AS WITNESSES," Vol. IX, p. 513.

62. *Lomer v. Meeker*, 25 N. Y. 361; *Siegmeister v. Lisenard Realty Co.*, 107 N. Y. Supp. 158; *Second Nat. Bank v. Weston*, 172 N. Y. 250, 64 N. E. 949; *Molloy v. Whitehall Cement Co.*, 116 App. Div. 839, 102 N. Y. Supp. 363; *Schechter v. Watson*, 35 Misc. 43, 70 N. Y. Supp. 1; *Karl v. New York City R. Co.*, 52

interested and disinterested witnesses by requiring the testimony of the former to be in all cases submitted to the jury,<sup>63</sup> though

Misc. 650, 101 N. Y. Supp. 750; *Lewis v. New York City R. Co.*, 50 Misc. 535, 99 N. Y. Supp. 462; *Madden v. New York City R. Co.*, 50 Misc. 555, 99 N. Y. Supp. 320; *Steenburgh v. M'Rorie*, 60 Misc. 510, 113 N. Y. Supp. 1118; *Bolster v. New York City R. Co.*, 113 N. Y. Supp. 770; *Mann v. Warshawsky*, 112 N. Y. Supp. 1062.

"If the evidence is possible of contradiction in the circumstances; if its truthfulness or accuracy is open to a reasonable doubt upon the face of the case and the interest of the witness furnishes a proper ground for hesitating to accept his statements, it is a necessary and just rule that the jury should pass upon it. Where however the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities, nor in its nature surprising, or suspicious, there is no reason for denying to it conclusiveness." *Hull v. Littauer*, 162 N. Y. 569, 57 N. E. 102.

**63.** *Alabama*.—*Keith v. Woodruff*, 136 Ala. 433, 449, 34 So. 911.

*District Columbia*.—*Brown v. Petersen*, 25 App. Cas. 359.

*Illinois*.—*Lange v. Cullinan*, 205 Ill. 365, 68 N. E. 934.

*Iowa*.—*Woodward v. Squires*, 39 Iowa 435.

*Louisiana*.—*Marks v. New Orleans Cold Storage Co.*, 107 La. 172, 31 So. 671, 90 Am. St. Rep. 285, 57 L. R. A. 271.

*New Jersey*.—*Tracy v. Tracy*, 62 N. J. Eq. 807, 48 Atl. 533.

*Wisconsin*.—*Burnham v. Norton*, 100 Wis. 8, 75 N. W. 304; *Moore v. Ellis*, 89 Wis. 108, 61 N. W. 291; *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909.

But compare the cases cited *supra*, note 60, next preceding.

**Adverse Party Having Foreknowledge of Nature of Testimony.** Uncontradicted testimony of a defendant could not be disregarded, where the adverse parties were informed of what his testimony would

be by the answer filed several months before the trial and where they did not themselves take the stand to contradict his testimony. *Beene v. Rotan Groc. Co.* (Tex. Civ. App.), 110 S. W. 162.

**Servant's Uncontradicted Testimony**, should not be disregarded.

*United States*.—*The Dunbritton*, 73 Fed. 352, 363, 19 C. C. A. 449; *Illinois Cent. Co. v. Coughlin*, 132 Fed. 801, 65 C. C. A. 101; *McMillan v. Grand Trunk R. Co.*, 130 Fed. 827, 65 C. C. A. 165.

*Arkansas*.—*St. Louis I. M. & S. R. Co. v. Landers*, 67 Ark. 514, 55 S. W. 940.

*Illinois*.—*Ohio & M. R. Co. v. Atteberry*, 43 Ill. App. 80; *St. Louis A. & T. H. R. Co. v. Manly*, 58 Ill. 300.

*Kentucky*.—*Kentucky Cent. R. Co. v. Talbot*, 78 Ky. 621.

*New York*.—*Ferguson v. Harlem Sav. Bank*, 43 Misc. 10, 86 N. Y. Supp. 825; *Beisiegel v. New York Cent. R. Co.*, 40 N. Y. 9; *Wilson v. United Tract. Co.*, 94 App. Div. 539, 88 N. Y. Supp. 122.

*Rhode Island*.—*Savage v. Rhode Island Co.*, 67 Atl. 633.

*South Dakota*.—*Miller v. Chicago & N. W. R. Co.*, 111 N. W. 553.

*Compare Stuetgen v. Wis. Cent. R. Co.*, 80 Wis. 498, 50 N. W. 407; *Albrecht v. New York C. & H. R. Co.*, 54 App. Div. 636, 66 N. Y. Supp. 605, *affirmed*, 166 N. Y. 622, 59 N. E. 1118.

"The jury cannot arbitrarily disregard the evidence of any witness which is not contradicted or discredited by other evidence or circumstances. The jury should regard the testimony of every witness sworn. They are not obliged to believe it, but it is their duty to give the evidence of witnesses the weight to which in their opinion as conscientious men seeking after truth, they believe it to be entitled; but the employment or business of a witness affords no reason why his evidence should arbitrarily or without reason be disregarded." *Brunswick & W.*

where any doubt appears in the case it should be submitted to the jury who may consider the interest of the witness in passing upon it.<sup>64</sup>

d. *What Is Uncontradicted Testimony.* — (1.) *In General.* — No absolute rule can be laid down by which to determine when testimony is uncontradicted, as that term is used in this connection.<sup>65</sup> It may be stated generally, however, that contradiction may appear in other ways than by the direct testimony of opposing witnesses.<sup>66</sup>

(2.) *Contradiction By Circumstances.* — The surrounding circumstances may effectually impeach the testimony of the witness so as to justify the jury in refusing to give it full credit.<sup>67</sup>

R. Co. v. Wiggins, 113 Ga. 84, 39 S. E. 551.

The testimony of the engineer, conductor and fireman that they did not see cattle on the track cannot be disregarded by the jury where there is nothing improbable in their story and they are not contradicted by the circumstances. *Miller v. Chicago & N. W. R. Co.* (S. D.), 111 N. W. 553.

**Uncontradicted Evidence as to Damages** not conclusive on the jury. *Bee Printing Co. v. Hichborn*, 4 Allen (Mass.) 63; *Durkee v. Moulton*, 133 Cal. xix, 65 Pac. 469.

64. *Hull v. Littauer*, 162 N. Y. 569, 57 N. E. 102.

65. "It is often a difficult question to decide when a witness is, in a legal sense, uncontradicted. He may be contradicted by circumstances as well as by the statements of others contrary to his own. In such cases, courts are not bound to refrain from exercising their judgment and to blindly adopt the statements of the witness for the simple reason that no other witness has denied them and that the character of the witness is not impeached." *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549.

66. *Hunter v. Wethington*, 205 Mo. 284, 103 S. W. 543; *Lautner v. Kann*, 184 Pa. St. 334, 39 Atl. 55.

"Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court, but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the

court or jury to disregard his evidence even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions, or of his own conduct as to discredit his whole story. His manner too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these facts may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced." *Quock Ting v. United States*, 140 U. S. 417, 420.

"But a witness may be contradicted by the facts he states as completely as by direct adverse testimony. A court or jury is not bound to accept it as true, merely because there is no direct testimony contradicting it, where it contains such inherent improbabilities or contradictions, which alone or in connection with other circumstances in evidence satisfy them of its falsity." *Anderson v. Liljengren*, 50 Minn. 3, 52 N. W. 219.

67. *United States.* — *North Pac. R. Co. v. Austin*, 64 Fed. 211, 12 C. C. A. 97; *Grand Trunk R. Co. v. Cobleigh*, 78 Fed. 784, 24 C. C. A. 342; *Woey Ho v. United States*, 109 Fed. 888, 48 C. C. A. 705.

*California.* — *County of Sonoma v. Stoten*, 125 Cal. 32, 57 Pac. 681; *Prewett v. Dyer*, 107 Cal. 154, 40 Pac. 105; *Baker v. Firemen's Fund Ins. Co.*, 79 Cal. 34, 21 Pac. 357;

(3.) **Incredible and Improbable Testimony.**—Testimony which is incredible or improbable need not be believed although it is not contradicted by any direct evidence.<sup>68</sup>

*People v. Milner*, 122 Cal. 171, 54 Pac. 833.

*Connecticut.*—*Lewis v. Lewis*, 76 Conn. 586, 57 Atl. 735; *Bradley v. Gorham*, 77 Conn. 211, 58 Atl. 698; *McGann v. Sloan*, 74 Conn. 726, 52 Atl. 405; *Phoenix Mut. L. Ins. Co. v. Oppen*, 75 Conn. 295, 53 Atl. 586.

*District of Columbia.*—*Beals v. Finkenbinder*, 12 App. Cas. 23; *Alexander v. Blackman*, 26 App. Cas. 541.

*Iowa.*—*Babcock v. Chicago & N. W. R. Co.*, 62 Iowa 593, 13 N. W. 740, 17 N. W. 909; *Bacus v. Chicago, B. & Q. R. Co.*, 118 N. W. 751.

*Kentucky.*—*Howard v. Louisville R. Co.*, 32 Ky. L. Rep. 309, 105 S. W. 932.

*Massachusetts.*—*Saures v. Stevens Mfg. Co.*, 196 Mass. 543, 82 N. E. 694; *Allen v. Wilbur*, 199 Mass. 366, 85 N. E. 429; *Lindenbaum v. New York, N. H. & H. R. Co.*, 197 Mass. 314, 84 N. E. 129; *Bearse v. Mabie*, 198 Mass. 451, 84 N. E. 1015; *Devine v. Murphy*, 168 Mass. 249, 46 N. E. 1066; *Barker v. Loring*, 177 Mass. 389, 59 N. E. 66; *Palmer v. Coyle*, 187 Mass. 136, 72 N. E. 844; *Hamilton v. Taylor*, 195 Mass. 68, 80 N. E. 592; *Mercantile Guaranty Co. v. Hilton*, 191 Mass. 141, 77 N. E. 312.

*Michigan.*—*Michigan Pipe Co. v. Michigan F. & M. Ins. Co.*, 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277.

*Minnesota.*—*Anderson v. Liljengren*, 50 Minn. 3, 52 N. W. 219.

*Montana.*—*Bowen v. Webb*, 97 Pac. 839.

*New York.*—*Koehler v. Adler*, 78 N. Y. 287; *Foreman v. New York City R. Co.*, 54 Misc. 557, 104 N. Y. Supp. 932; *Condit v. Sill*, 18 N. Y. Supp. 97, 44 N. Y. St. 284; *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549, 554; *Mendoza v. Levy*, 111 App. Div. 449, 97 N. Y. Supp. 753; *Rosenbloom v. Cohen*, 46 Misc. 80, 91 N. Y. Supp. 382; *Johnston v. New York City R. Co.*, 54 Misc. 642, 104 N. Y.

Supp. 812; *Reilly v. Interurban St. R. Co.*, 87 N. Y. Supp. 423.

*South Dakota.*—*Lighthouse v. Chicago, etc.*, R. Co., 3 S. D. 518, 54 N. W. 320; *McGill v. Young*, 16 S. D. 360, 92 N. W. 1066.

*Texas.*—*Cheatham v. Riddle*, 12 Tex. 112; *Mercantile & Bkg. Co. v. Landa* (Tex. Civ. App.), 40 S. W. 406.

*Wisconsin.*—*Moore v. Ellis*, 89 Wis. 108, 61 N. W. 291; *Zimmerman v. Bannon*, 101 Wis. 407, 77 N. W. 735; *Roth v. Barrett Mfg. Co.*, 96 Wis. 615, 71 N. W. 1034; *Groesbeck v. Chicago, etc.*, R. Co., 93 Wis. 505, 67 N. W. 1120.

"That a witness who is unworthy of belief testifies positively to a fact does not require the court to believe him nor bind the court to find the fact as testified to, when from all the other evidence and circumstances proven and from the appearance and demeanor of the witness, the court is satisfied such witness has testified falsely or is mistaken." *Widmayer v. Davis*, 231 Ill. 42, 83 N. E. 87.

68. *United States.*—*The Helen R. Cooper*, 7 Blatchf. 378, 11 Fed. Cas. No. 6,334; *In re Leslie*, 119 Fed. 406; *The Dauntless*, 121 Fed. 420; *Lee Sing Far v. United States*, 94 Fed. 834, 35 C. C. A. 327; *The William Gray*, 1 Paine 16, 29 Fed. Cas. No. 17,694.

*California.*—*Fleming v. Howard*, 150 Cal. 28, 87 Pac. 908.

*Georgia.*—*Macon Consol. St. R. Co. v. Barnes*, 113 Ga. 212, 38 S. E. 756.

*Illinois.*—*Larson v. Glos*, 235 Ill. 584, 85 N. E. 926; *Podolski v. Stone*, 186 Ill. 540, 58 N. E. 340; *Chicago Union Tr. Co. v. O'Brien*, 219 Ill. 303, 76 N. E. 341; *Hester v. Frary*, 99 Ill. App. 51; *Highley v. American Exch. Nat. Bank*, 86 Ill. App. 48.

*Indiana.*—*Peter v. Wright*, 6 Ind. 183, 193; *Princeton Coal Co. v. Roll*, 162 Ind. 115, 66 N. E. 169.

*Maryland.*—*Williams v. Hunting-*

(4.) **Manner of Testifying.**—Again, the manner of the witness while testifying may justify a disregard of his testimony.<sup>69</sup>

ton, 68 Md. 590, 13 Atl. 336, 6 Am. St. Rep. 477.

*Massachusetts.*—Wait *v.* McNeil, 7 Mass. 261.

*Minnesota.*—Lang *v.* Ferrant, 55 Minn. 415, 57 N. W. 140; Hawkins *v.* Sauby, 48 Minn. 69, 50 N. W. 1015; Second Nat. Bank *v.* Donald, 56 Minn. 491, 58 N. W. 269.

*Missouri.*—Lovell *v.* Davis, 52 Mo. App. 342.

*New Jersey.*—Levy *v.* Levy, 57 Atl. 1011; Vreeland *v.* Vreeland, 48 N. J. Eq. 56, 21 Atl. 627; Earle *v.* Norfolk & N. B. Co., 36 N. J. Eq. 188.

*New York.*—Gordon *v.* Ashley, 191 N. Y. 186, 93 N. E. 686.

*Pennsylvania.*—Shultz *v.* Wall, 134 Pa. St. 262, 19 Atl. 742.

*Rhode Island.*—Gorman *v.* Hand Brew. Co., 66 Atl. 209.

*South Dakota.*—Lighthouse *v.* Chicago, etc. Co., 3 S. D. 518, 54 N. W. 320.

*Washington.*—Keene *v.* Behan, 40 Wash. 505, 82 Pac. 884; Coey *v.* Darknell, 25 Wash. 518, 65 Pac. 760.

*Wisconsin.*—Stuettgen *v.* Wisconsin Cent. R. Co., 80 Wis. 498, 50 N. W. 407; Bourda *v.* Jones, 110 Wis. 52, 85 N. W. 671; Zimmerman *v.* Bannon, 101 Wis. 407, 77 N. W. 735.

"Although there be no direct evidence contradicting the testimony of witnesses, the jury are not bound to accept it as true where it contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence, furnish a reasonable ground for concluding that the testimony is not true." Hawkins *v.* Sauby, 48 Minn. 69, 50 N. W. 1015.

"The jury under our system of laws, are the sole judges of the credibility of the witnesses and the weight to be given their testimony, and they have the authority to reject the testimony of a witness, although he is not contradicted by other witnesses, when the circumstances cast a suspicion upon his statements or render them inconsistent with reason and common observation." El Paso Foundry & M.

Co. *v.* De Guereque (Tex. Civ. App.), 101 S. W. 814 ("it is in the face of reason to say that a hook that had held up from five thousand to seven thousand pounds, and had not been used since would give way under a weight of four thousand three hundred").

"If the positive evidence is inherently improbable, the court may reach a conclusion based upon the circumstantial evidence in the case which proves more convincing." *In re Friedman*, 164 Fed. 131, 139.

**69.** *United States.*—*In re Dornig*, 128 Fed. 146; Craft *v.* Northern Pac. R. Co., 62 Fed. 735; *United States v.* Sing Lee, 125 Fed. 627.

*Illinois.*—Ayres *v.* Ayres, 142 Ill. 374, 30 N. E. 672; Hauser *v.* People, 210 Ill. 253, 71 N. E. 416.

*Indiana.*—Oliver *v.* Pate, 43 Ind. 132.

*Kansas.*—Missouri, K. & T. R. Co. *v.* Murphy, 59 Kan. 774, 52 Pac. 863.

*Minnesota.*—Anderson *v.* Liljengren, 50 Minn. 3, 52 N. W. 219.

*Nebraska.*—Chezem *v.* State, 56 Neb. 496, 76 N. W. 1056.

*New York.*—Strong *v.* Walton, 67 App. Div. 114, 60 N. Y. Supp. 353.

*Texas.*—Galveston H. & S. A. R. Co. *v.* Murray (Tex. Civ. App.), 99 S. W. 144; Missouri, K. & T. R. Co. *v.* Harris (Tex. Civ. App.), 101 S. W. 506; El Paso Foundry & M. Co. *v.* De Guereque (Tex. Civ. App.), 101 S. W. 814; Mercantile & Bkg. Co. *v.* Landa (Tex. Civ. App.), 40 S. W. 406; Stitzle *v.* Evans, 74 Tex. 596, 12 S. W. 326; Cheatham *v.* Riddle, 12 Tex. 112. But see Madden *v.* New York City R. Co., 99 N. Y. Supp. 320 ("considering the character of the plaintiff's testimony, the rejection of it as untrue cannot be justified solely on the ground of the unfavorable impression made by the plaintiff's demeanor").

"His manner upon the witness stand, his halting and quibbling in answering questions may satisfy both the court and jury that he is swearing falsely and yet no witness may be in existence that could contradict



(5.) **Testimony Contradicted by Admitted Facts.**—Any testimony which is inconsistent with the admitted or physical facts appearing in the case will be disregarded.<sup>70</sup>

(6.) **Impeached Witness.**—Testimony of a witness who has been successfully impeached need not be believed though uncontradicted by direct evidence.<sup>71</sup>

e. *In Criminal Cases.*—In view of the fact that in criminal cases the court cannot direct a verdict, the rule that the jury will not be allowed to arbitrarily reject the uncontradicted testimony of witnesses cannot properly be said to apply to such cases,<sup>72</sup> but

his testimony." *People v. Tuczke-witz*, 149 N. Y. 240, 251, 43 N. E. 548.

**Poor Memory.**—Uncontradicted testimony of a witness who appears to remember poorly need not be believed. *Felton v. Newport*, 105 Fed. 332.

70. *Macon Consol. St. R. Co. v. Barnes*, 113 Ga. 212, 38 S. E. 756. See *Western & A. R. Co. v. Beason*, 112 Ga. 553, 37 S. E. 863.

**Admitted Facts**, in general, see *supra*, III, 6, B.

"The jury are not bound to believe every story that a witness or witnesses are willing to swear to simply because no other witness contradicts it. If its inherent improbability or irreconcilability with facts shown or admitted are such that it does not command their assent, the jury may disregard it." *Lonzer v. Lehigh Val. R. Co.*, 196 Pa. St. 610, 46 Atl. 937.

**Illustration.**—Uncontradicted testimony that a broken wire rope had been tied together carefully and in a manner such that it did not amount to negligence to leave it need not control the jury where from the facts it appears otherwise—the rope could scarcely be bent, the man who repaired it had only one hand and the rope finally actually came down again. *Logue v. Grand Trunk R. Co.*, 102 Me. 34, 65 Atl. 522.

**Physical Appearance Controlling Testimony as to Age.**—Testimony of a witness that he was a minor may be disbelieved by the jury who had seen him and believe him to be of age. *Waterman v. Waterman*, 42 Misc. 195, 85 N. Y. Supp. 377; *Garbarsky v. Simkin*, 36 Misc. 195, 73 N. Y. Supp. 199; *Levy v. Abramssohn*, 39

Misc. 781, 81 N. Y. Supp. 344. And see *Ark Foo v. United States*, 128 Fed. 697, 63 C. C. A. 249.

71. *Penfield Inv. Co. v. Bruce*, 132 Mo. App. 257, 111 S. W. 888.

**Reasonable and Corroborated Testimony of Impeached Witness.**—"It is plain that the evidence of a witness, possessing in the lowest degree qualities of credibility, if in itself reasonable, and corroborated by other evidence, would be of great weight, in arriving at the truth. Un-corroborated it would fail to convince; and if unreasonable also it would be of no weight whatever. The corroborating facts and the reasonableness of a hypothesis together might fail to convince, but the evidence of a witness, in himself wanting in credibility might give such additional weight of evidence that the hypothesis becomes to our minds a fact. Without one of these ingredients the evidence has no weight, with them all it is satisfactory, and the mind settles down into belief of the fact. The evidence of a witness who is not credible, if corroborated and not contrary to reason, ought not be disregarded." *Callanan v. Shaw*, 24 Iowa 441.

72. "In civil cases, the jurors are not the sole judges of the facts. It is only the controverted questions that are submitted to them." In criminal cases the jury is the exclusive judge of the facts; the court may advise an acquittal (under § 410, N. Y. Code Cr. Proc.) but it cannot order or even advise on conviction. *People v. Tuczke-witz*, 149 N. Y. 240, 43 N. E. 548. See *United States v. Taylor*, 3 McCrary (U. S.) 500; *People v. Barberi*, 149 N. Y.

nevertheless instructions embodying the rule are sometimes given.<sup>73</sup>

f. *Subject-Matter of Testimony*. — (1.) **Declarations**. — It has been held that uncontradicted testimony as to declarations made some time before the trial may properly be disbelieved.<sup>74</sup>

(2.) **Mental Processes**. — Testimony of a person as to his intent or purpose is not conclusive upon the jury.<sup>75</sup>

(3.) **Expert Opinion Evidence**. — While expert and opinion evidence is ordinarily not conclusive upon the jury,<sup>76</sup> still in those cases in which it is uncontradicted and refers to matters of which the lay-

256, 43 N. E. 635, 52 Am. St. Rep. 717.

"In a criminal case it is not within the power of the court to direct a verdict of guilty or not guilty or compel the jury to find such a verdict however clear and conclusive the evidence may be. Therefore the jury may find a verdict of guilty or not guilty arbitrarily or capriciously and when the finding is 'not guilty' the verdict must stand. . . . Therefore the rule that reasonable, disinterested, credible and uncontradicted evidence having no element of inherent improbability, cannot be disregarded, has no application in a criminal case." *United States v. Lee Huen*, 118 Fed. 442, 459.

73. *Williams v. State*, 47 Ala. 659; *United States v. Stevens*, 2 Hask. 164, 27 Fed. Cas. No. 16,392; *United States v. Harbison*, 26 Fed. Cas. No. 15,300; *Jesse v. State*, 20 Ga. 156, 168; *State v. Fowler*, 52 Iowa 103, 2 N. W. 983.

74. "We think a qualification of the rule may grow out of the nature or subject-matter of the testimony. If it relate to declarations or conversations happening some time before the witness is called to testify and the precise words are important to the point in issue, and the witness though confident is not positive in his testimony, the jury are at liberty to refuse such entire credit as may be necessary to satisfy them that the words in question are fully proved." *Harding v. Brooks*, 5 Pick. (Mass.) 244.

75. *Shepard v. Morgan*, 123 App. Div. 128, 108 N. Y. Supp. 379 ("the best guide in ascertaining a man's purpose is the acts which he has committed"). *Stewart v. Outhwaite*,

141 Mo. 562, 44 S. W. 326; *Bank of British North America v. Delafield*, 126 N. Y. 410, 27 N. E. 797; *Dickinson v. Dickinson*, 167 Mass. 474, 45 N. E. 1091; *Western Union Tel. Co. v. Burton* (Tex. Civ. App.), 115 S. W. 364 (acts of person weightier than his testimony as to what he thought); *Allen v. Southern Cal. R. Co.*, 70 Fed. 370; *Myers v. Spooner*, 55 Cal. 257, 260.

And see articles "BELIEF," Vol. II, p. 260, under (2); "HOMESTEADS AND EXEMPTIONS," Vol. VI, p. 543, under (1); "INTENT," Vol. VII, p. 596.

"It is impossible to contradict the testimony of a witness as to his state of mind by direct evidence, unless he has made impeaching statements, and such testimony where it is that of an interested party, is entitled to but little weight if it is inconsistent with the reasonable presumptions arising from circumstantial evidence." *In re A. B. Baxter & Co.*, 152 Fed. 137, 81 C. C. A. 355.

"When the defendant's liability depends upon the purpose with which an act, that is nearly neutral so far as outward manifestations are concerned, is done, it would be strange if the jury were not at liberty to disbelieve the testimony of one employed by the defendant as to his mental processes." *Hankinson v. Lynn Gas & Elec. Co.*, 175 Mass. 271, 56 N. E. 604.

76. See article "EXPERT AND OPINION EVIDENCE," Vol. V.

"While there are doubtless authorities that hold a jury (and in this class of cases the court acts as jury) has no right arbitrarily to ignore or discredit the testimony of unimpeached witnesses so far as they testify to facts, and that a wilful disre-

man has no accurate knowledge, it must be credited by the jury.<sup>77</sup>

g. *Attitude of Appellate Court.*—The record on the appeal should contain the statement of the reason why a witness contradicted by direct evidence was discredited by the trial judge,<sup>78</sup> but a clear case must be made out before the court will interfere with the jury's finding.<sup>79</sup>

gard of such testimony will be ground for a new trial, no such obligation attaches to witnesses who testify merely to their opinion; and the jury may deal with it as they please giving it credence or not as their own experience or general knowledge of the subject may dictate." *The Conqueror*, 166 U. S. 110, 131.

77. *Cornish v. Farm Buildings Fire Ins. Co.*, 74 N. Y. 295, *explaining Leitch v. Atlantic Mut. Ins. Co.*, 66 N. Y. 100; *Frace v. New York, L. E. & W. R. Co.*, 143 N. Y. 182, 38 N. E. 102 (uncontradicted evidence of experts as to the excellency of a system of spark arresters employed by a railroad held conclusive). But see *Hunnewell v. Taber*, 12 Fed. Cas. No. 6,880.

The opinions of experts "are not as a rule, conclusive upon the jury. But in a case where the evidence and the facts to be deduced therefrom are undisputed, and the case concerns a matter of science or specialized art or other matter, of which a layman can have no knowledge, the jury must base their conclusion upon the testimony of the experts." *Moratzky v. Wirth*, 74 Minn. 146, 76 N. W. 1032.

**Illustration.**—"In many cases, expert testimony though all tending one way, is not conclusive upon the court and jury, but the latter as men of affairs, may draw their own inferences from the facts and accept or reject the statements of experts, but such cases are where the subject of discussion is on the border line between the domain of general and expert knowledge, as, for instance, where the value of land is involved, or where the value of professional services is in dispute. There the mode of reaching conclusions from the facts when stated is not so different from the inferences of common knowledge that expert

testimony can be anything more than a mere guide. But when a case concerns the highly specialized art of treating an eye for cataract or for the mysterious and dread disease of glaucoma with respect to which a layman can have no knowledge at all, the court and jury must be dependent upon expert evidence. There can be no other guide and where want of skill or attention is not thus shown by expert evidence applied to the facts, there is no evidence of it, proper to be submitted to the jury." *Ewing v. Goods*, 78 Fed. 442.

**Foreign Law.**—Evidence of an expert as to the law of a foreign country was held to be controlling in the absence of any evidence contradicting it. *The August*, 60 L. J. P. 57, (1891) p. 328, 344, 66 L. T. 32.

78. "To warrant a finding against the (uncontradicted) statement of a witness, something should appear upon the record (on appeal) to justify the court in refusing to give it full faith and credit"—the fact that the appearance of the witness discredited him should be noted. *United States v. Lee Huen*, 118 Fed. 442, 458.

"There is no fact in the record which tends to disprove or rebut the statements of that witness, and without some evidence to authorize it the court could not reject his uncontradicted statements." *Clark v. McGrath* (Tex. Civ. App.), 22 S. W. 527.

79. *Vojta v. Pelikan*, 15 Mo. App. 471.

"That must be a strong case which will justify an interference by this court, with the exercise by the jury of their undoubted right of determining the credibility and weight of evidence." *Schwartz v. Germania Life Ins. Co.*, 21 Minn. 215 (*holding* that the uncontradicted testimony in the case was not so clear and posi-

D. CONCLUSIVE EVIDENCE. — The subject of conclusive evidence is discussed in another portion of this work.<sup>80</sup>

E. IMPROBABILITIES. — a. *In General*. — Evidence, even though uncontradicted<sup>81</sup> need not be accepted as proof of a fact<sup>82</sup> when it is contrary to all reasonable probabilities of the case.<sup>83</sup>

tive as to make it error for the jury to disregard it).

**Presumption** on appeal is that the trial court saw something in the manner of uncontradicted witnesses to impair their testimony, and as testimony which is inaccurate and self contradictory need not be believed although not directly contradicted, a verdict will not be disturbed. *Hammett v. Wabash R. Co.*, 128 Mo. App. 1, 106 S. W. 1106.

**80.** See article "CONCLUSIVE EVIDENCE," Vol. III.

**81.** See *supra*, III, 6, C, d, (3).

"The mere fact that sworn testimony is produced in court to establish a fact, even though not disputed by other sworn testimony, does not warrant even the submission of the question involved, to the jury. It is the effect of the testimony, the weight of it, that must solve the initial question of whether there is a conflict of reasonable inferences calling for solution by a jury." *Groth v. Thomann*, 110 Wis. 488, 495, 86 N. W. 178.

**82.** "It has often been said that courts and juries are not obliged to find that a fact exists, and cannot properly do so, merely because there is evidence to that effect from the mouth of a witness or any number of witnesses. . . . It is not infrequently supposed that a sworn statement is necessarily proof, and that if uncontradicted, it establishes the fact involved. Such is by no means the law. Testimony, regardless of the amount of it, which is contrary to all reasonable probabilities or conceded facts — testimony which no sensible man can believe, — goes for nothing, while the evidence of a single witness to a fact, there being nothing to throw discredit thereon, cannot be disregarded." *Bourda v. Jones*, 110 Wis. 52, 60, 85 N. W. 671.

"When witnesses testify to improbable things they do not prove them, but render themselves in some

measure suspected of falsehood — for what is not probable is not credible, nor to be considered, — probability is akin to nature, improbability is contrary to nature." *Armstrong v. Gage*, 25 Grant Ch. (U. C.) 1, 37.

"We do not understand that the credulity of a court must necessarily correspond with the vigor and positiveness with which a witness swears. A court may reject the most positive testimony though the witness be not discredited by direct testimony impeaching him or contradicting his statements. The inherent improbability of a statement may deny to it all claims to belief." *Blankman v. Vallejo*, 15 Cal. 639, 646, *quoted in Nelson v. Big Blackfoot M. Co.*, 17 Mont. 553, 44 Pac. 81.

**83.** *McDaniel v. Walker*, 29 Ga. 266; *Stafford v. Brown*, 104 N. Y. Supp. 801; *Roth v. Barrett Mfg. Co.*, 96 Wis. 615, 71 N. W. 1034.

The testimony of a witness "can have no probative force when it is in direct conflict with the conceded or physical facts, and to believe it would involve an absurdity in reason and common experience." *Waters-Pierce Oil Co. v. Knisel*, 79 Ark. 608, 96 S. W. 342, 348.

A story may be so "strange and unusual, not to say, too absurd, as to effectually refute itself." *Main v. Glen*, 7 Biss. 86, 16 Fed. Cas. No. 8,973.

"Should a person affirm that black was white or white was black, or being in the full possession of his faculties and having the unrestricted use of his limbs; should testify that he actually and necessarily occupied a year in walking a mile, his statement would be so in conflict with recognized possibilities as to be entitled to no credit or character as evidence." *Matter of Harriot*, 145 N. Y. 540, 40 N. E. 246.

Corroboration of an improbable story is sometimes required. *Smith v. Davis*, 34 Fed. 783.

**Adverse Witness of Inferior Cred-**

**b. Tests.** — (1.) **In General.** — The only test of whether an alleged fact or circumstance is so improbable as to be unworthy of credence is the common experience, knowledge and observation of ordinary men.<sup>84</sup>

(2.) **Inherent Improbability Not the Guide.** — Since improbable facts are nevertheless provable<sup>85</sup> the improbability which justifies a withholding of belief should be found in the surrounding circumstances of the case<sup>86</sup> although many cases will be found in which the inherent improbability appeared to be so great that courts have refused to place any credit in the facts as alleged.<sup>87</sup>

**c. Probable Nature.** — Strange and unlooked for events are all

ibility. — Inherent improbability in a witness' testimony may call for belief in the opposing witness although of inferior credibility. *Bohl v. Carson*, 63 Fed. 26, 11 C. C. A. 16.

<sup>84.</sup> *Gardner v. Weston*, 18 Iowa 533.

"Evidence to be believed, must not only proceed from the mouth of a credible witness, but it must be credible in itself — such as the common experience and observation of mankind can approve as probable under the circumstances. We have no test of the truth of human testimony except its conformity to our knowledge, observation and experience. Whatever is repugnant to these belongs to the miraculous and is outside of judicial cognizance." *Daggers v. Van Dyck*, 37 N. J. Eq. 130. And so in *Vreeland v. Vreeland*, 48 N. J. Eq. 56, 66, 21 Atl. 627.

"To declare sworn testimony of a fact incredible we must be convinced that it is so in conflict with the uniform course of nature or with fully established physical facts that no reasonably intelligent person could give it credence." *Salchert v. Reimig*, 135 Wis. 194, 115 N. W. 132.

<sup>85.</sup> See *infra*, III, 6, D, c.

<sup>86.</sup> *Northern Pac. R. Co. v. Hayes*, 87 Fed. 129, 30 C. C. A. 576; *The William Gray*, 1 Paine 16, 29 Fed. Cas. No. 17,694; *Coonrod v. Kelly*, 113 Fed. 378; *Dolhonde v. Lemoine*, 32 La. Ann. 251; *Dunn v. Weir*, 34 Ill. App. 612; *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, 200, 25 N. E. 402, 10 L. R. A. 676.

"The positive testifying of an otherwise unimpeached witness can only be disregarded when its im-

probability or inconsistency furnishes a reasonable ground for doing so, and this improbability or inconsistency must appear from facts and circumstances disclosed by the evidence in the case. It cannot be arbitrarily disregarded by either court or jury for reasons resting wholly in their own minds, and not based upon anything appearing on the trial." *Second Nat. Bank v. Donald*, 56 Minn. 56 Minn. 491, 58 N. W. 269.

"Where the improbability arises from the facts not being in accordance with those we have previously known and believed, it were presumptuous to discredit them, making one's own knowledge and observation the exclusive standard of probability," but more cogent proof was required. *Armstrong v. Gage*, 25 Grant Ch. (U. C.) 1, 37.

"Courts and jurors must be cautious in rejecting positive testimony and should never disregard it simply because of their own theories of its probability or improbability." *In re Will of Vanderveer*, 20 N. J. Eq., 463, 471.

<sup>87.</sup> "The whole story is so inherently improbable that if it were before a jury on the same evidence, it would require a well-seasoned and rather hardy advocate to ask twelve men to believe it. Before a chancellor, it has not a foot to stand on." *Dick v. Ireland*, 130 Pa. St. 299, 319, 18 Atl. 735.

"Her unsupported evidence would tax the court to believe a romantic story which finds no reason in any of the springs of human action, and to which no court of justice can conscientiously give credence." *Succession of Gaines*, 38 La. Ann. 123.

the time occurring<sup>88</sup> and there is no rule of law which prevents proof of an improbable fact,<sup>89</sup> but the question is always one for the trier of the facts<sup>90</sup> except in those cases in which the occurrence of the facts testified to was clearly impossible.<sup>91</sup>

d. *Importance of the Subject.* — (1.) *In General.* — Although courts are slow to disregard evidence upon the mere ground that

88. *Cooper v. Bockett*, 4 Moore, P. C. 419, 439, 13 Eng. Reprint 365, 372 ("the improbable is not always the untrue"); *Highfill v. Missouri Pac. R. Co.*, 93 Mo. App. 219, 222 ("there are happenings exceedingly strange and apparently against all our preconceived ideas of their possibility"); *Sutcliffe v. Traveling Men's Assn.*, 119 Iowa 220, 93 N. W. 90, 97 Am. St. Rep. 298 ("the unlikely often happens"); *Berger v. Chicago & A. R. Co.*, 97 Mo. App. 127, 133, 71 S. W. 102 ("that the improbable and unlooked for do sometimes occur is common experience"); *Missouri, K. & T. R. Co. v. Brown* (Tex. Civ. App.), 101 S. W. 464 (the unaccountable and apparently impossible, sometimes occurs in actual life).

"Their conduct is incomprehensible, but no attempt has been made to show that either of them is not to be believed. The story that each one tells borders on the incredible, but the only reason furnished us to disbelieve them is the unnaturalness of their conduct. But we all know there is no limit to the eccentricities of men." *Dolhonde v. Lemoine*, 32 La. Ann. 251.

"The complainant's case . . . rests wholly on a suspicion which owes its origin to incredulousness of the existence of a friendship which could bestow, even though it be out of its abundance, so large a gift upon a destitute and suffering family. Such friendship is rare, indeed, but happily it is not so rare as to challenge absolute disbelief of its existence." *First Nat. Bank v. Irons*, 28 N. J. Eq. 43, 49.

**No Arbitrary Line Between the Possible and Impossible.** — "When a question of fact is tested although it may involve the existence of a power not generally recognized, evidence bearing on the question must be considered as in other cases.

Science has not yet drawn, and probably never will draw, a continuous line between the possible and impossible, the knowable and the unknowable. Such line may appear to be drawn in one decade, but it is removed in the next and encroaches on what was the domain of the impossible and unknowable." *Post v. United States*, 135 Fed. 1, 11, 67 C. C. A. 569 (a mental healing case).

89. *Ross v. State*, 74 Ala. 532.

"An improbable fact, properly verified, is not to be rejected because of such improbability." *Buser v. Novelty Mach. Co.*, 151 Fed. 478, 491.

90. *Blumenthal v. B. & M. R. R.*, 97 Me. 255, 54 Atl. 747.

"However improbable the testimony of a witness may appear who testifies to a fact not in itself impossible in the ordinary course of events, the credibility, force and effect of such testimony is for the jury." *Hastings v. Brooklyn L. Ins. Co.*, 138 N. Y. 473, 479, 34 N. E. 289, quoted in *Hudson v. Rome, W. & O. R. Co.*, 73 Hun 467, 26 N. Y. Supp. 386.

Evidence although it "staggeres credulity" is for the jury. *Atlanta R. & P. Co. v. Monk*, 118 Ga. 449, 45 S. E. 494.

91. "It often happens that science and common knowledge may be invoked for the purpose of demonstrating that a particular statement in regard to some particular accident must be absolutely false; in such cases the question is for the court; but in cases of doubt we think it is wiser and better to remit such controversies to the proper tribunal for settling facts." *Walters v. Syracuse R. T. R. Co.*, 178 N. Y. 50, 70 N. E. 98.

Circumstances may render a story so improbable that the court is justified in directing a verdict. *Thomp-*

it is improbable,<sup>92</sup> still the improbability of the evidence may always be considered by the jury,<sup>93</sup> and is in fact a matter of great importance.<sup>94</sup> Evidence will often prove a probable fact which would be insufficient to establish one of less probability.<sup>95</sup>

(2.) *Where Evidence Conflicts.* — Where the evidence is conflicting

son *v.* Pioneer Press Co., 37 Minn. 285, 33 N. W. 856.

<sup>92.</sup> Chicago *v.* Jarvis, 226 Ill. 614, 80 N. E. 1079; Bollinger *v.* Interurban St. R. Co., 50 Misc. 293, 98 N. Y. Supp. 641; Rattan *v.* Central Electric R. Co., 120 Mo. App. 270, 278, 96 S. W. 735.

"We are not to reject conclusions from evidence from mere impressions of improbability." Johnson *v.* The Anne, 13 Fed. Cas. No. 7,370.

"The testimony of four concurring witnesses unimpeached, of good character, having no interest in the case, ought not to be disregarded upon proof of the simple improbability of their story." Boylan *v.* Meeker, 28 N. J. L. 274, 302.

In *In re Will of Vanderveer*, 20 N. J. Eq. 463, the question was whether a testator executed a will with knowledge of its contents, and the court after referring to the subscribing witnesses, one of whom was a lawyer and the other a clergyman, said: "It is difficult to disregard the clear and positive evidence of two such witnesses, uncontradicted, solely upon what appears to me the mere improbability of such dispositions having been made by the testator." But the case was reversed in 21 N. J. Eq. 561, where the court was more impressed and influenced by the improbabilities in the case.

It was considered strange that a farmer should carry eight hundred dollars in his pocket with no definite object in view, but the court said: "Facts stranger than this constantly come under observation, or are developed beyond doubt by evidence in suits before us. And no judge or juror is justified in disregarding positive testimony especially when uncontradicted, because it seems to him, on the whole, rather improbable." Merchants Nat. Bank *v.* Northrup, 22 N. J. Eq. 58.

<sup>93.</sup> Johnson *v.* People, 140 Ill.

350, 29 N. E. 895; Huchberger *v.* Merchants Fire Ins. Co., 4 Biss. 265, 12 Fed. Cas. No. 6,822.

"A jury may well consider the improbability of positive statements made by an unimpeached witness when there are facts and circumstances in evidence tending to lessen the probability that such testimony is true." United States *v.* Cander, 65 Fed. 308, 312.

<sup>94.</sup> Cobb *v.* Battle, 34 Ga. 458, 480.

"It often happens that the gross improbability of an alleged occurrence outweighs and overcomes the affirmative testimony of many witnesses." Cleveland Target Co. *v.* Empire Co., 97 Fed. 44, 72.

"The weight of the evidence is with the defendant . . . irrespective of the positive testimony on either side, because it is difficult to accept the plaintiff's theory that the agreement was forged in the manner in which she contends that it was. The theory requires credence to be given to several unlikely things." Seiferd *v.* Meyer, 93 App. Div. 615, 87 N. Y. Supp. 636, 639.

<sup>95.</sup> "Testimony offered in support of alleged transactions, in accordance with the ordinary course of business, may be entirely satisfactory, while the same character of testimony in support of alleged facts, at variance with the experience of men, and wanting in any probable motive, would be rejected as unsatisfactory, if not unworthy of credit." Gardner *v.* Weston, 18 Iowa 533.

Testimony of subscribing witnesses as to the sanity of the testator was strengthened by the fact that the will was a reasonable one. Pancoast *v.* Graham, 15 N. J. Eq. 294, 309.

*Degree of Proof Required.* — See *supra*, I, 3, C, c.

the improbability of the case of one party may control the decision.<sup>96</sup>

e. *Improbabilities Classified*. — (1.) **Improbable Conduct**. — Cases which are based upon a course of conduct which is unnatural and unusual are notoriously weak.<sup>97</sup>

96. *Canada*. — *Rees v. Wittrock*, 6 Grant Ch. 418.

*United States*. — *The Bay State*, 153 Fed. 973; *Walsh v. Rogers*, 13 How. 283.

*Illinois*. — *Proudfoot v. Wightman*, 78 Ill. 553; *Bonnell v. Wilder*, 67 Ill. 327.

*Maryland*. — *Barnett v. Nally*, 6 Atl. 535.

*New Jersey*. — *Larrison v. Larri-*  
*son*, 20 N. J. Eq. 100.

*New York*. — *In re Gaines' Will*, 84 Hun. 520, 32 N. Y. Supp. 398.

"Where the evidence is conflicting, the extreme improbability of the fact alleged must be decisive of the controversy." *Brewer v. Wil-*  
*son*, 17 N. J. Eq. 180, 184.

Where two witnesses of equal credibility differ as to a certain fact "the court is therefore obliged with some doubt as to the correctness of its conclusions, to determine the cause to a great degree upon the reasonable probabilities of which statement is most likely to be correct," aided by what corroboration of either there may be. *Jordan v. Eaton*, 13 Fed. Cas. No. 7,520.

97. *Sharon v. Hill*, 26 Fed. 337, 371 (conduct held to disprove allegations of marriage); *Daggers v. Van Dyck*, 37 N. J. Eq. 130 (improbable business conduct); *Cooper v. Bockett*, 4 Moore P. C. 419, 439, 13 Eng. Reprint 365, 372 (improbable that a witness would attest an instrument before it was signed by the maker).

"How are these things to be explained? I will say with Sir William Scott: I am not deaf to the fair pretensions of human testimony but at the same time, I cannot shut my senses against the ordinary course of human conduct." *Johnson v. The Anne*, 13 Fed. Cas. No. 7,370.

"That a man from any cause desirous of concealing himself from his relatives, should retain his family name and seek to effect that ob-

ject by changing his Christian name only, we think is hardly credible." *Hardy v. Harbin*, 154 U. S. 598.

"Is his story reasonable and probable? A witness is not entitled to credit whose testimony is inconsistent with the common principles by which the conduct of mankind is naturally governed." *Earle v. Norfolk & N. B. Co.*, 36 N. J. Eq. 188.

Improbability of a witness's statement that the defendant told him he was going to rob the postoffice may be considered. *United States v. Candler*, 65 Fed. 308, 311.

Plaintiff's statement that he jumped from a moving train going forty miles an hour because of the threats made by passengers to tie and rob him, was held on appeal to be the result of a disordered mind and a new trial was ordered. *Spohn v. Missouri Pac. R. Co.*, 87 Mo. 74.

In an action for divorce, the facts detailed were held to be so improbable, the conduct of the parties was alleged to have been carried on so openly, as to entirely discredit the story. *Brown v. Brown*, 63 N. J. Eq. 348, 50 Atl. 608.

A dentist having testified that he had discovered a method of extracting teeth without pain but had not used it, the court said: "The story seems to me so improbable that it should require strong corroboration to induce belief." *Smith v. Davis*, 34 Fed. 783.

"While the unreasonableness or absurdity of a line of conduct, or of acts claimed, is not sufficient to overcome positive evidence that the line of conduct was pursued, or that the acts were done, nevertheless if the evidence be so imperfect or so conflicting that the truth can not be clearly perceived the unreasonableness or absurdity of what is claimed to have been the conduct or acts of parties may be of controlling importance, for those who are allowed to act for themselves are presumed to conduct themselves and act with



(2.) **Testimony Opposed to Physical Laws.** — (A.) **IN GENERAL.** — The testimony of a witness will be entirely disregarded where it clearly conflicts with physical and natural facts and laws,<sup>98</sup> but owing to the difficulty of determining the effects of these laws in particular

ordinary prudence and sagacity." *Knowles v. Knowles*, 86 Ill. 1, 8, holding that it was unreasonable to suppose a person would lend money at an unfixed rate of interest, to be repaid at the pleasure of the borrower.

**Probability From Previously Expressed Intention.** — "It would ordinarily take much less evidence to prove that an act has been done by a person if such person has previously expressed his intention and desire to do the act. A man is very likely to do any reasonable thing which his heart strongly inclines him to do and especially if the performance of the act imposes no unwilling burden or responsibility upon himself." *Grant v. Bradstreet*, 87 Me. 583, 605, 33 Atl. 165.

**Patent Cases.** — In deciding who was the original inventor in patent cases, the courts have laid stress upon "the ordinary laws that govern human conduct," and have based their decisions largely upon the fact that the conduct of the claimants was or was not what would be naturally expected from persons putting forth such claims. *Telephone Cases*, 126 U. S. 1, 567; *Atlantic Works v. Brady*, 107 U. S. 192, 203.

**98. United States.** — *Missouri, K. & T. R. Co. v. Collier*, 157 Fed. 347. *Illinois.* — *Chicago & E. I. R. Co. v. Kirby*, 86 Ill. App. 57, 59.

*Louisiana.* — *Ferris v. Hernsheim*, 51 La. Ann. 178, 24 So. 771.

*Maine.* — *Tillson v. Maine C. R. Co.*, 102 Me. 463, 67 Atl. 407 (a semaphore light could not exhibit red to one person, green to another, and mixed to another, all at the same time and under the same conditions, and each of accurate vision).

*Missouri.* — *Zalotuchin v. Metropolitan St. R. Co.*, 127 Mo. App. 577, 106 S. W. 548 (statement that a street car raised such a cloud of dust in front of it as to obscure the headlight, disbelieved).

*New York.* — *Laidlaw v. Sage*, 158 N. Y. 73, 92, 52 N. E. 679, 44 L.

R. A. 216; *Meinrenken v. New York Cent. & H. R. Co.*, 81 App. Div. 132, 80 N. Y. Supp. 1074.

*Wisconsin.* — *Beyersdorf v. Cream City S. & D. Co.*, 109 Wis. 456, 84 S. W. 860; *Musbach v. Wisconsin Chair Co.*, 108 Wis. 57, 84 N. W. 36; *Marshall v. Green Bay & W. R. Co.*, 125 Wis. 96, 100, 103 N. W. 249.

"Testimony given in direct contravention of physical laws is necessarily deemed incredible." *Tillson v. Maine Cent. R. Co.*, 102 Me. 463, 67 Atl. 407.

"When physical situations or matters of common knowledge point so certainly to the truth as to leave no room for a contrary determination, based on reason and common sense, such physical situation and reasonable probabilities are not affected by sworn testimony which in mere words, conflicts therewith." *Groth v. Thomann*, 110 Wis. 488, 496, 86 N. W. 178.

Where the plaintiff claimed that a street car collided with a wagon by running straight into and striking it squarely in the rear, the fact that the horse and wagon were turned half way around by the blow was held sufficient to rebut this theory and to show that the wagon was struck on the side instead of in the rear. *Spiro v. St. Louis Transit Co.*, 102 Mo. App. 250, 76 S. W. 684.

**Judicial Notice Taken of Incredibility of the Facts.** — A verdict will be set aside which appears to be based on facts which are contrary to nature, although the appellate court has to take judicial notice of the natural facts, — as the question was not raised at the trial. *Hunter v. New York O. & W. R. Co.*, 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246 (that injured person must have been nine feet tall if the alleged facts were true).

**Even in Criminal Cases,** the defendant's statements will not be believed when inconsistent with his

cases with absolute accuracy<sup>99</sup> the courts are very cautious in applying this rule.<sup>1</sup>

(B.) "LOOK AND LISTEN" RULE.—A witness who testifies that he looked and listened at a crossing but neither saw nor heard the train which struck him will be disbelieved,<sup>2</sup> unless the physical sur-

acts and the physical facts. *State v. Bryant*, 102 Mo. 24, 14 S. W. 822; *State v. Turlington*, 102 Mo. 642, 15 S. W. 141; *State v. Anderson*, 89 Mo. 312, 1 S. W. 135; *State v. Nelson*, 118 Mo. 124, 23 S. W. 1088 (not entitled to an instruction upon his testimony in such case); *State v. Brown*, 119 Mo. 527, 24 S. W. 1027, 25 S. W. 200.

**Theory of Counsel** in conflict with physical facts, not considered. *Chicago, M. & St. P. R. Co. v. Clarkson*, 147 Fed. 397, 405, 76 C. C. A. 575; *Schloemer v. St. Louis Trans. Co.*, 204 Mo. 99, 213, 102 S. W. 505.

99. "There is very little room for argument upon a proposition involving what may or may not have happened to the body of a man struck by the front end of a rapidly moving locomotive, between the place where it was run against and the spot where it was subsequently found. 'The unexpected always happens' is a common proverb, and 'the things which are impossible with men are possible with God,' is an utterance of one possessed of greater than human wisdom, and the jury may well have dismissed that proposition from their consideration in reliance upon the authority of either of those sayings." *Baltimore & O. R. Co. v. Stanley*, 54 Ill. App. 215, 219.

Where it was claimed that it was impossible for a person struck by a train to have landed where he did, under the circumstances detailed by him, the court said: "So frequently do unlooked for results attend the meeting of interacting forces that courts in such cases should not indulge in arbitrary deductions from physical law and fact except when they appear to be so clear and irrefutable that no room is left for the entertainment by reasonable minds of any other." *Lang v. Missouri Pac. R. Co.*, 115 Mo. App. 489, 497, 91 S. W. 1012.

"No accurate law of physics can

be invoked to determine just how a body ought to fall, or will fall, when struck under such circumstances." *Hoyt v. Metropolitan St. R. Co.*, 73 App. Div. 249, 76 N. Y. Supp. 832 (*holding* that the fact that the plaintiff was thrown into the fender of the car was not necessarily inconsistent with his statement that he was just leaving the track when struck.)

1. A claim that an injury to a street-car passenger which she alleges was caused by the sudden jerking of the car could not have been so caused since the physical facts made such an occurrence impossible was held not warranted by the disclosed facts—where six hundredths of an inch of rain fell and the motorman did not find it necessary to use the sand, it could not be confidently affirmed that a sudden and violent starting of the car was impossible because of the slippery rails. *McNamara v. St. Louis Transit Co.*, 106 Mo. App. 349, 80 S. W. 303.

That a woman who was alighting from a street car, facing forward, was thrown by the sudden starting of the car and fell striking the back of her head on the step, held not to be physically impossible. *Carlton v. St. Louis & S. R. Co.*, 128 Mo. App. 451, 106 S. W. 1100.

2. *United States*.—*Gipson v. Southern R. Co.*, 140 Fed. 410; *Chicago, R. I. & P. R. Co. v. Pounds*, 82 Fed. 217, 27 C. C. A. 112; *The Starlight*, 22 Fed. Cas. No. 13,310.

*Alabama*.—*Peters v. Southern R. Co.*, 135 Ala. 533, 33 So. 332.

*Arkansas*.—*Waters - Pierce Oil Co. v. Knisel*, 79 Ark. 608, 96 S. W. 342.

*Illinois*.—*Chicago & E. I. R. Co. v. Kirby*, 86 Ill. App. 57; *Chicago & A. R. Co. v. Vremeister*, 112 Ill. App. 346; *Chicago, P. & St. L. R. Co. v. De Freitas*, 109 Ill. App. 104.

*Indiana*.—*Mann v. Belt R. Co.*,

roundings were such that it was possible for him to have looked and listened and still not have observed the train.<sup>3</sup>

(3.) **Mathematical Impossibilities.**—Testimony which involves mathematical absurdities will always be disregarded.<sup>4</sup>

128 Ind. 138, 26 N. E. 819; *Lake Erie & W. R. Co. v. Stick*, 143 Ind. 449, 41 N. E. 365.

*Iowa.*—*Bloomfield v. Burlington & W. R. Co.*, 74 Iowa 607, 38 N. W. 431; *Artz v. Chicago, R. I. & P. R. Co.*, 34 Iowa 153; *Payne v. Chicago, R. I. & P. R. Co.*, 39 Iowa 523.

*Kansas.*—*Metropolitan St. R. Co. v. Agnew*, 65 Kan. 478, 70 Pac. 345; *Bressler v. Chicago, etc. R. Co.*, 74 Kan. 256, 86 Pac. 472.

*Maine.*—*Blumenthal v. B. & M. R. Co.*, 97 Me. 255, 54 Atl. 747.

*Maryland.*—*Reidel v. Philadelphia, W. & B. R. Co.*, 87 Md. 153, 39 Atl. 507, 67 Am. St. Rep. 328.

*Missouri.*—*Lane v. Missouri Pac. R. Co.*, 132 Mo. 4, 33 S. W. 645, 1128; *Kelsay v. Missouri Pac. R.*, 129 Mo. 362, 376, 30 S. W. 339; *Fellenz v. St. Louis, etc. R. Co.*, 106 Mo. App. 154, 80 S. W. 49 ("his evidence is against the mathematics of his environment"); *Payne v. Chicago & A. R. Co.*, 136 Mo. 562, 38 S. W. 308; *Hook v. Missouri Pac. R. Co.*, 162 Mo. 569, 63 S. W. 360.

*New Jersey.*—*Diele v. Erie R. Co.*, 70 N. J. L. 138, 56 Atl. 156; *Green v. Erie R. Co.*, 65 N. J. L. 301, 47 Atl. 418; *Conkling v. Erie R. Co.*, 63 N. J. L. 338, 43 Atl. 666.

*New York.*—*Dolfini v. Erie R. Co.*, 178 N. Y. 1, 70 N. E. 68; *McKinley v. Metropolitan St. R. Co.*, 91 App. Div. 153, 86 N. Y. Supp. 461.

*Ohio.*—*Cleveland etc. R. Co. v. Elliott*, 28 Ohio St. 340.

*Pennsylvania.*—*Canfield v. Railroad Co.*, 208 Pa. St. 372, 57 Atl. 763; *Holden v. Pennsylvania R. Co.*, 169 Pa. St. 1, 32 Atl. 103; *Marland v. Pittsburgh, etc. R. Co.*, 123 Pa. St. 487, 16 Atl. 624; *Moore v. Philadelphia, etc. R. Co.*, 108 Pa. St. 349; *Myers v. Baltimore & O. R. Co.*, 150 Pa. St. 386, 24 Atl. 747.

• *Wisconsin.*—*Cawley v. La Crosse City R. Co.*, 101 Wis. 145, 77 N. W.

179; *White v. Chicago & N. W. R. Co.*, 102 Wis. 489, 78 N. W. 585.

"It was a physical impossibility for the deceased to have failed to see the approaching train if he had looked in that direction." *Hayden v. Missouri, K. & T. R. Co.*, 124 Mo. 566, 28 S. W. 74.

"When to look is to see, the mere utterance that one did look and could not see, will be disregarded as testimony by the court." *Hook v. Missouri Pac. R. Co.*, 162 Mo. 569, 581, 63 S. W. 360.

"The testimony that the witness did not see the defendant's train on this bright, clear afternoon, with no intervening obstruction is incredible as matter of law." *Keller v. Erie R. Co.*, 183 N. Y. 67, 75 N. E. 965.

"A blind man may say, 'I looked and did not see,' and it may be said of an idiot that he looked and no impression was made upon his mind; but not so with a person who has good eyes and a sound intellect." *Swart v. New York Cent. & H. R. Co.*, 81 App. Div. 402, 80 N. Y. Sup. 906, affirmed, 177 N. Y. 529, 69 N. E. 1131.

**Rule Applied in Negligence Case.** Statement of plaintiff, employe, that he did not see a descending weight which was directly before his eyes will not be given any weight. *Scanlon v. Butler-Duncan Land Co. (R. I.)*, 67 Atl. 364.

3. *Baltimore & O. R. Co. v. State*, 104 Md. 76, 64 Atl. 304; *McCusker v. Pennsylvania R. Co.*, 198 Pa. St. 540, 48 Atl. 491; *Boggs v. Pittsburgh M. & G. R. Co.*, 216 Pa. St. 314, 65 Atl. 535.

4. "When plaintiff's witnesses said that it would cost as much to clear the land after the trees were felled and the logs removed as it would when the trees were standing, they were taxing (successfully it appears) the credulity of the jury. They were in effect telling the jury that the part is as great as the

(4.) **Mechanical Improbabilities.**—Where a machine is so constructed as to work only in accordance with a certain method, testimony that being in a state of repair, it worked in any other manner will not be credited.<sup>5</sup>

(5.) **Lack of Collision Marks.**—In cases where injuries are alleged to have been occasioned by the collision of objects, the fact that no marks exist on the objects tending to indicate the collision is almost conclusive against the claim.<sup>6</sup>

whole." *Nelson v. Big Blackfoot M. Co.*, 17 Mont. 553, 44 Pac. 81.

"In other words, according to such expert testimony, a man can lift two hundred pounds, but can only shove seventy-five pounds up an inclined plane. And while an ordinary man can lift two hundred pounds it takes sixteen section hands to lift six hundred pounds. . . . It is too obvious for debate that such testimony shows conclusively that the witness was not an expert or else that he was playing upon the credibility or gullability of the jury." *Haviland v. Kansas, etc. R. Co.*, 172 Mo. 106, 72 S. W. 515.

5. *Irvine v. Palmer Mfg. Co.*, 2 App. Div. 69, 37 N. Y. Supp. 322; *Vorbrich v. Geuder & Paeschke Mfg. Co.*, 96 Wis. 277, 71 N. W. 434.

"The statements by a witness of the existence or the non-existence, the occurrence or non-occurrence of a given thing as a fact that contravenes all laws of mechanics and philosophy that are so generally recognized that courts cannot ignore them, cannot be said to be matters of fact that must go to the jury for their consideration." *Nugent v. Kauffman Milling Co.*, 131 Mo. 241, 253, 33 S. W. 428.

"If the mechanism of the machine was such as to render the abnormal movement of the knife claimed to have happened impossible, then the testimony of any number of witnesses that it did make such a movement would not warrant the jury's finding." *Fleming v. Northern Paper Mill*, 135 Wis. 157, 114 N. W. 841. And see *Princeton Coal Co. v. Roll*, 162 Ind. 115, 66 N. E. 169.

"Ordinarily testimony that a machine made an unexpected movement which it could not have made

if properly adjusted and in a proper state of repair is unworthy of belief in the face of a clear case that the machine uniformly before and after the alleged unexpected movement, without anything being done to change it in any way, ran all right and there was no discoverable defect therein." *Fleming v. Northern Paper Mill*, 135 Wis. 157, 114 N. W. 841.

6. "It is to my mind simply incredible, against all human experience, against all physical facts, that the end of a shaft attached to a buggy drawn by a horse, going at a full brisk trot should strike a woman in her left side, with force sufficient to throw her on a granite paved street, and with force sufficient as plaintiff claims, to cause her death, and yet not leave on the body the slightest sign of violence. Such testimony should be disregarded by both courts and juries and no probative force should be given to it." *DeMaet v. Fidelity etc. Co.*, 121 Mo. App. 92, 96 S. W. 1045.

"We may properly say in passing that the improbability, impossibility would be the better term, of an electric car, going several miles an hour on a down grade, colliding with a wagon and the car stopping substantially at the point of collision without the persons on the car being disturbed or the car showing any evidence of the occurrence other than a few scratches . . . did not seem to be appreciated. . . . Such circumstances so outweigh any amount of testimony from the lips of witnesses that the car was going many miles per hour at or about the instant of the collision as to leave no room for such testimony to be true." *Stafford v.*

(6.) **Extremely Minute Memory.**—The testimony of a witness who exhibits remarkable memory of details, matters intrinsically difficult to remember, or matters which were of little interest to him at the time, is viewed with extreme suspicion.<sup>7</sup>

**Failure To Remember** an important matter is also regarded as highly improbable.<sup>8</sup>

(7.) **Other Cases.**—In the notes are given other cases which show the tendency of the courts to regard testimony as to improbable facts with suspicion.<sup>9</sup>

*f. Effect on Other Testimony.*—An incredible statement may

Chippewa Val. Elec. R. Co., 110 Wis. 331, 348, 85 N. W. 1036.

The court declared it to be inconceivable that an iron strip on a door of a car going at the rate of twenty-five miles an hour could have struck a crowbar and have left no dent or mark upon it. *Wheelan v. Chicago, M. & St. P. R. Co.*, 85 Iowa 167, 52 N. W. 119.

**Nature of Bruises** may determine which of two events caused the injury. *Chicago B. & Q. R. Co. v. Hildebrand*, 42 Neb. 33, 60 N. W. 335.

**Cause of Death.**—That the injury or death was caused in the alleged manner may be proved "by showing some distinctive mark upon the pipe, as hair or blood, or some bruise upon the head that was peculiar to the pipe". *McTaggart v. Maine Cent. R. Co.*, 100 Me. 223, 230, 60 Atl. 1027.

7. *Armstrong v. Gage*, 25 Grant Ch. (U. C.) 1, 36; *Standard Sanitary Mfg. Co. v. Mott Iron Wks.*, 152 Fed. 635, 639; *American Bell Tel. Co. v. People's Tel. Co.*, 22 Fed. 309, 336; *Willett v. Fister*, 18 Wall. (U. S.) 91.

8. *In re Leslie*, 119 Fed. 406.

9. **Electrical Phenomena** are regarded by the courts with special respect and any claim in relation thereto is seldom found abstractly impossible. *Walters v. Syracuse R. T. R. Co.*, 178 N. Y. 50, 70 N. E. 98.

**Course of Bullets.**—The course of bullets in the human body is liable to be very peculiar, "not at all to be accounted for by any preconceived theories drawn from the doctrine of projectiles, nor to be ex-

plained by any diagrams formed upon mathematical rules," and any theory as to the direction from which the shot was fired is manifestly weak. *Hart v. Powell*, 18 Ga. 635.

**Incredible Coincidences** are sometimes noticed. *West Chicago St. R. Co. v. Brown*, 112 Ill. App. 351 (that four witnesses in different cars of a train should have noticed the plaintiff on the street and carefully watched her movements while boarding the car).

**Silence of Seamen.**—"Master mariners, as well as other seafaring men are very apt to converse when they meet on the theatre of their favorite pursuit; and the statement that they remained together in the pilot house even for two minutes without speaking, needs confirmation." *Chamberlain v. Ward*, 21 How. (U. S.) 548, 569.

**Prior Discovery in Patent Cases.**  
**Avocation of Claimants.**—The fact "that only a man thoroughly conversant with the art of brewing, practically as well as scientifically, could make and apply the Miller & Hoffman process,—seems to render it very improbable that an ignorant young man, not even a brewer by trade and apparently destitute of scientific knowledge, could have conceived and carried out a plan which had escaped the attention or baffled the ingenuity of the most experienced brewers, for centuries." *New Process Co. v. Koch*, 21 Fed. 580. "The strong probability is that a man having practical knowledge of an art to which an invention belongs is the one who makes a disclosure to the one unskilled in that

have the effect of weakening the witness's entire testimony.<sup>10</sup>

g. *Number of Witnesses*.—That a number of witnesses testify to an improbable fact has a tendency to engender belief that it occurred as stated,<sup>11</sup> but is not of controlling weight.<sup>12</sup>

h. *On Appeal*.—An appellate court is justified in setting aside a verdict of the jury which rests on evidence contrary to the course of nature or physical laws.<sup>13</sup>

F. TESTIMONY LACKING POSITIVE ASSERTION.—The value of testimony where the witness refuses to testify positively to the

art." *Alexander v. Blackman*, 26 App. Cas. (D. C.) 541, 544. And see *Telephone Cases*, 126 U. S. 1, 567.

10. The testimony of the witness "abounds in the most palpable and apparently reckless contradictions, and in statements so incredible as to cast discredit upon all his testimony." *Horton v. Handvil*, 41 N. J. Eq. 57, 61, 3 Atl. 72.

"In this case, the testimony of Mrs. Cook touching the manner in which her signature to the mortgage was obtained is so incredible, that her account of the way in which her acknowledgment was taken is entitled to little weight." *Insurance Co. v. Nelson*, 103 U. S. 544.

A circumstance in a case may be "so unnatural and improbable as to shock credulity and to cast deep distrust upon her whole case." *Haydock v. Haydock*, 33 N. J. Eq. 494.

11. "It is nevertheless true that under some circumstances what might appear to one impossible, supported by the testimony of a single disinterested witness, . . . might not so appear upon an investigation stimulated by the testimony of so large a number of apparently disinterested witnesses as to render it at least next to impossible that they all testified falsely." *Fleming v. Northern Paper Mill*, 135 Wis. 157, 114 N. W. 841.

12. See *Bourda v. Jones*, 110 Wis. 52, 60, 85 N. W. 671.

"Even many witnesses testifying to improbabilities do not prove them; number does not supply defect." *Armstrong v. Gage*, 25 Grant Ch. (U. C.) 1, 37.

"The inherent improbability of the story is insufficient to negative the testimony of any number of wit-

nesses." *Dodge v. Post*, 76 Fed. 807.

13. A verdict resting on evidence contrary to the ordinary course of nature will be set aside. In such a case a court need not "be convinced that the jury found an event to have occurred that was physically impossible or miraculous. It is enough if the event found was so improbable according to the ordinary operation of physical forces, or was so overwhelmingly disproved by credible witnesses as to compel the conviction that the jury either failed to weigh the evidence carefully or drew unwarranted inferences or yielded to a partisan bias." *Spiro v. St. Louis Trans. Co.*, 102 Mo. App. 250, 263, 76 S. W. 684.

"A jury is not to be allowed to establish wild or insensible or perverse or impossible propositions." *Connor v. Giles*, 76 Me. 132.

In an action against a carrier for non-delivery of goods, the plaintiff alleged that there was a fraudulent substitution of inferior goods after the parcels were delivered to the carrier. "If we concede that this was a legitimate argument to address to the jury, we must still consider whether such an argument was sufficient to warrant a jury, as reasonable men, in adopting the plaintiff's inference when the adoption of that inference involved the adoption of the highly improbable theory of a substitution of goods on the ship, and when the adoption of the simpler inference that the goods were received and entered for what they purported to be would have avoided entirely the improbabilities of the theory of a substitution on the ship." *Cunard S. S. Co. v. Kelley*, 126 Fed. 610, 617, 61 C. C. A. 532.

facts, is for the jury to determine<sup>14</sup> and will vary with the surrounding circumstances and the manner and appearance of the witness.<sup>15</sup>

G. CONVERSATIONS, ADMISSIONS AND DECLARATIONS. — a. *Oral Statements*. — (1.) *Evidence to Prove*. — (A.) *IN GENERAL*. — Failure to clearly distinguish between the evidence by which oral statements are proved to have been made and the statements themselves, when so established,<sup>16</sup> has led to a general looseness of statement in

14. See article "BELIEF," Vol. II, p. 265, under 4.

15. "The qualifying words, 'I think' used by this witness, are of frequent occurrence in the trial of cases. Sometimes when uttered by an honest, careful man, they detract nothing from the weight of his testimony; while at others they are thrown in by dishonest witnesses as a kind of supposed antidote to their perjury." *Hoitt v. Moulton*, 21 N. H. 586.

"Because one witness speaks positively and another doubtingly it does not follow that the jury must credit the former rather than the latter. Equally truthful men often speak in very different ways about the same transaction." *Muscott v. Stubbs*, 24 Kan. 520.

"A man's best recollection is a very indefinite matter. It might amount to so little as to be entirely worthless for any practical purposes." *United States v. Baxter*, 46 Fed. 350. And see *McClellan v. Sanford*, 26 Wis. 595, 606; *Babcock v. Eldridge*, 15 La. 149 (insufficient to prove usury); *Vernon v. Vernon*, 69 N. J. Eq. 759, 762, 61 Atl. 409 (sufficient to prove a declaration).

The "impression" of a witness is entitled to little consideration where it does not appear upon what his impression was based. *Todd v. Hardie*, 5 Ala. 698. And see *Swinney v. Booth*, 28 Tex. 113, 116.

**General Rule.** — Another rule for weighing testimony "was, that when one witness spoke positively to the facts, and the other not positively but from belief, the one who testified positively was to have the preference over him who spoke not positively but from belief." *Jeter v. Haviland, Keese & Co.*, 24 Ga. 252. And see *Idaho Merc. Co. v. Kalanquin*, 8 Idaho 101, 66 Pac. 933.

**Witness Will Sometimes Suppress Evidence Who Would not Affirmatively Prevaricate.** — All a witness could be induced to state was that he may have heard a certain statement made but if he did, he does not now recollect it. The court said: "This style of testifying has very much the appearance of an attempt to suppress the truth. There are witnesses whose moral sense seems to be much less outraged by a suppression of the truth than by a downright denial of it. They seem to think the shock to conscience will be much less violent if they merely pretend to forget, than it would be if they ventured upon a bold, blunt, denial." *Haydock v. Haydock*, 33 N. J. Eq. 494, 499.

**Interested Witness.** — Statement of a witness who is interested in disproving a fact, that he "thinks" the fact did not exist, is of very little weight. *Harp v. Parr*, 168 Ill. 459, 471, 48 N. E. 113.

**Fact Requiring Clear Proof.** Where a fact must be proved by clear evidence, as the contents of a destroyed will, testimony of a witness to the best of his recollection will be insufficient. *McCarn v. Rundall*, 111 Iowa 406, 82 N. W. 924.

**In Affidavits.** — The term "belief" used in an affidavit falls considerably short of an affirmation of the truth of facts stated. "How far short it would be in a given case, would depend upon the conscientiousness, and to some extent upon the intelligence of the person using the term. No one can fail to see that when that term is used the party commits himself less conclusively to the principal fact." *Ingram v. Robbins*, 33 N. Y. 409, 417.

16. "These authorities establish the obvious distinction which must always be observed between the verbal admission of a party and the evi-

the cases to the effect that oral statements belonging to an inferior class of evidence<sup>17</sup> are of slight weight<sup>18</sup> and are to be received with great care,<sup>19</sup> when all that is usually intended by such remarks is to reflect upon the quality of the proof by which they are established.<sup>20</sup>

(B.) MEMORY. — (a.) *In General.* — Testimony as to verbal declarations of all kinds, is subject to the infirmities common to all testi-

dence by which such admission is sought to be proved. It is the evidence offered to establish the admission which the jury are to scrutinize, and in receiving which they are to exercise great caution. The natural as well as the legal presumption is that a party will not admit that which is untrue against his own interest. And upon this principle it is held that such an admission, when satisfactorily proved to have been made, constitutes convincing evidence against the party." *Higgs v. Wilson*, 3 Met. (Ky.) 337.

17. *United States.* — *The Florence*, 88 Fed. 302.

*California.* — *Mattingly v. Pennic*, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87 (citing Code Civ. Proc., § 2061).

*Dakota.* — *Waldron v. Evans*, 1 Dak. 11, 46 N. W. 607.

*Louisiana.* — *Tuttle v. Succession of Burroughes*, 9 La. Ann. 494; *McKown v. Mathes*, 19 La. 542.

*Michigan.* — *Hayes v. Livingstone*, 34 Mich. 384, 396.

*New York.* — *Law v. Merrills*, 6 Wend. 268; *Garrison v. Akin*, 2 Barb. 25; *Hoellerer v. Kaplan* (App. Div.), 43 N. Y. Supp. 1035.

*Wisconsin.* — *Dreher v. Town of Fitchburg*, 22 Wis. 675, 681.

'Admissions are "the most dangerous, and certainly the most unreliable, of all species of evidence." *Churcher v. Guernsey*, 39 Pa. St. 84.

"Statements of verbal admissions of a party are the most unreliable and unsatisfactory of all human testimony." *In re Gould*, 2 Hask. 34, 10 Fed. Cas. No. 5,604, p. 768.

"The evidence of confessions at best, is the weakest and least to be relied on, of any known to be competent in law." *Vaughn v. Hann*, 6 B. Mon. (Ky.) 338.

18. *Kirk v. Middlebrook*, 201 Mo.

245, 288, 100 S. W. 450; *Moore v. Tate*, 114 Ala. 582, 21 So. 820.

19. *United States.* — *Miller v. United States*, 133 Fed. 337, 349, 66 C. C. A. 399.

*California.* — *People v. Sternberg*, 111 Cal. 11, 43 Pac. 201 (citing Code Civ. Proc., § 2061).

*Georgia.* — *Ocean S. S. Co. v. McAlpin*, 69 Ga. 437; *City of Atlanta v. Brown*, 73 Ga. 630.

*Illinois.* — *Bragg v. Geddes*, 93 Ill. 39, 60.

*Iowa.* — *Oberholtzer v. Hazen*, 101 Iowa 340, 79 N. W. 207.

*Michigan.* — *Hart v. New Haven*, 130 Mich. 181, 89 N. W. 677.

*New York.* — *In re Dailey*, 43 Misc. 552, 89 N. Y. Supp. 538.

20. *Burdette v. May*, 100 Mo. 13, 12 S. W. 1056; *Hill v. Newman*, 47 Ind. 187, 195; *Higgs v. Wilson*, 3 Met. (Ky.) 337; *Tozer v. Hershey*, 15 Minn. 257.

"The accuracy of the repetition of admissions is dependent entirely upon the witness' intelligence, the reliability of his recollection, the correctness of his understanding, the difficulty of imparting the inflections or deflections of voice, and the gestures accompanying the alleged admissions, the reproduction of all of which is essential to correctly convey the meaning of the language employed in making the alleged admissions. Such testimony has always been regarded as evidence of the lowest order, to be accepted only with zealous caution." *Steffens v. Steffens*, 11 N. Y. Supp. 424, 33 N. Y. St. 643.

"Admissions, as facts established by the testimony are strong evidence against the party making them, and not weak, but the testimony by which they are sought to be proved or established should be received with the greatest caution and



mony based upon the mere recollection of the witness,<sup>21</sup> and distrust of the memory of the witness is perhaps the commonest reason assigned for discrediting such evidence.<sup>22</sup>

(b.) *Casual Statements.*—Statements made in a casual conversation at a somewhat remote period are scarcely ever remembered with accuracy, and are entitled to and receive but little weight.<sup>23</sup>

scrutiny." *Nash v. Hoxie*, 59 Wis. 384, 18 N. W. 408.

21. See *infra*, III, § 9, I.

22. *Midmer v. Midmer's Exrs.*, 26 N. J. Eq. 299.

"Although a witness is perfectly honest, it is impossible in most cases, for him to give the exact words in which an admission was made." *Law v. Merrills*, 6 Wend. (N. Y.) 268, 277.

"Where a witness can only give what he thinks is the substance of what was said, the weight to be given such testimony depends largely upon the strength of memory and intelligence of the witness." *Ellis v. Republic Oil Co.*, 133 Iowa 11, 20, 110 N. W. 20.

Testimony of several witnesses as to the precise form of words used in a verbal contract, stamps the story as false. *Davies Sewing Mach. Co. v. Dunbar*, 29 W. Va. 617, 2 S. E. 91.

**Recital of Testimony of a Witness at a Former Trial.**—"I have never heard a witness in twenty years who could give any man's evidence in his precise words. I never saw an attorney who could pretend to state the precise words of a witness six hours after his testimony had been given, and his assertion that he could narrate verbatim, from memory the whole of a witness's statement, would in ninety-nine cases in a hundred be convincing evidence to men of sense that his word was not to be relied on." *Wagers v. Dickey*, 17 Ohio 439, 442. And see *Ruch v. Rock Island*, 97 U. S. 693; *Moore v. Pearson*, 6 Watts. & S. (Pa.) 51. See article "FORMER TESTIMONY," Vol. V, p. 963, under 7.

23. *United States v. Bedilian v. Seaton*, 3 Wall. Jr. 279, 3 Fed. Cas. No. 1,218; *In re Gould*, 2 Hask. 34, 10 Fed. Cas. No. 5,604; *Williams v. The Vim*, 29 Fed. Cas. No. 17,744 a.

*Alabama.*—*Bryan v. Cowart*, 21 Ala. 92.

*Illinois.*—*Chicago, etc. R. Co. v. Hazzard*, 26 Ill. 373, 383; *Harris v. McIntyre*, 118 Ill. 275, 284, 8 N. E. 182.

*Iowa.*—*Parker v. Pierce*, 16 Iowa 227.

*Kentucky.*—*Vaughn v. Hann*, 6 B. Mon. 338; *Martin v. Letty*, 18 B. Mon. 573, 581.

*Louisiana.*—*Succession of Piffet*, 37 La. Ann. 871.

*Maine.*—*Parker v. Prescott*, 86 Me. 241, 29 Atl. 1007.

*Michigan.*—*Willard v. Fralick*, 31 Mich. 431, 435; *Grosvenor v. Harrison*, 54 Mich. 194, 199, 19 N. W. 951.

*Missouri.*—*Kinney v. Murray*, 170 Mo. 674, 706, 71 S. W. 197; *Cornet v. Bertelsmann*, 61 Mo. 118, 127.

*New Jersey.*—*Van Houten v. Post*, 33 N. J. Eq. 344, 350; *Riddle v. Clabby*, 59 N. J. Eq. 573, 44 Atl. 859; *Eyre v. Eyre*, 19 N. J. Eq. 102; *Lipp v. Fielder*, 66 Atl. 189; *Haley v. Goodheart*, 58 N. J. Eq. 368, 376, 44 Atl. 193; *Vanderbeck v. Vanderbeck*, 30 N. J. Eq. 265; *Hendrickson v. Ivins*, 1 N. J. Eq. 562, 567; *Wolfinger v. McFarland*, 67 N. J. Eq. 687, 54 Atl. 862, 63 Atl. 1119; *Kohl v. State*, 59 N. J. L. 445, 36 Atl. 931, 37 Atl. 73.

*New York.*—*Sarvent v. Hesdra*, 5 Redf. 47, 54.

*Ohio.*—*Crowell v. Western Reserve Bank*, 3 Ohio St. 406, 412.

*Vermont.*—*State v. Bedard*, 65 Vt. 278, 26 Atl. 719.

*Wisconsin.*—*Benedict v. Horner*, 13 Wis. 256; *Grotjan v. Rice*, 124 Wis. 253, 262, 102 N. W. 551.

"The human memory is so constituted that after the lapse of thirty or even twenty years it cannot call up with any degree of certainty even the substance of a casual conversation." *Martin v. Letty*, 18 B. Mon. (Ky.) 573, 581.

"Admissions in casual conversations, to persons having no interest

(c.) *Partial Remembrance*. — A witness may well remember the general nature and substance of a conversation and not be able to repeat the statements made in detail<sup>24</sup> but care must be exercised in such cases to see that the meaning of the whole is not perverted by omissions of important matters.<sup>25</sup>

(C.) MEANING OF SPEAKER. — The liability of the hearer to misunderstand the words used by the speaker or the meaning intended to be conveyed is another source of weakness of the evidence.<sup>26</sup>

in the matter, are the lightest and most unreliable of all kinds of evidence, especially where the party whose admissions are offered is dead, and cannot recall to the witness the circumstances under which they were made." *McKinney v. Admx. v. Slack*, 19 N. J. Eq. 164.

"Time and time again it has been pointed out that loose, casual remarks, long gone by and poured from the leaking cup of human memory into the judicial ear, are insidiously dangerous and therefore inadequate to afford the stringent proof demanded by the law to set aside the statute of wills." *Kirk v. Middlebrook*, 201 Mo. 245, 292, 100 S. W. 450.

24. "It is very rarely, indeed, that we find a witness of such remarkable memory, as to recall the substance of all that was said in a conversation occurring years before, and yet portions of it may be fully recollected by him and may contain statements or admissions covering the very point at issue." *Voorheis v. Bovell*, 20 Ill. App. 538.

"The main fact (concerning a conversation) would be likely to impress itself upon the mind while the particular expressions might not be noted or retained." *Chambers v. Hill*, 34 Mich. 523.

"Their account of the substance of the conversations, the purposes and the result of the conversations may be accurate." *Riddle v. Clabby*, 59 N. J. Eq. 573, 579, 44 Atl. 859.

25. "The admissions of a party must be received with caution by the jury, and particularly so, when the witness can only give a part of the admissions." *Chandler v. Schoonover*, 14 Ind. 324.

**Whole of Admission To Be Received.** — "On the subject of admissions, it may be laid down as a first

principle that the whole of the statement containing the admission is to be received together." *Williams v. Keyser*, 11 Fla. 234.

26. *Miller v. United States*, 133 Fed. 337, 349, 66 C. C. A. 399; *Garrett v. Garrett's Heirs*, 29 Ala. 439; *Schwachtgen v. Schwachtgen*, 65 Ill. App. 127; *McMullen v. Clark*, 49 Ind. 77, 81; *Hall v. Layton*, 16 Tex. 262; *Rich v. Ferguson*, 45 Tex. 396.

"How often in human affairs has it occurred, that the change or omission of a word, the substitution of the definite for the indefinite article, has given a meaning to what is represented as having been said, widely different from what was actually said? How often, also, has it happened that the recital of a part of a conversation, the picking out as it were, of a sentence separating it from its context, has distorted the whole idea and given to it a coloring that is false?" *Cobb v. Battle*, 34 Ga. 458, 479.

"When there is no reason to apprehend fabrication, there is such danger of mistake or imperfection, in the repetition of the mere oral statements of another, so much of uncertainty as to the clearness with which his meaning was expressed, or whether he was understood by the witness as he intended to be understood, that in its own nature the evidence is unsatisfactory." *Lehman Bros. v. McQueen*, 65 Ala. 570.

**Transposition of Words May Alter Meaning.** — "Sometimes even the transposition of the words of a party may give a meaning entirely different from that which was intended to be conveyed to the witness." *Law v. Merrills*, 6 Wend. (N. Y.) 268, 277.

**Change of Single Word Might Alter Meaning.** — "In many of the declarations testified to, the change of

(D.) IDENTIFICATION. — The evidence must clearly show that the statement made was made in reference to and about the subject-matter with which it is sought to connect it in order to entitle it to any considerable weight as evidence.<sup>27</sup>

(E.) EASE OF FABRICATION. — The ease with which testimony regarding oral statements of other persons can be fabricated and the difficulty of contradicting such evidence, furnishes a further reason why the evidence submitted to prove the making of such statements should be closely scrutinized.<sup>28</sup>

(F.) DECLARATIONS OF DECEDENT. — Alleged declarations of deceased persons are regarded as of very little probative value,<sup>29</sup> especially where they are relied upon to establish a claim against his estate,<sup>30</sup>

a word, or the form of expression would render it consistent with the theory of appellant's claim to the land." *Harris v. McIntyre*, 118 Ill. 275, 284, 8 N. E. 182. And see *Holmes v. Morse*, 50 Me. 102; *Oberholtzer v. Hazen*, 101 Iowa 340, 70 N. W. 207.

**Witness to Conversation Partially Deaf.** — Testimony of witness partially deaf as to a conversation is peculiarly weak. *Riddle v. Clabby*, 59 N. J. Eq. 573, 579, 44 Atl. 859.

27. "It is not only necessary that the declarations should be clearly proved, but they should be deliberately made and precisely identified," to entitle them to any considerable weight. *Printup v. Mitchell*, 17 Ga. 558, 567. And see *Garrett v. Garrett's Heirs*, 29 Ala. 439.

28. *Clement v. Clement*, 54 N. C. (1 Jones' Eq.) 184; *Garrison v. Akin*, 2 Barb. (N. Y.) 25; *Donaghe v. Toms*, 81 Va. 132, 150; *Garrett v. Garrett's Heirs*, 29 Ala. 439.

29. *United States v. Curtice v. Crawford Co. Bank*, 110 Fed. 830, 841.

*Alabama.* — *Bibb v. Hunter*, 79 Ala. 351.

*California.* — *Mattingly v. Pennie*, 105 Cal. 514, 523, 39 Pac. 200, 45 Am. St. Rep. 87.

*Missouri.* — *Fanning v. Doan*, 139 Mo. 392, 410, 41 S. W. 742; *Johnson v. Quarles*, 46 Mo. 423; *Ringo v. Richardson*, 53 Mo. 385; *Davis v. Green*, 102 Mo. 170, 183, 14 S. W. 876, 11 L. R. A. 90; *Grantham v. Gossett*, 182 Mo. 651, 81 S. W. 895.

*Nebraska.* — *Williams v. Miles*, 68 Neb. 463, 478, 94 N. W. 705, 96 N. W. 151, 62 L. R. A. 383.

*New Jersey.* — *Jones v. Knauss*, 31 N. J. Eq. 609; *Wilson v. Terry*, 70 N. J. Eq. 231, 242, 62 Atl. 310.

*New York.* — *Holt v. Tuite*, 188 N. Y. 17, 80 N. E. 364; *Sheldon v. Sheldon*, 133 N. Y. 1, 8, 30 N. E. 730.

*Texas.* — *Grace v. Hanks*, 57 Tex. 14; *Coats v. Elliott*, 23 Tex. 606; *Portis v. Hill*, 14 Tex. 69.

*Virginia.* — *Donaghe v. Toms*, 81 Va. 132, 150.

Admissions by a decedent are to be "tolerated" rather than favored by the courts. *Reed v. Morgan*, 100 Mo. App. 713, 723, 73 S. W. 381.

"Testimony as to declarations of a deceased person should undoubtedly be disregarded upon the least conflict with the probabilities of the case." *In re Burtis' Will*, 43 Misc. 437, 89 N. Y. Supp. 441, 457.

"The courts of justice lend a very unwilling ear to statements of what dead men have said." *Lea v. Polk Co. Copper Co.*, 21 How. (U. S.) 494, quoted in *Williams v. Miles*, 68 Neb. 463, 478, 94 N. W. 705, 96 N. W. 151, 62 L. R. A. 383; *Curtice v. Crawford County Bank*, 110 Fed. 830, 841.

"Our experience shows the case with which the declarations of a deceased person may be proved, and warns us not to place too great reliance upon them. Evidence of such declarations it is true is admissible, but it never amounts to direct proof of the facts claimed to have been admitted by those declarations." *Johnson v. Quarles*, 46 Mo. 423.

30. *Harman v. Harman*, 70 Fed. 894, 927, 17 C. C. A. 479 ("distorted and perjured testimony is safe in the presence of death"); *Clarke v.*

since they are especially susceptible to the weaknesses already enumerated.<sup>31</sup>

(2.) **Statements Themselves.**—(A.) **IN GENERAL.**—When once the foregoing rules and elements of weakness have been met, and the statements stand forth clearly and satisfactorily proved, they are entitled to great weight.<sup>32</sup>

Robert's Estate, 38 Colo. 316, 87 Pac. 1077; *Bringier v. Gordon*, 14 La. Ann. 274; *Longwell v. Mierow*, 130 Wis. 208, 109 N. W. 943; *In re Smith's Estate*, 18 Misc. 139, 41 N. Y. Supp. 1093.

And see article "EXECUTORS AND ADMINISTRATORS," Vol. V, p. 419, under d.

31. See *supra*, III, 6, F, a, (1.); *Estate of Williams*, 128 Cal. 552, 61 Pac. 670, 79 Am. St. Rep. 67 (easy to fabricate).

**Rule Especially Applicable to Declarations of a Decedent.**—*Fanning v. Doan*, 139 Mo. 392, 41 S. W. 742; *Kinney v. Murray*, 170 Mo. 647, 707, 71 S. W. 197.

No species of evidence is more easily fabricated than that of admissions or declarations purported to have been made by a decedent since evidence to contradict is hard to obtain. *Wales v. Newbould*, 9 Mich. 45, 90.

"Extra judicial admissions of a dead man are the weakest of all evidence. They cannot be contradicted. No fear of detection in false swearing impends over the witness. In most instances such testimony is scarcely worthy of consideration." *Bodenheimer v. Bodenheimer*, 35 La. Ann. 1005.

A claim for services rendered a decedent was supported only by evidence of oral admissions of the decedent. The court spoke of this as "the kind of evidence most apt to be misapprehended and mistaken and in relation to which a facile conscience may stretch itself like India rubber." *Harbold's Exrs. v. Kuntz*, 16 Pa. St. 210.

**Traditionary Evidence, Weak.** "In cases where the whole evidence is traditionary, when it consists entirely of family reputation or of statements of declarations made by persons who died long ago, it must be taken with such suspicions and

also with such suspicions as ought reasonably to be attached to it." *Johnston v. Todd*, 5 Beav. (Eng.) 597.

32. *Alabama.*—*Garrett v. Garrett's Heirs*, 29 Ala. 439.

*Arkansas.*—*Hazen v. Henry*, 6 Ark. 86.

*Delaware.*—*Simeone v. Lindsay*, 65 Atl. 778.

*Illinois.*—*Chicago & N. W. R. Co. v. Button*, 68 Ill. 409.

*Iowa.*—*Ellis v. Republic Oil Co.*, 133 Iowa 11, 20, 110 N. W. 20.

*Michigan.*—*Stiles v. Stiles*, 14 Mich. 72.

*Pennsylvania.*—*In re Krug's Estate*, 196 Pa. St. 484, 46 Atl. 484.

*Tennessee.*—*Spurlock v. Brown*, 81 Tenn. 241, 247, 18 S. W. 868.

*Virginia.*—*Cralle v. Cralle*, 79 Va. 182.

*Wisconsin.*—*Nash v. Hoxie*, 59 Wis. 384, 18 N. W. 408.

And see articles "ADMISSIONS," Vol. I, p. 610, under VIII; "CONFESSIONS," Vol. III, p. 366, under IV; "DECLARATIONS," Vol. IV, p. 74, under 6.

"Admissions by parties are not to be regarded as an inferior kind of evidence; on the contrary, when satisfactorily proved, they constitute a ground of belief on which the mind repose with strong confidence." *Smith v. Page*, 72 Ga. 539.

"Men are not likely to understate their rights, especially in relation to property. For this reason admissions or declarations against interest, especially where no reasonable motive is given for such conduct, are considered weighty evidence that what a party so states concerning his right or interest is true." *Arnold v. Sinclair*, 12 Mont. 248, 273, 29 Pac. 1124.

**Value as Compared With Testimony by Witnesses From Personal Knowledge.**—Evidence of admissions "is of a less satisfactory kind

(B.) REPEATED STATEMENTS.—Added weight is to be given oral statements when it is shown that they have been several times repeated by the speaker.<sup>33</sup>

(C.) DELIBERATION AND CASUAL REMARKS.—Where the statement is shown to have been made deliberately,<sup>34</sup> and with full knowledge and understanding<sup>35</sup> of its nature and effect, it is entitled to much more weight than is a casual remark made without due consideration.<sup>36</sup>

than that of witnesses who testify from a personal knowledge of the facts in controversy." *O'Reily v. Fitzgerald*, 40 Ill. 310.

**Weighed as Is Other Evidence.** "Admissions when proved to have been made are before the jury to be considered and weighed precisely as other evidence." *Ayers v. Metcalfe*, 39 Ill. 307.

**If Act Accompanies Declaration Against Interest**, the weight of the admission is greatly increased. *County of Mahaska v. Ingalls*, 16 Iowa 81, 96.

33. *In re Dailey's Estate*, 43 Misc. 552, 89 N. Y. Supp. 538; *Sutton v. Hayden*, 62 Mo. 101, 110; *Greenawalt v. McEnelley*, 85 Pa. St. 352.

34. *Hill v. Newman*, 47 Ind. 187, 195; *Higgs v. Wilson*, 3 Met. (Ky.) 337; *Tozer v. Hershey*, 15 Minn. 257; *Wittick's Admr. v. Keiffer*, 31 Ala. 199; *Garrett v. Garrett's Heirs*, 29 Ala. 439; *Allen v. Kirk*, 81 Iowa 658, 670, 47 N. W. 906.

"An admission, in order to be important and weighty, must be clearly proven, and shown to have been made with some degree of deliberation." *Colbert v. State*, 125 Wis. 423, 438, 104 N. W. 61.

Where admissions are made understandingly and deliberately, the chief element of weakness is in the statement or recollection of the witness who repeats them. *Allen v. Kirk*, 81 Iowa 658, 670, 47 N. W. 906.

35. *Ray v. Bell*, 24 Ill. 444.

"Distinct statements made when the very subject was called to the attention of the deceased and for the very purpose of meeting and deciding the particular matter in hand" are to be given great weight.

*Eichelberger's Estate*, 170 Pa. St. 242, 246, 32 Atl. 605.

"Admissions too are made under a variety of circumstances which add or detract from their value as evidence. When a party is informed, and in view of all the circumstances makes an admission which is opposed to his interest, such admission is of the highest character of proof when clearly proved by persons understanding and remembering what was said." *Ayers v. Metcalfe*, 39 Ill. 307.

**Conversation Arranged for Purpose of Discussing the Matter.**—Verbal admissions made in the course of a conversation had and arranged for the express purpose of discussing the matter in controversy, should have considerable weight. *Doerr v. Brune*, 56 Ill. App. 657, 660.

36. *Alabama*.—*Bryan v. Cowart*, 21 Ala. 92, 105.

*Illinois*.—*Ayers v. Metcalfe*, 39 Ill. 307.

*Iowa*.—*Holmes v. Connable*, 111 Iowa 298, 309, 82 N. W. 780; *Cooper v. Skeel*, 14 Iowa 578; *State v. Donovan*, 61 Iowa 278, 16 N. W. 130; *Parker v. Pierce*, 16 Iowa 227.

*Missouri*.—*King v. Isley*, 116 Mo. 155, 22 S. W. 634; *Kinney v. Murray*, 170 Mo. 674, 706, 71 S. W. 197; *Cornet v. Bertelsmann*, 61 Mo. 118, 127.

*New York*.—*Van Slooten v. Wheeler*, 140 N. Y. 624, 631, 35 N. E. 583.

*Pennsylvania*.—*Stafford v. Stafford*, 27 Pa. St. 144; *Bender v. Pitzer*, 27 Pa. St. 333.

*Vermont*.—*Cleveland v. Burton*, 11 Vt. 138.

*Wisconsin*.—*Grotjan v. Rice*, 124 Wis. 253, 262, 102 N. W. 551; *Col-*

(D.) *RES GESTÆ* DECLARATIONS. — While *res gestæ* declarations are undoubtedly often of considerable value,<sup>37</sup> there is a tendency to give them undue weight.<sup>38</sup>

(E.) DYING DECLARATIONS. — So also in the case of dying declarations, they are very likely to be regarded as of more value than their intrinsic nature would warrant.<sup>39</sup> They are admitted only

bert *v.* State, 125 Wis. 423, 438, 104 N. W. 61.

"Verbal admissions, hastily and inadvertently made, however clearly established, should have little or no binding efficacy." Printup *v.* Mitchell, 17 Ga. 558, 567.

37. Louisville, N. A. & C. R. Co. *v.* Buck, 116 Ind. 575, 19 N. E. 453; Cross Lake Logging Co. *v.* Joyce, 83 Fed. 989, 28 C. C. A. 250 ("of the highest value as evidence"); Com. *v.* Werntz, 161 Pa. St. 591, 29 Atl. 272; Jack *v.* Mutual Res. Fund Life Assn., 113 Fed. 49, 51 C. C. A. 36. And see article "*RES GESTÆ*," Vol. XI, p. 350, under H.

"The verbal statement of a person made under some circumstances may be a part of the actual occurrence, and be entitled to as much weight as evidence as any other part of the transaction. . . . When a person receives a sudden injury, it is natural for him, if in the possession of his faculties, to state at once how it happened. Metaphorically it may be said, the act speaks through him and discloses its character." Murray *v.* Boston & M. R. Co., 72 N. H. 32, 54 Atl. 289, 101 Am. St. Rep. 660, 61 L. R. A. 495.

"Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results. There is none which rests on a more solid basis of reason and authority." Union Casualty & Sur. Co. *v.* Mondy, 18 Colo. App. 395, 71 Pac. 677.

**Reasons for Giving Them Weight.** "The weight which they are to receive at the hands of the jury will depend upon the closeness and fullness to the transaction out of which they spring; their proximity in point of time to it, and the strength of the light which they shed upon it." Mitchum *v.* State, 11 Ga. 615, 624.

**A Charge** that the jury should give but little weight to *res gestæ* declarations was held improper in Chicago, M. & St. P. R. Co. *v.* Clarkson, 147 Fed. 397, 405, 77 C. C. A. 575.

38. Guild *v.* Pringle, 130 Fed. 419, 424, 64 C. C. A. 621 ("many juries give such statements undue weight").

**Reasons for Weighing Them Carefully.** — All such statements, whether proximate or remote, are untrustworthy in the extreme; they are not made under oath; they cannot be discussed by cross-examination; nor are they likely to be open to explanation, generally being fragmentary and incomplete and liable, therefore, to be misunderstood and misreported." Estell *v.* State, 51 N. J. L. 182, 17 Atl. 118.

39. See article "*DYING DECLARATIONS*," Vol. IV.

"Nor is the reason ordinarily given for their admission at all satisfactory. It is that the declarant in the immediate presence of death is so conscious of the great responsibility awaiting him in the near future if he utters falsehood that he will in all human probability, utter only the truth. The fallacy of this reasoning has been many times demonstrated. It leaves entirely out of account the influence of the passions of hatred and revenge which almost all human beings naturally feel against their murderers, and it ignores the well known fact that persons guilty of murder, beyond all question, very frequently deny their guilt up to the last moment upon the scaffold." Railing *v.* Com., 110 Pa. St. 100, 1 Atl. 314.

**Weaknesses Enumerated.** "There are many reasons why dying declarations should be received and weighed with caution. First, they are necessarily wanting in that

under the necessity of the case,<sup>40</sup> and while they are considered to have the equivalent of the sanction of an oath,<sup>41</sup> there is no opportunity for cross-examination,<sup>42</sup> and they are often proved under such circumstances as to unduly influence the jury.<sup>43</sup> In addition to this the declarant's physical condition at the time of making the declaration is often such as to reflect seriously upon the accuracy of his memory.<sup>44</sup>

greatest test of the credibility of oral testimony, cross-examination. Second, the jury are without the opportunity of observing the temper and manner of the declarant. Third, such testimony is generally given by relatives and friends of the deceased who had watched by his bedside, and bias is to be expected. Fourth, all narrations of other men's sayings should be scrutinized with care, because what men say is so liable to be misunderstood. . . . Fifth, many persons, even in serious conversations, assert as facts those things of which they have only strong convictions, but have no knowledge derived from the senses. Well may we, in the language of the judges and text-books writers, say that such evidence is received from necessity, and to prevent the escape of offenders who commit the awful crime of murder." *Shell v. State*, 88 Ala. 14, 7 So. 40.

40. "The rule of admitting dying declarations as thus restricted stands only upon the ground of the public necessity of preserving the lives of the community by bringing man-slayers to justice." *Waldele v. New York, etc. R. Co.*, 95 N. Y. 274, 288. See also *Railing v. Com.*, 110 Pa. St. 100, 1 Atl. 314.

41. While a dying declaration is entitled to be considered as having the weight of an oath on account of the solemn circumstances under which it is made, it would be wrong to say that it had all the weight which the law can give to evidence. "While the law recognizes the necessity of admitting such proof on a par with an oath in a court of justice, it does not and cannot regard it as of the same value and weight as the evidence of a witness given in a court of justice, under all the tests and safeguards which

are there afforded for discovering the truth and the object of judicial inquiry. For there the accused has the opportunity of more fully investigating the truth of the evidence by the means of cross-examination, and the jury have the opportunity of observing the demeanor of the person whose testimony is relied upon." *People v. Kraft*, 148 N. Y. 631, 43 N. E. 80.

42. "A defendant against whom dying declarations are received has not the opportunity of cross-examining the declarant. Hence it is justly held that he is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of a more full investigation by means of cross-examination." *Com. v. Cooper*, 5 Allen (Mass.) 495.

43. "The evidence goes to the jury with surroundings tending to produce upon the mind emotions of deep sympathy for the deceased, and of involuntary resentment against the accused." *Starkey v. People*, 17 Ill. 17.

44. "Credit is not in all cases due to the declarations of a dying person, for his body may survive the powers of his mind; or his recollection, if his senses are not impaired, may not be perfect." *Waldele v. New York, etc. R. Co.*, 95 N. Y. 274, 288.

Speaking of a dying declaration the court remarked that there was strong reason for believing that the faculties of the declarant were "so much impaired by the wounds under which he suffered that he was incapable of remembering with distinctness or stating with accuracy, the facts and circumstances of the recentre." *Brown v. State*, 32 Miss 433, 448.

The witness is in most cases

(F.) **CONFESSIONS.**—The weight to be given to evidence of confessions is fully discussed elsewhere.<sup>45</sup>

(G.) **STATEMENTS MADE IN SLEEP.**—Statements made by a person while asleep are not regarded as his conscious utterances, and are entitled to no consideration at all.<sup>46</sup>

b. *Admissions by Silence.*—The requirements which must be met before evidence of admissions by failure to deny statements made in the presence of the person is admissible,<sup>47</sup> indicate the slight weight that is ordinarily attached to them by the course,<sup>48</sup>

“racked with pain, incapable in most cases of giving a full and accurate account of the transaction, weakened in body and mind.” *Marshall v. Chicago*, etc. R. Co., 48 Ill. 475; *Brom v. People*, 216 Ill. 148, 154, 74 N. E. 790.

45. See article “**CONFESSIONS**,” Vol. III, pp. 359, 360.

**Sufficiency of Confessions To Prove Corpus Delicti.**—See article “**CORPUS DELICTI**,” Vol. III, pp. 665, 666.

46. “If the defendant was asleep, the inference is that he was not conscious of what he was saying, and words spoken by him in that condition constituted no evidence of guilt.” *People v. Robinson*, 19 Cal. 41.

“Words spoken while in sleep are not evidence of a fact or condition of mind; they proceed from an unconscious and irresponsible condition; they have little or no meaning; they are as likely to refer to unreal facts or conditions as to things real; they are wholly unreliable, and a jury ought not to be allowed to guess that such expressions are produced by a present mental or physical condition. . . . The expressions of a person in sleep may be induced without cause and by past as well as present conditions. In dreams things long forgotten return, and we live over a past that has no relation to present conditions.” *Plummer v. Ricker*, 71 Vt. 114, 41 Atl. 1045, 76 Am. St. Rep. 754.

**Dream.**—Witness not allowed to relate his dream. *Louisville & N. R. Co. v. Smith*; 27 Ky. L. Rep. 257, 84 S. W. 755.

47. See article “**ADMISSIONS**,” Vol. I, pp. 367, 383.

48. *Slattery v. People*, 76 Ill. 217;

*Whitney v. Houghton*, 127 Mass. 527; *Parulo v. Philadelphia & R. R. Co.*, 145 Fed. 664; *Corser v. Paul*, 41 N. H. 24, 29.

“Such evidence is most dangerous, and should be received with great caution.” *People v. Smith*, 172 N. Y. 210, 232, 64 N. E. 814; *People v. Kennedy*, 164 N. Y. 449, 58 N. E. 652; *People v. Cascone*, 185 N. Y. 317, 329, 78 N. E. 287.

Admissions by silence are worth very little unless the party had the means of knowing the truth or falsehood of the statement. *Corser v. Paul*, 41 N. H. 24, 29; *State v. Maxwell*, 64 N. C. 313.

**Reasons For Weakness.**—“When anything is attempted to be established in this way, all the attending circumstances should be known, the temper of the parties accompanying declarations, and the tenor of the conversation should all be stated with accuracy. It is said that such evidence is equivocal and should be received with cautious and reluctant credence. 1 Serg. & Rawle, 398. This is manifestly so, as but few men can be supposed to know the effects of their silence, and a failure to contradict may arise from various other circumstances. It is not an invariable rule that men in conversation deny everything that is asserted against them. We cannot attach to this evidence, sufficient importance to justify a rescission of the contract.” *Hall v. Thompson*, 1 Smed. & M. (Miss.), 443, 487.

**Silence When Charged With Crime.**—“There is a sound reason for giving less effect to this silence of a party in relation to assertions charging him with a crime than to those affecting his pecuniary interest, because the mind is more liable to



though in some instances they may be of considerable importance.<sup>49</sup>

c. *Admissions by Conduct*. — Admissions by conduct are ordinarily entitled to great weight,<sup>50</sup> and may outweigh the testimony of a witness as to his recollection of the matter in issue.<sup>51</sup>

d. *Judicial Admissions*. — Judicial admissions are, in most cases, conclusive upon the person making them.<sup>52</sup>

e. *Written Declarations*. — Written declarations and admissions of a person are accorded great weight<sup>53</sup> on the general theory that written evidence is superior to oral evidence.<sup>54</sup>

H. OTHER CLASSES OF EVIDENCE. — The nature and value of various other classes of evidence will be found discussed under their appropriate titles in other portions of this work.<sup>55</sup>

be disturbed and the judgment be left uncertain as to what is proper to be done under an imputation touching his liberty or life than one solely concerning his property." *United States v. Matthews*, 26 Fed. Cas. No. 15,741b.

49. In *Pritchett v. Sheridan*, 29 Ind. App. 81, 63 N. E. 865, failure to contradict statements made in the defendant's presence was held to more truly represent the facts in the case than his later testimony to the contrary.

**Sufficient To Shift Burden of Proof.** — In *Moore v. Moore's Admr.*, 30 Ky. L. Rep. 1370, 101 S. W. 358, proof that the defendant remained silent under circumstances which were sufficient to call for a reply, was held to shift the burden of proof upon the issue.

50. See article "ADMISSIONS," Vol. I, pp. 362, 367.

**Not Conclusive.** — An attempt to bribe a witness by a party "is not conclusive even when believed by the jury, because a party may believe he has a bad case when in fact he has a good one, but it tends to discredit his witnesses and to cast doubt upon his position." *Nowack v. Metropolitan St. R. Co.*, 166 N. Y. 433, 60 N. E. 32, 54 L. R. A. 592.

51. *Wiswall v. Ayres*, 51 Mich. 324, 334, 16 N. W. 667; *Stanford v. Lyon*, 37 N. J. Eq. 94, 107; *Clark v. Dwelling House Ins. Co.*, 81 Me. 373, 17 Atl. 303.

52. *Shanahan v. St. Louis Transit Co.*, 109 Mo. App. 228, 83 S. W. 783. And see article "ADMISSIONS," Vol. I, pp. 613, 614.

53. *Harrison v. Peabody*, 34 Cal. 178; *Stone v. Stillwell*, 23 Ark. 444, 455 (letter); *Kehr v. Stauf*, 12 Daly (N. Y.) 115; *Peters' Estate*, 20 Pa. Super. 223; *Buford & Co. v. McGetchie*, 60 Iowa 298, 14 N. W. 790.

"The written admissions of a party, before any controversy has arisen, as to the meaning and effect of a contract, manifestly outweigh oral testimony in contradiction of same, given after the controversy has arisen." *Moore v. Grayson*, 132 Cal. 602, 64 Pac. 1074.

Admissions in letters held to outweigh contrary testimony of the party on trial. *Williams v. Williams*, 23 Fla. 324, 2 So. 768.

**Who Is Addressee of Letter, Unimportant.** — "Admissions may be contained in a letter addressed to the opposite party, or to a third person, and in either case are entitled to equal weight and credit." *Cook v. Barr*, 45 N. Y. 156.

**Receipts.** — "A written receipt is evidence of the highest and most satisfactory evidence, and to do away with its force the testimony should be convincing." *Rosenmueller v. Lampe*, 89 Ill. 212. And see *Burns v. Walsh*, 10 Misc. 699, 31 N. Y. Supp. 788.

**Verdict Contrary to Written Admission**, held against the weight of evidence. *East Tennessee etc. R. Co. v. McClure*, 94 Ga. 658, 20 S. E. 93.

54. See *supra*, III, 5, A.

55. **Demonstrative Evidence.** See article "DEMONSTRATIVE EVIDENCE," Vol. IV, p. 272.

"To a rational man of perfect or-

**7. As Affected by Subject-Matter.** — A. **IDENTITY.** — a. *In General.* The general topic of identity is treated elsewhere,<sup>56</sup> and it is intended here merely to give the opinions of the courts as to the value of the different methods of proving the identity.

b. *Identification From Similarity of Features.* — Undue weight is apt to be accorded to the testimony of witnesses who profess to recognize other persons by their features and appearance, and this class of evidence should be viewed with caution.<sup>57</sup>

c. *Identification by Voice.* — The identification of a person by his voice alone, is always viewed with suspicion,<sup>58</sup> especially where

ganization, the best and highest proof of which any fact is susceptible is the evidence of his own senses. This is the ultimate test of truth, and is, therefore, the first principle in the philosophy of evidence." Gentry v. McMinnis, 3 Dana (Ky.) 382, 386.

**Expert Evidence.** — See articles "EXPERT AND OPINION EVIDENCE," Vol. V; "HANDWRITING," Vol. VI; "UNCONTRADICTED EXPERT EVIDENCE," *supra*, III, 6, C, f, (3).

**Positive and Negative Evidence.** See article "POSITIVE AND NEGATIVE EVIDENCE," Vol. IX.

**Circumstantial Evidence.** — See articles "CIRCUMSTANTIAL EVIDENCE," Vol. III, pp. 75-82; "DIRECT EVIDENCE," Vol. IV.

**56.** See article "IDENTITY," Vol. VI.

**57.** "The combination and arrangement of the human features and lineaments are ordinarily so unique in each particular person, and the peculiarities of individual expression, tone of voice, gesture and carriage, so marked and striking, that to a familiar acquaintance or friend there can be very slight choice of mistaking personal identity. Still we constantly meet with general, as well as particular resemblances, among the millions of our race, which often deceive the casual observer, and which where fraud is designed, may easily be made the basis of criminal personation with the aid of art to help nature." Cunningham v. Burdell, 4 Bradf. (N. Y.) 343, 473.

Witnesses are often mistaken as to the identity of a person and the jury must receive and consider evidence of personal identity which is

inconsistent with other evidence in the case with scrupulous care and caution." Tisdale v. Mut. Ben. L. Ins. Co., 23 Fed. Cas. No. 14,059.

**Comparative Height of Persons** and clothing worn very weak as evidence of identity. People v. Gotshall, 123 Mich. 474, 82 N. W. 274.

**Identification of a Robber** by the person attacked made positively and unequivocally, held to outweigh the testimony of three witnesses tending to prove an alibi. Schroeder v. People, 196 Ill. 211, 63 N. E. 678.

**But Identification May Be Made Without Recognition of a Single Feature.** — We may recognize a person, and be able to testify to his identity with confidence, without being able to describe a single peculiar feature different from that of every other man. The proof in such case depends upon the conclusion formed in the mind of the witness. It is a mere matter of opinion, but it is the only satisfactory or reliable evidence that can be given." DeWitt v. Barley, 13 Barb. (N. Y.) 550, 554. And see People v. Mullen, 49 Misc. 289, 99 N. Y. Supp. 227, 230.

**58.** Com. v. Hayes, 138 Mass. 185; Pilcher v. United States, 113 Fed. 248, 51 C. C. A. 205; Brown v. Brown, 63 N. J. Eq. 348, 357, 50 Atl. 608; Com. v. Williams, 105 Mass. 62, 67.

**Voice Heard Over Telephone** may identify speaker where hearer is familiar with him. Lord Electric Co. v. Morrill, 178 Mass. 304, 59 N. E. 807; Lillie v. State, 72 Neb. 228, 100 N. W. 316. And see People v. Strollo, 191 N. Y. 42, 61, 83 N. E. 573. See article "TELEGRAPHS AND TELEPHONES," Vol. XII, pp. 477-479.

the hearer is shown to have been excited by anger or hatred.<sup>59</sup>

d. *Previous Acquaintance*.—The value of evidence concerning identity is increased proportionately as a witness shows himself to be familiar with the person or thing identified.<sup>60</sup>

e. *Lapse of Time*.—Evidence as to the identity of a person diminishes in value as the time since he was last seen by the witness increases.<sup>61</sup>

f. *Other Factors*.—In the notes are collected cases in which the effect of various matters upon the value of evidence as to identity is commented upon.<sup>62</sup>

**Wagon Identified by Peculiar Rattle.**—Where a wagonmaker identified a buggy by its rattle, the court said: "Observation teaches that identification in this manner may often be safely established. The business of the witness would tend to direct his attention to the buggy, and enable him to recognize the peculiar noise made by it." *State v. Rainsbarger*, 74 Iowa 196, 37 N. W. 153. And see *Com. v. Best*, 180 Mass. 492, 62 N. E. 748.

**Dog** may be identified by its bark, though it is not seen. *Wilbur v. Hubbard*, 35 Barb. (N. Y.) 303.

59. *Ramsay v. Ryerson*, 40 Fed. 739, 744.

60. *Duffy v. People*, 98 Ill. App. 34.

"If one undertake to identify a stranger whom he has seen only once, and that by a doubtful light, the liability to error is very great, and it takes but little to balance it, but it becomes less if he saw him by daylight, still less if it should have been a friend, still less if a brother, still less if they conversed about family affairs, still less if they transacted serious family business, still less if there were two witnesses to all these facts; and the liability to mistake decreases with every additional witness and fact until the hypothesis of mistake is excluded from the case." *Boylan v. Meeker*, 28 N. J. L. 274, 333.

Identification of a robber by the party attacked who had never seen the person before "and then saw him, if at all, for but a moment and while laboring under great excitement," was held insufficient. *People v. Smith*, 55 Hun 606, 7 N. Y. Supp. 841.

#### Identification of Child By Parent.

"The knowledge of identity on the part of a parent, . . . is the result not of any natural impulse, independent of observation and judgment, whereby a mother is better able to recognize her child than anybody else would be. It arises from continually serving and watching the particular individual; from becoming familiarized by daily habit with everything that pertains to personal identification." *In re Sheehan's Estate*, 139 Pa. St. 168, 20 Atl. 1003, 1009, quoting from Lord Chief Justice Cockburn's opinion in the celebrated Tichborne case in which the fraudulent claimant actually deceived the alleged mother who received him as her own son.

Evidence of identity given nearly two years after the time in question and as to a person whom the witness had never seen before or since, is entitled to very little consideration. *Reid v. Reid*, 17 N. J. Eq. 101.

61. *In re Jew Wong Loy*, 91 Fed. 240 (twenty years); *Ark Foo v. United States*, 128 Fed. 697, 63 C. C. A. 249 (ten years).

Very improbable that a child could be identified even by a parent when he had last seen her when she was two or three years old and she was now fifteen. *Lee Sing Far v. United States*, 94 Fed. 834, 35 C. C. A. 327.

62. Where identification is made doubtfully at the time, but the party becomes suddenly positive of the fact several days later, without any special reason, the proof of identification is not strong. *People v. Smith*, 55 Hun 606, 7 N. Y. Supp. 841.

Identification of a boat by read-

**B. MEASUREMENTS**—Actual measurements and computations, carefully made, will outweigh the mere general estimates of other witnesses,<sup>63</sup> since they are made under circumstances which tend to accuracy of observation by the party making them.<sup>64</sup>

**C. ORAL CONTRACT PROVED BY ANY ONE OF SEVERAL CONVERSATIONS.**—Where an attempt is made to establish an oral contract by proof of several separate conversations, in each of which a distinct contract was made, the proof is no stronger than that made by the strongest conversation.<sup>65</sup>

**D. MORTALITY TABLES.**—The value of mortality tables is elsewhere discussed.<sup>66</sup>

ing the name on the stern very unsatisfactory where the observer was in an unfavorable situation and had poor eyesight. *The Ramleh*, 157 Fed. 769.

"The mere fact that a witness cannot read writing does not necessarily render him incompetent to testify to the identity of a written paper," but the identification might not be so satisfactory in such a case. *Com. v. Meserve*, 154 Mass. 64, 27 N. E. 997.

Identification of a dead body is especially hard on account of the changes which naturally occur. *Cunningham v. Burdell*, 4 Bradf. (N. Y.) 343, 475.

**Shadows as Basis for Identification and Description.**—A witness whose testimony as to seeing the defendant in a divorce suit in a compromising condition of undress was based on shadows seen through two thicknesses of window shades. The court said: "Now, it is a matter of common observation that grotesque shapes and figures strongly resembling human beings or animals and birds, and the like, can at will be thrown upon or against a curtain or shade by simply using and manipulating the two hands and the fingers as images interposed between a light and such shade. It would, it seems to me, be as reasonable to claim that the appearance of such odd forms through a shade was proof of the actual life of such mythical creatures as the claim this witness makes that the shadows he gazed upon should be relied on as evidence of the existence of any certain forms of life behind the shade. To attempt to elevate to the dignity

of proof in a court of justice such misleading and fleeting eye images, is to introduce an element of startling uncertainty in the trial of cases. I think no precedent can be found in the trials of causes before any court of authority, approving or sanctioning such appearances as proper elements of proof." *Brown v. Brown*, 63 N. J. Eq. 349, 50 Atl. 608.

<sup>63.</sup> *Taylor v. Harwood*, 1 Taney 437, 23 Fed. Cas. No. 13,794, p. 776 (damages to boat from collision); *Spring v. Markowitz*, 98 App. Div. 324, 90 N. Y. Supp. 602 (profits of transaction); *Koepke v. City of Milwaukee*, 112 Wis. 475, 88 N. W. 238 (place of accident); *Truesdell v. Erie R. Co.*, 114 App. Div. 34, 99 N. Y. Supp. 694 (height of street car step from ground); *Texas & N. O. R. Co. v. White*, 25 Tex. Civ. App. 278, 62 S. W. 133 (amount of sand removed from pit).

"The testimony of even disinterested and unimpeached witnesses on the subjects of measurements, distances, dates, and the like, which is based merely on memory, estimate, or casual observation, must yield to that which is based on actual measurement or reference to definite data." *Busse v. State*, 129 Wis. 171, 108 N. W. 64.

"Estimates of distance can never be relied upon in this class of cases" (admiralty collision). *The J. L. Hasbrouck*, 14 Blatchf. 30, 13 Fed. Cas. No. 7,323. And see *The Jeremiah*, 13 Fed. Cas. No. 7,289 (estimate in night).

<sup>64.</sup> See *infra*, III, 9, H.

<sup>65.</sup> *Grantham v. Gossett*, 182 Mo. 651, 673, 81 S. W. 895.

<sup>66.</sup> See articles "MORTALITY TA-

**8. Classes of Witnesses.** — A. ATTORNEYS. — Testimony given by attorneys and counsellors is commonly referred to as entitled to great weight,<sup>67</sup> but where the witness is also retained in the case, he is to be regarded as an interested witness.<sup>68</sup>

B. CLERGYMEN. — Clergymen, as a class, are recognized as being entitled to full credit as witnesses,<sup>69</sup> though there is no rule of law upon the matter,<sup>70</sup> and where any fact appears which tends to show bias or interest their evidence is to be weighed in relation to it.<sup>71</sup>

bles," Vol. VIII, pp. 642, 643; "INJURIES TO PERSONS," Vol. VII, pp. 426-428.

**Too Much Weight** apt to be given to mortality tables. *Kerrigan v. Pennsylvania R. Co.*, 194 Pa. St. 98, 44 Atl. 1069.

**67.** Speaking of a lawyer who was a witness, the court said: "His profession is a respectable one, and although there may be members of it in the city where he practices of bad character for integrity, yet a large proportion of them are men of high character," and remarked that if there had been anything tending to lessen his credit it could have been easily shown. *In re Vanderveer*, 20 N. J. Eq. 463, 467.

Speaking of a counselor in good standing who was a witness, the court said: "If such a witness is not entitled to credit, it is difficult to determine whom to believe." *King v. Ruckman*, 20 N. J. Eq. 316, 358.

"A member of the bar whose integrity and candor are beyond suspicion." *Rice's Estate*, 173 Pa. St. 298, 33 Atl. 1100. And see *Lamb v. Irwin*, 69 Pa. St. 436 (judge as a witness).

**68.** *Fidelity Mut. L. Assn. v. Jeffords*, 107 Fed. 402, 412, 46 C. C. A. 377; *Little v. McKeon*, 1 Sandf. (3 N. Y. Super.) 607, 609; *O'Donoghue v. Title Guarantee & T. Co.*, 79 Ill. App. 263; *Christy v. Clarke*, 45 Barb. (N. Y.) 529, 547; *Brooke v. Scoggins*, 4 Fed. Cas. No. 1,936; *Derby v. Derby*, 21 N. J. Eq. 36, 48. See *Parkhurst v. McGraw*, 24 Miss. 134, 141. See also article "ATTORNEY AND CLIENT," Vol. II, pp. 151-154.

"An attorney occupying the attitude of both witness and attorney

for his client, subjects his testimony to criticism, if not suspicion." *Ross v. Demoss*, 45 Ill. 447.

In *Edwards v. Edwards*, 63 N. J. Eq. 244, 246, 49 Atl. 819, the court says of the testimony of counsel: "Their testimony must be discounted by the unconscious influence of a desire for victory, which naturally shades the opinions of any witness who is at the same time of counsel in the cause."

**69.** See *Moran's Heirs v. Societe Catholique*, 107 La. 286, 290, 31 So. 658; *In re Vanderveer*, 20 N. J. Eq. 463, 467; *Arnold v. Diggon*, 20 Nova Scotia 303, 307; *Bell v. Hill*, 3 Fed. Cas. No. 1,252.

**70.** "The profession of a preacher does not necessarily invest a man with that purity of morals which renders him more scrupulous in declaring the truth than another man; for it sometimes happens that even the members of that sacred vocation are overpowered by the temptations to vice. That a witness is a preacher ought if proved, to be stated to the jury, that they may judge how far that circumstance entitles his testimony to additional weight; but even then a jury would draw their conclusions from his individual character and its correspondence with his profession, rather than from the profession itself." *Sneed v. Creath*, 8 N. C. (1 Hawks) 309, 312.

**71.** Testimony of clergymen belonging to a wing of the church which the testatrix failed to remember in her will, is to be cautiously weighed. *In re Wingert's Estate*, 199 Pa. St. 427, 431, 49 Atl. 281.

**Clergyman Unfaithful to His Creed.** — "It is notorious that the Catholic Church prohibits marriage

C. SEAMEN. — It is a well-recognized fact that the testimony of sailors as to matters concerning the interests of their ship are very apt to be unreliable and biased because of interest.<sup>72</sup>

D. DETECTIVES. — Testimony given by private detectives,<sup>73</sup> or police officers,<sup>74</sup> is not entitled to implicit confidence, but must be

to her priests. . . . When a priest of that religion, who does not claim to have conscientiously renounced it, but who still professes it, admits that he has married since his ordination, he shows that he has in a grave matter directly affecting his profession and state of life, deliberately violated what he must regard as a most solemn obligation," and it may well be concluded that he holds an oath in light regard. *Muller v. St. Louis Hosp. Assn.*, 5 Mo. App. 390, 401.

72. *The Ceto*, L. R. 14 App. Cas. (Eng.) 670, 683; *The M. M. Chase*, 2 Hask. 270, 17 Fed. Cas. No. 9,684; *The Hortensia*, 2 Hask. 141, 12 Fed. Cas. No. 6,706; *Dooley v. The Neptune's Car*, 7 Fed. Cas. No. 3,997.

"An unvarying experience shows that the testimony of all seafaring men is affected by the supposed interest of the ship they sail on." *The Margaret B. Roper*, 103 Fed. 886.

"That perpetual temptation which assails the virtue of mankind affecting its testimony by consideration of interest, prejudice, loyalty or zeal is nowhere more potent than among those 'who go down to the sea in ships.'" *The Olinde Rodrigues*, 91 Fed. 274, 284.

"The yarn spun by sailors, assuming the solemn dignity of testimony, must always be received with caution, and scrupulously sifted, however carefully woven." *The Armstrong*, 1 Fed. Cas. No. 540.

**No Rule of Law** exists that the testimony of seamen is not entitled to belief. *United States v. Freeman*, 4 Mason 505, 25 Fed. Cas. No. 15,162.

**Rule Limited to Sailors.** — "They are not sea-tramps, here today, and gone tomorrow, but men of substance and permanence, who are responsible for what they say. They are all seamen now living ashore." *The Nith*, 36 Fed. 86, 94.

73. "A man who will deliber-

ately ingratiate himself into the confidence of another for the purpose of betraying that confidence . . . cannot be possessed of a very high sense of honor or of moral obligation. Hence the law looks with suspicion on the testimony of such witnesses." *Heldt v. State*, 20 Neb. 492, 497, 30 N. W. 626, 57 Am. Rep. 835.

"A superserviceable detective is very apt to discover, in his eagerness to illustrate his fidelity to a self-imposed master, what he seeks." *Gorham Mfg. Co. v. Emery-Bird, Thayer Co.*, 92 Fed. 774.

Professional detectives "do not always limit their labors to a mere discovery of the actual facts, but not infrequently, attempt to make a case." *Jewett v. Bowman*, 29 N. J. Eq. 174, 187.

74. *People v. Knapp*, 42 Mich. 267, 3 N. W. 927, 36 Am. Rep. 438; *State v. Miller*, 9 Houst. (Del.) 564, 580; *Pruit v. People*, 5 Neb. 377, 383; *Sandage v. State*, 61 Neb. 240, 85 N. W. 35, 87 Am. St. Rep. 457; *King v. Wong Hoi Long*, 7 Hawaii 748; *United States v. Martin*, 26 Fed. Cas. No. 15,730; *United States v. Montgomery*, 3 Sawy. 544, 26 Fed. Cas. No. 15,800. But see *United States v. Evans*, 25 Fed. Cas. No. 15,061; *Chicago City R. Co. v. Osborne*, 105 Ill. App. 462, 470.

"From the nature of their business and their frequent and constant association with members of the criminal classes, their minds are oftentimes unduly biased and prejudiced against those accused of crime, and in whose arrest they have been instrumental, and their testimony thereby colored against them." *Needham v. People*, 98 Ill. 275.

"We know of no law which subjects the evidence of a detective to other rules than those applied to other witnesses." *State v. Bennett*, 40 S. C. 308, 18 S. E. 886.

weighed with reference to the interest of the witness in the action.<sup>75</sup>

E. OTHER RACES. — a. *Indians*. — The rule that a witness is not to be discredited because he is not a white man or belongs to a foreign race,<sup>76</sup> has been applied to the case of an Indian.<sup>77</sup>

b. *Chinese*. — Chinese<sup>78</sup> and other oriental races,<sup>79</sup> are recognized as having little regard for the obligation of an oath,<sup>80</sup> but their testimony may not be arbitrarily rejected.<sup>81</sup>

c. *Negroes*. — Aside from the weakness due to the ignorance of many witnesses of the negro race,<sup>82</sup> there is said to be no ground

75. See article "DETECTIVES AND INFORMERS," Vol. IV, pp. 626-629.

"However reprehensible it may be as violative of the principle of propriety and morality, the fact that a witness has acted as a detective or decoy, apparently entering into the criminal plan in order to detect and expose it, does not of itself, render his evidence unworthy of belief." *In re Wellcome*, 23 Mont. 450, 59 Pac. 445.

In *People v. Strollo*, 191 N. Y. 42, 68, 83 N. E. 573, the court takes occasion to speak in terms of praise of the work of police officers and detectives.

76. See article "CREDIBILITY," Vol. III, pp. 755-757.

77. "It is a fact that Indians lie, and it is also a fact that white men lie, and some of the most civilized and cultured men are among the greatest liars. The evidence of Indian witnesses is entitled to as much credit and weight as the evidence of white men, and such credibility and weight are determined by the same rules of law." In holding this charge to be correct the court said: "No witness is to be discredited simply on account of his race or color. Every witness whether white, dark, black, or yellow, unless otherwise disqualified by statute, is competent to testify. It may be that an Indian whose religious ideas have not been as fully developed as some white men's may have as keen a perception of the facts which transpired in his presence, and be as able to satisfy a jury of the truth of his statement, as any white man could be; and this may be true notwithstanding the fact that the white man might be able to express his ideas or knowledge of the princi-

ples of the Christian religion, or the nature of an oath, better than the Indian." *Shelp v. United States*, 81 Fed. 694, 26 C. C. A. 570.

78. *Fong Yue Ting v. United States*, 149 U. S. 698, 729; *In re Jew Wong Loy*, 91 Fed. 240; *Wise v. Tong Ong*, 16 Hawaii 457.

79. *Hindus*. — India has been referred to as a country where the religious obligation of an oath is unfortunately little felt and where documents are readily fabricated. *Sootrugun v. Sabitra Dye*, 2 Knapp 287, 12 Eng. Reprint 489.

80. The Chinese Exclusion Case, 130 U. S. 581; 598; *Fong Yue Ting v. United States*, 149 U. S. 698, 730.

**Enslaved People, Generally.** — It is common knowledge, that enslaved peoples, develop an inordinate propensity for lying, and this is characteristic of most oriental nations. This comes largely from their being subject to the caprice and exactions of their masters or superiors, and having no sense of moral responsibility to them they come to regard lying to them as no sin and an habitual disregard of the truth is thus engendered. *United States v. Lee Huen*, 118 Fed. 442, 464.

81. "A court is not at liberty arbitrarily and without reason to reject or discredit the testimony of a witness upon the ground that he is a Chinaman, an Indian, a negro, or a white man. All people without regard to their race, color, creed or country, whether rich or poor, stand equal before the law." *Woey Ho v. United States*, 109 Fed. 888, 48 C. C. A. 705.

82. See *supra*, III, 9, D.

"Like the testimony of the ignorant class of colored witnesses gen-

for refusing to give full weight and credit to their testimony.<sup>83</sup>

d. *Other Foreigners*.—The testimony of witnesses belonging to foreign races is not to be given less weight on that account;<sup>84</sup> indeed that very fact may tend to explain apparent contradictions and uncertainties in their story.<sup>85</sup>

F. *INSANE PERSONS*.—The weight of testimony offered by insane persons will vary with and be measured by the nature and extent of the trouble from which they are suffering.<sup>86</sup>

G. *OPIUM EATERS AND DRUNKARDS*.—Users of opium<sup>87</sup> are

erally, it is obviously more compliant with the wishes of their employers than truthful for the truth's sake." *The Emily A. Foote*, 73 Fed. 508, 512.

83. In *McDaniel v. Monroe*, 63 S. C. 307, 41 S. E. 456, the court charged as follows: "If the truth comes from the lips of a negro you are bound to believe it just as much as if it comes from the lips of a white man."

The principle that the testimony of a white man shall prevail over that of a negro "can never be tolerated in any intelligent and impartial tribunal for the trial of such issues, whether by judge or jury, either avowedly or covertly by the invention of some pretense to disguise the operation of pure prejudice on that subject." *The General Rucker*, 35 Fed. 152.

84. See article "CREDIBILITY," Vol. III, pp. 755-757.

"We cannot judicially affirm of any race of people of whatever color, as St. Paul did of the Cretans, that they were 'always liars.'" *Fonville v. State*, 91 Ala. 39, 8 So. 688.

"The credibility of a witness is not to be tested by the color of the witness or by the race to which he belongs." *McDaniel v. Monroe*, 63 S. C. 307, 312, 41 S. E. 456.

85. A witness who was a Russian who was spoken of as "puzzle-headed; did not see things in the true perspective, and her story is told with incoherence, possibly arising from the poverty of her language." *White v. St. Louis & M. R. Co.*, 202 Mo. 539, 550, 101 S. W. 14.

"Where a witness speaks a foreign language, the fact that he does not express his meaning clearly is no

reason for discrediting his testimony." *Pickrell v. Kunst*, 15 Ill. App. 461.

"The testimony of foreigners and of others who are brought from a distance to the place of trial requires to be scrutinized with more than common caution. The tribunal before whom they speak knows little of them, and they care little for it, and may have no respect for the laws of the country in which they are giving evidence." *United States v. Lee Huen*, 118 Fed. 442, 463.

86. Jury may act upon the testimony of an insane person, in the absence of testimony that his mind is so diseased that no reliance can be placed upon it. *Reg. v. Hill*, 15 Jur. (Eng.) 470. And see *District of Columbia v. Armes*, 107 U. S. 519.

**Testimony Received With Caution.** Statements made by an insane person "must be received with caution; and they must be corroborated by, or be construed with, the other evidence of the facts in question." *Durham v. Durham*, 10 P. D. (Eng.) 80, 87.

**Testimony as to Facts Occurring During Temporary Derangement.** "Great doubt must necessarily attach itself to the evidence of persons who having recovered from a state of insanity seek to testify to facts occurring during its existence." *Sarbach v. Jones*, 20 Kan. 497.

87. *Dawson v. Dawson*, 23 Mo. App. 169, 173.

"The fact that the plaintiff has for many years been addicted to the use of opium detracts largely from her testimony." *Miller v. Miller*, 43 Iowa 325, 329.

In *State v. King*, 88 Minn. 175, 180, 92 N. W. 965, the court re-



held to make unreliable witnesses, and the same rule is applied to habitual drunkards.<sup>88</sup>

H. CRIMINALS. — The weight of testimony coming from criminals or persons who have ever been convicted of crime, is seriously affected by this circumstance.<sup>89</sup>

9. Qualities of Witnesses. — A. AGE. — a. *Children*. — (1.) In General. — The evidence of children of tender years is usually considered not to be of great weight,<sup>90</sup> but it is, of course, entitled to

fused to allow proof that a witness was a confirmed opium eater, and that the use of opium renders the user unreliable in his statements, on the ground that that would be entering into collateral issues.

88. See "CREDIBILITY," Vol. III, pp. 755-757, "Entyc. of Ev., 1908 Supp.," pp. 360, 361.

89. *Atherton v. British Am. Assur. Co.*, 91 Me. 289, 39 Atl. 1006; *People v. Shea*, 147 N. Y. 78, 96, 41 N. E. 505; *People v. Tuczkewitz*, 149 N. Y. 240, 251, 43 N. E. 548; *Leonard v. Pope*, 27 Mich. 145, 146 ("very likely a man who steals may lie also"); *Chicago & A. R. Co. v. Pratt*, 14 Ill. App. 346, 349 ("the evidence of this witness is somewhat weakened by the fact that he had been convicted of an infamous crime"); *Lamoureux v. New York, etc. R. Co.*, 169 Mass. 338, 47 N. E. 1009.

"It seems clear that evidence tending to establish the plaintiff's guilt of the crime of larceny, . . . was as effectual an attack upon his character for truth as any other impeaching evidence would be. If it be true that he is a man so devoid of honesty and integrity as to be guilty of such offenses, it needs no argument to show that evidence coming from him comes from a polluted source, and is not to be relied upon. The only security for its truth is the chance, in the mind of the witness, of detection and punishment in case he swears falsely. It is bereft of the highest sanction and greatest safeguard, a good conscience and an honest purpose." *Tedens v. Schumers*, 14 Ill. App. 607, 614.

"It cannot be doubted that a previous criminal experience will depreciate the credit of a witness to

a greater or less extent, in the judgment of all persons." *Wilbur v. Flood*, 16 Mich. 40.

**Presumption as to Change in Moral Conditions.** — The testimony of a former criminal is weighed with caution, and there "is a strong presumption against any sudden change in the moral, as well as the mental and social condition of men." *People v. Haynes*, 55 Barb. (N. Y.) 450, 460.

**Effect of Subsequent Pardon.** "It being proven that the master of the McNair has been convicted of an infamous crime, he is not a witness entitled to full credit," and a subsequent pardon does not restore it. *Wallamet R. T. Co. v. Oregon S. N. Co.*, 29 Fed. Cas. No. 17,106.

**Counterfeiter.** — On cross-examination it may be shown that a witness follows a nefarious occupation such as counterfeiting. *People v. Giblin*, 115 N. Y. 196, 21 N. E. 1062, 4 L. R. A. 757.

**Violation of Municipal Ordinance** as to speed limit for automobiles, may not be shown to impeach a witness by showing him to be of bad character and a criminal. See *v. Wormser*, 129 App. Div. 596, 113 N. Y. Supp. 1093.

90. See *Von Salvellergh v. Green Bay Tr. Co.*, 132 Wis. 166, 111 N. W. 1120; *State v. Whittier*, 21 Me. 341.

"The testimony of any child, however truth-loving, should be sifted with care, mindful that it is but natural that it may not comprehend as if an adult, the duty and limitations of a witness speaking of facts." *People v. Donohue*, 114 App. Div. 830, 100 N. Y. Supp. 202.

"An inexperienced youth, a person of weak mind, great age or infirm health . . . will fail to

such weight and credit as the jury may see fit to accord to it.<sup>91</sup>

(2.) **Elements of Weakness.**—Young children have not the intelligence and ability to enable them to correctly describe what they have seen and heard,<sup>92</sup> and in addition to this they are peculiarly susceptible to influence by their surroundings,<sup>93</sup> and their testimony is likely to have been prompted by what they have heard others say rather than by what they observed themselves.<sup>94</sup> For

carry conviction to the mind against the statements of witnesses of opposite qualities and higher capacity." *Whitaker v. Parker*, 42 Iowa 585.

The credit of a witness eight years old, "which is greatly impaired by his age," is to be judged of by the jury from the manner of his testifying and other circumstances. *Com. v. Hutchinson*, 10 Mass. 225.

Testimony of a child will not overcome positive declarations of a party, and the probabilities of the case. *Graham v. Graham*, 50 N. J. Eq. 701, 25 Atl. 358.

In *People v. DeGarmo*, 73 App. Div. 46, 76 N. Y. Supp. 477, the court on appeal took notice of the immature years of the chief witness as being a fact to be considered in weighing the evidence.

**Admissions of a Child.**—In *Chicago City R. Co. v. Tuohy*, 95 Ill. App. 314, slight weight was attached to admissions of plaintiff, a boy of six years, as to the circumstances under which he lost his leg by being run over by a street car. "Any boy would be likely to make some general answer to such questions, and but few boys of appellee's age would take the trouble to state the details with fullness or accuracy."

And see *Atchison T. & S. F. R. Co. v. Potter*, 60 Kan. 808, 58 Pac. 471, 72 Am. St. Rep. 385; *Chicago City R. Co. v. Tuohy*, 196 Ill. 410, 63 N. E. 997; *State v. Aaron*, 4 N. J. L. 263, 280 (confession).

**Unnatural or Improbable story** should not be believed where the witness was a child of tender years. *State v. McMillan*, 20 Mont. 407, 51 Pac. 827.

91. See article **INFANTS**, Vol. VII, p. 282.

92. Children "do not have that degree of intelligence which is nec-

essary to inspire confidence in the credibility of their evidence, as a basis for determining conflicting claims in a court of justice. They are too susceptible to surrounding influences. The diversity of opinion as to the age at which a child may become a competent witness shows how small the difference is between the value of the evidence of a child of four and nine, and to how little credit the testimony of children under nine is entitled." *In re Sheehan's Estate*, 139 Pa. St. 168, 20 Atl. 1003, 1007.

See *infra*, III, 9, D.

93. See *Shannon v. Swanson*, 104 Ill. App. 465, 475; *Masonic F. T. Assn. v. Collins*, 110 Ill. App. 504.

Fact that a child came from custody of one of the parties important. *Hays v. Hays*, 75 Neb. 728, 106 N. W. 773. See *Pedrick v. Pedrick* (N. J. Eq.), 3 Atl. 406.

**Fear of Parental Punishment.** "I do not attach much importance to the fact that she reiterated the story under oath. If the story was a falsehood, and she was always punished by her parents for her lies, it was more childlike to adhere to her falsehood from fear of parental punishment than to confess it in order to avert divine wrath." *People v. Donohue*, 114 App. Div. 830, 100 N. Y. Supp. 202.

**Reason Especially Strong in Divorce Cases.**—Where in a divorce case, the testimony of children was taken to support the case of the mother, attention was called to the fact that they were separated from the father and under the control of the mother. *C— v. C—*, 28 Eng. L. & Eq. Cas. 603, 608; *Blake v. Blake*, 70 Ill. 618.

94. "Courts must hesitate to rely upon the testimony of a child of such extreme youth and upon his

these reasons their memory is not to be relied upon to any great extent.<sup>95</sup>

(3.) **Elements of Strength.**—On the other hand, there is little danger of a child's story being wilfully false,<sup>96</sup> though it is likely to be exaggerated,<sup>97</sup> and inaccuracies in it will nearly always be disclosed by cross-examination.<sup>98</sup>

(4.) **In Divorce Cases.**—In divorce proceedings especially, courts are loathe to act upon testimony of children, both because of the

ability to distinguish between facts known to him and his recollection of what others in whom he confides have told him or said in his hearing, and also upon his ability to remember facts for so long a time after the event." *Shannon v. Swanson*, 104 Ill. App. 465, 475 (boy seven years old at time of trial and five when the events occurred).

Where it appeared that the mother of a boy of nine years had talked over the matter with him the day before the trial, it was proper for the court to call the attention of the jury to the youth of the witness and to the "extreme liability of a child to repeat what he has heard, if he has been talked to about a matter of that kind." *Banks v. Connecticut R. & L. Co.*, 79 Conn. 116, 64 Atl. 14.

The affidavit of a boy of fourteen was full of dates and other details and the court remarked: "He states particulars evidently not from recollection, but which have been impressed upon his mind from conversations with others." *Parker v. Parker*, 12 N. J. Eq. 105.

<sup>95.</sup> *Shannon v. Swanson*, 104 Ill. App. 465; *Goering v. Outhouse*, 95 Ill. 346; *Hankinson v. Hankinson*, 33 N. J. Eq. 66, 71. But compare *Conklin v. Conklin*, 17 Abb. Prac. (N. Y.) 20 (note).

In speaking of the testimony of a child, the court said: "I cannot believe that his statements are corruptly false, but I think it is highly probable that his memory under the artful and positive statements of his father, has been so wrought upon as to have unconsciously substituted the occurrences of a prior visit for those of the last." *Gibbons v. Potter*, 30 N. J. Eq. 204, 211.

<sup>96.</sup> See *Gibbons v. Potter*, 30 N. J. Eq. 204, 211.

The witness "was a youth of unusual timidity, who appeared to give evidence in court, for the first time in his life; and although he was kept on the stand an uncommon length of time and cross-examined by counsel till he fainted away, he still, as with his dying breath, adhered to this statement." *Den ex dem. Mickle v. Matlack*, 17 N. J. L. 86, 110.

In *Gibbons v. Potter*, 30 N. J. Eq. 204, 211, the court speaks of the "natural inclination of the mind to give credit to the testimony of children."

"A child may not be able to understand the nature of an oath, and yet be capable of telling what he saw and heard on a particular occasion with entire accuracy. . . . The old saying that 'fools and children always tell the truth' rests on the common observation that while such persons can tell what they saw and heard, they cannot invent a story and stick to it when closely questioned."

<sup>97.</sup> In *People v. Donohue*, 114 App. Div. 830, 100 N. Y. Supp. 202, the court calls attention to the exaggerations and embellishments that are common to the statements of children as witnesses, and refers to the fact that they will go on adding to their stories in order to explain away inconsistencies.

<sup>98.</sup> "There is of course some danger that a child of tender years may be influenced to tell what is not true. But the inability of such an inexperienced boy to keep up a consistent false story through the various questionings of a trial is a pretty safe guard against any great danger on that head. He is far more

incorrect notions which the children may have of the acts in question, the nature of which they are too young to understand,<sup>99</sup> and because of a natural desire not to drag them into the proceedings.<sup>1</sup>

(5.) **Contradictions.** — Contradictions in the testimony of children are to be expected,<sup>2</sup> and are even regarded as tending to strengthen it.<sup>3</sup>

b. *Elderly Witnesses.* — After the prime of life has passed,<sup>4</sup> and as old age approaches, the faculties of the human mind are affected, and it becomes unsafe to rely upon the testimony of such a witness.<sup>5</sup> The memory is usually the first faculty to be affected,<sup>6</sup> and recent events are the first to be forgotten.<sup>7</sup>

likely to answer wrongly from not fully understanding questions put to him than from deliberate falsehood." *McGuire v. People*, 44 Mich. 286, 6 N. W. 669, 38 Am. Rep. 265.

99. "The evidence of such children to acts which will naturally be construed by their prepossessions and immature and incorrect notions, is of very slight value, even when honestly called out and given, and is easily shaped and perverted if a dishonest father shall be so inclined. We shall not grant a divorce upon such evidence unsupported." *Crownier v. Crownier*, 44 Mich. 180, 6 N. W. 198, 38 Am. Rep. 245 (children twelve years old).

1. "We think it exceedingly unsafe to grant a divorce on the testimony of such children, and are not disposed to encourage a practice of such evil tendency as the calling of them as witnesses against their mother for such a purpose, and at such an age." *Kneale v. Kneale*, 28 Mich. 344.

2. *Barnard v. State*, 88 Wis. 656, 60 N. W. 1058; *State v. Gordon*, 199 Mo. 561, 574, 98 S. W. 39; *Mathis v. State*, 18 Ga. 343.

Contradictory testimony of a little boy may be "accounted for by the inexperience of a child, and the sharp fire of cross-examination to which he was subjected." *Mathis v. State*, 18 Ga. 343.

A child of six years contradicted herself to a certain extent. The court said: "It is not very much to be wondered at that a child less than six years of age should testify as the one in question did, under the circumstances, intending to relate just what happened." *Van Salv-*

*lergh v. Green Bay Tr. Co.*, 132 Wis. 166, 111 N. W. 1120.

3. *Beck v. People*, 115 Ill. App. 19.

4. The witness "is in the prime of life, of sound mind and memory, and therefore, likely to remember the important details of a business in which he has been engaged for over twenty years." *National Casket Co. v. Stols*, 157 Fed. 392, 85 C. C. A. 300.

5. *Waterhouse v. Lee*, 10 Grant Ch. (U. C.) 176, 188; *Harris v. Frank*, 81 Cal. 280, 285, 22 Pac. 856.

"He is now an aged man and from forgetfulness, interest or other cause, his testimony is unreliable." *Brown v. Mutual Ben. L. Ins. Co.*, 32 N. J. Eq. 809.

"Considering her age and ignorance, if she had attempted to give her recollection of her dealings with the defendant, it is not probable her evidence would have been entitled to much consideration or weight." *Lyons v. Van Riper*, 26 N. J. Eq. 337, 344.

6. See *Williams v. Champion*, 39 N. J. Eq. 350; *Kent v. Lasley*, 24 Wis. 654; *Sutton v. Sutton*, 5 Har. (Del.) 459.

"The memory is the first faculty to wane in the progress of age. Its acquisitive power fails more than its retentive. Its weakness is shown not so much in forgetting old, as in not holding recent facts." *Bleecker v. Lynch*, 1 Bradf. (N. Y.) 458, 466.

7. *Boylan v. Meeker*, 28 N. J. L. 274, 426; *McClaskey v. Barr*, 54 Fed. 781; *In re American Board*, 102 Me. 72, 66 Atl. 215, 224; *In re Ames' Will*, 40 Or. 495, 504, 67 Pac.

**B. SEX.**—There is no judicial sanction for a rule of law which would give less weight to the testimony of women than to the testimony of men,<sup>8</sup> although the superior reasoning power of men has been noticed;<sup>9</sup> and women are more affected and embarrassed by the novelty of their situation as witnesses.<sup>10</sup>

**Memory of a Woman** as to the events surrounding her marriage seldom fails.<sup>11</sup>

**C. MORAL CHARACTER.**—*a. In General.*—It is well established that the veracity of a witness is not necessarily dependent upon his good moral character,<sup>12</sup> but in many jurisdictions proof of bad

737; *Clark v. Fisher*, 1 Paige (N. Y.) 171.

"His memory became unretentive of recent occurrences, and, as usually happens in such cases, his mind was constantly recurring to the incidents of early life. It is one of the compensations of age, that when current events cease to imprint themselves upon the memory, those of former years are often reproduced with the freshness of first impression and become the leading topics of reflection and conversation." *Clapp v. Fullerton*, 34 N. Y. 190, 198.

"The testatrix in the latter part of her life, gave evidence of the usual concomitant of age (the absence of which would be surprising) a loss of memory as to recent occurrences." *Eddy's Case*, 32 N. J. Eq. 701.

Although the tendency is for aged people to forget recent transactions, where they take especial interest in a recent event, and profess to remember it, the confidence due them is not to be diminished on account of their age. *Bentley v. Phelps*, 2 Woodb. & M. 426, 3 Fed. Cas. No. 1,331.

8. "In my experience, women are as reliable witnesses as men, and often give better testimony on some points." *Napier v. Ferguson*, 18 N. Bruns. 415, 430.

"There was one witness in this case whose testimony was, to my mind, a gem. Every word that fell from that woman's lips I believe was golden truth." *In re Kiedaisch's Will*, 13 N. Y. Supp. 255, 260.

Evidence of a woman was believed rather than that of a man on points in issue. *Clark v. Clark*, 52 N. J. Eq. 650, 30 Atl. 81.

9. "The testimony of women is weighed with caution and allowances made for them differently from that of men, but never with the slightest suspicion that they are not as truthful," referring to the superior reasoning power in men and the greater instinct in women. *Gaines v. Relf*, 12 How. (U. S.) 472, 557.

10. *Thayer v. Hart*, 20 Fed. 693.

Contradictions in a woman's testimony was explained by the court as being probably due to "the confusion common to her sex in the unusual position of a witness in court." *Carson's Appeal*, 59 Pa. St. 493, 504.

11. "A woman is not likely to forget when and where she was married, whether according to the forms of law or otherwise." *Holmes v. Holmes*, 1 Sawy. 99, 12 Fed. Cas. No. 6,638.

"Singular" that a woman should forget the town where she was married." *Harter v. People*, 204 Ill. 158, 68 N. E. 447. And see *Harrer v. Wallner*, 80 Ill. 197.

12. *Tedens v. Schumers*, 112 Ill. 263, 267; *Boon v. Weathered's Admr.*, 23 Tex. 675, 684.

"All experience shows that the general characters of many men are bad, in the common acceptation of the word, while their veracity is unimpeachable. Indeed, most men term that man's general character bad, who has some one cardinal vice, although in other respects he may be irreproachable." *Gilbert v. Sheldon*, 13 Barb. (N. Y.) 623, 626.

"With many, telling the truth is a habit and a principle which they adhere to always, though they may indulge in drinking, swearing,

moral character is allowed to be made,<sup>13</sup> and will seriously affect the weight given to the witness's testimony.<sup>14</sup>

b. *Prostitutes*. — The testimony of unchaste women,<sup>15</sup> or of admitted prostitutes, while competent,<sup>16</sup> is usually regarded with

gambling, roystering, or making close bargains. With others lying is the habit or principle, and if elevated to be senators, or legislators, or made church members or deacons, it does not always reform them." *Atwood v. Impson*, 20 N. J. Eq. 150, 157.

"A man may indulge in many vices to such an extent as to destroy his general character, yet his truthfulness and veracity may be absolutely unimpeachable." *Holton v. Davis*, 108 Fed. 138, 168, 47 C. C. A. 246.

13. See article "CHARACTER," Vol. III, pp. 23-25.

14. *People v. Rector*, 19 Wend. (N. Y.) 569, 586, 613; *Shepard v. Parker*, 36 N. Y. 517; *Wright v. Paige*, 36 Barb. (N. Y.) 438, 446; *State v. Smith*, 7 Vt. 141, 143.

"Vicious habits of whatever kind, sear the conscience, and prepare those who practice them for the easy utterance of falsehood." *People v. Blakeley*, 4 Park. Crim. (N. Y.) 176, 182.

Where witnesses admitted their own immoral habits, the courts said: "It is fit that courts should scrutinize such with great caution. It is just to refuse credit to them where important interests are at stake, and they stand contradicted by other testimony. . . . Witnesses who interlard their testimony with statements such as are found in this record, but photograph their own ideas of conscience, of right, and of truth." *Waddingham v. Waddingham*, 21 Mo. App. 609, 621.

"Men and women whose lives indicate an abandonment, or lack of moral principles, and show them to be lewd and debased characters, void of shame or decency, have not usually a great respect for the truth, or the sanctity of an oath." *Osborne v. Seligman*, 39 Misc. 811, 81 N. Y. Supp. 346.

The testimony was "subject to the discredit which attaches to a person

engaged in a scheme to defraud his creditors." *Munoz v. Wilson*, 111 N. Y. 295, 18 N. E. 855.

"Another reason for discrediting him is his own disclosure of an act which exhibits moral turpitude in himself, especially such an act as falls under the denomination of *crimin falsi*." *McDaniel v. Walker*, 29 Ga. 266.

**Knowledge of Past History** of a witness is very desirable to enable the jury to determine the weight his testimony is entitled to. *Wilbur v. Flood*, 16 Mich. 40.

15. See *People v. Mills*, 94 Mich. 630, 637, 54 N. W. 488. And see article "CHARACTER," Vol. III, pp. 25, 26.

"If a female witness admits herself to have broken down those barriers which the virtue and religion of every civilized country have reared for her improvement and protection, her oath would be of little value before a jury of intelligent men." *Shepard v. Parker*, 36 N. Y. 517.

Want of chastity is not of itself enough to destroy a witness' credibility. *State v. Larkin*, 11 Nev. 314, 330.

**Compare Weight of Testimony of Impure Men and Women.** — "It must not be forgotten that as the world goes and is, the sin of incontinence in a man is compatible with the virtue of veracity, while in the case of a woman, common opinion is otherwise. Nor is it intended by this suggestion to palliate or excuse the want of chastity in the one sex more than the other, but only in estimating the relative value of the oath of these parties, to give the proper weight to the fact founded on common experience, that incontinence in a man does not usually imply the moral degradation and insensibility that it does in a woman." *Sharon v. Hill*, 26 Fed. 337, 360.

16. Evidence of a prostitute is competent, "however much the fact

suspicion,<sup>17</sup> especially in divorce cases,<sup>18</sup> and a like suspicion attaches to the testimony of the proprietor of a brothel<sup>19</sup> and the servants employed there.<sup>20</sup>

D. INTELLIGENCE. — One of the fundamental elements to be considered in weighing testimony is the intelligence or ignorance of the witness,<sup>21</sup> though it is manifest that the nature of the point

shown may have affected her credibility." *State v. Hill*, 45 Wash. 694, 89 Pac. 160.

17. *State v. Smith*, 7 Vt. 141; *Sutcliffe v. Traveling Men's Assn.*, 119 Iowa 220, 223, 93 N. W. 90, 97 Am. St. Rep. 298.

"The experience of courts warns them to scan with caution and view with suspicion the testimony of abandoned women. As a class, their testimony is peculiarly and especially unreliable." *Bailus v. State*, 16 Ohio C. C. 226, 239.

18. *Mott v. Mott*, 3 App. Div. 532, 38 N. Y. Supp. 261.

"We agree with the learned judges of the General Term in their low estimate of the value in divorce cases of the evidence of prostitutes and private detectives." *Moller v. Moller*, 115 N. Y. 466, 22 N. E. 169.

Where the charge in a divorce case was adultery, the court said "the female belongs to the lowest grade of prostitutes," and her evidence was to be "received with distrust and weighed with caution." *Adams v. Adams*, 17 N. J. Eq. 324.

"All of the petitioner's witnesses, who give evidence tending to prove that his wife is an adulteress, are persons of questionable character; they either lead lewd lives or engage in unlawful practices; they belong to the class of persons whom it is possible to corrupt, and the testimony of every one of them is, in some one or more material respects, improbable and unnatural." *Fuller v. Fuller*, 41 N. J. Eq. 460, 5 Atl. 725.

Rule that the evidence of prostitutes in divorce actions should receive some corroboration is not a rule of evidence, but one for the guidance of the judicial conscience. *Winston v. Winston*, 165 N. Y. 553, 59 N. E. 273.

19. *Mott v. Mott*, 3 App. Div. 532, 38 N. Y. Supp. 261, 264.

20. *Platt v. Platt*, 5 Daly (N. Y.) 295. And see *Wagoner v. Wagoner* (Md.), 10 Atl. 221.

21. *Canada*. — *Brouse v. Stayner*, 16 Grant Ch. 553, 558.

*United States*. — *In re Leslie*, 119 Fed. 406, 411; *Universal Winding Co. v. Willimantic Linen Co.*, 82 Fed. 228, 236; *The Rhode Island*, 20 Fed. Cas. No. 11,745, p. 651 ("Mr. Schuyler, a most intelligent witness"); *Shelp v. United States*, 81 Fed. 694, 26 C. C. A. 570.

*Illinois*. — *Shevalier v. Seager*, 121 Ill. 564, 13 N. E. 499; *Chicago, etc. R. Co. v. Dickson*, 63 Ill. 151; *Manufacturers' Fuel Co. v. White*, 228 Ill. 187, 81 N. E. 841; *First Nat. Bank v. Myers*, 83 Ill. 507.

*Indiana*. — *Stephenson v. Arnold*, 89 Ind. 426.

*Iowa*. — *Madden v. Coal Co.*, 133 Iowa 699, 111 N. W. 57; *Whitaker v. Parker*, 42 Iowa 585.

*Maine*. — *Grant v. Bradstreet*, 87 Me. 583, 603, 33 Atl. 165.

*Michigan*. — *Wilcox v. Hill*, 11 Mich. 256, 261.

*New Hampshire*. — *Eames v. Eames*, 41 N. H. 177, 179.

*New Jersey*. — *Midmer v. Midmer's Exrs.*, 26 N. J. Eq. 299, 306; *Fluck v. Rea*, 51 N. J. Eq. 233, 27 Atl. 636.

*New York*. — *People v. Rector*, 19 Wend. 569, 610; *Cornwell v. Riker*, 2 Dem. 354, 372; *Ferrie v. Public Admr.*, 4 Bradf. 28, 71.

*Wisconsin*. — *Kent v. Lasley*, 24 Wis. 654.

"From time immemorial, in general, statements to jurors as to the things which they may take into consideration in determining what witnesses are the more credible, apparent intelligence or lack of intelligence has been one of the things frequently mentioned." *North Chicago St. R. Co. v. Wellner*, 105 Ill. App. 652, 655.

A witness appeared to be a man

in issue will have a considerable bearing upon the question.<sup>22</sup>

**E. IRRESPONSIBILITY.**—More weight is accorded to the testimony of witnesses who occupy respectable and responsible positions in society,<sup>23</sup> at least when their own interests are not at

of very little mentality, and the court observed: "That, of course, does not justify even the intimation that he does not tell the truth, but it does justify the court in saying that his evidence should not be alone accepted against the testimony of many others." *Griffin v. Jersey City*, etc. R. Co., 73 N. J. L. 389, 393, 63 Atl. 863.

"The testimony of a single, honest, intelligent witness respecting a matter of judgment, is entitled to more weight and credit than the testimony of many ignorant or unscrupulous witnesses." *Shevalier v. Seager*, 121 Ill. 564, 13 N. E. 499.

**Reasons for Distrust.**—"It is further to be observed that witnesses, and particularly ignorant and illiterate witnesses, must always be liable to give imperfect or erroneous evidence, even when orally examined in open court. The novelty of the situation, the agitation and hurry which accompany it, the cajolery or intimidation to which the witness may be subjected, the want of questions calculated to excite those recollections which might clear up every difficulty, and the confusion occasioned by cross-examination as it is too often conducted, may give rise to important errors and omissions." *Johnston v. Todd*, 5 Beav. (Eng.) 597.

**Liability to Influence.**—Ignorant persons are usually "in a situation in society peculiarly liable to influence from others." *Bernard v. Ashley*, *Hempst.* 665, 3 Fed. Cas. No. 1,346.

**22.** A negro witness testified that he was 117 years old, but his credibility was held not to be affected. "It is to be remembered that they are old slaves, who knew but little about dates, time, or numbers, but who can remember events with accuracy." *Davis v. Meaux*, 15 Ky. L. Rep. 308, 22 S. W. 324.

**In Patent Cases** more than common intelligence would seem to be

necessary in a witness to call for belief in him on many technical issues. *New York Grape Sugar Co. v. American Sugar Co.*, 35 Fed. 212, 216.

**Principle Not to be Abused.**—Reliance on differences of intelligence and moral stamina in witnesses must never be used as a cloak to cover an appeal to race prejudice. *The General Rucker*, 35 Fed. 152.

**23.** *Latham v. Latham*, 30 Gratt. (Va.) 307, 315 (social position to be considered).

"And it must also be remembered that the plaintiff is a person of long standing and commanding position in this community, of large fortune and manifold business and social relations, and is therefore so far, and by all that these imply, specially bound to speak the truth, and responsible for the correctness of his statements; and all this, over and beyond the moral obligation arising from the divine injunction not to bear false witness, or the fear of the penalty attached by human law to the crime of perjury. On the other hand, the defendant is a comparatively obscure and unimportant person, without property or position in the world. . . . And by this nothing more is meant than that while a poor and obscure person may be naturally and at heart as truthful as a rich and prominent one, and even more so, nevertheless, other things being equal, property and position are in themselves some certain guaranty of truth in their possessor, for the reason, if none other, that he is thereby rendered more liable and vulnerable to attack on account of any public moral delinquency, and has more to lose if found or thought guilty thereof than one wholly wanting in those particulars." *Sharon v. Hill*, 26 Fed. 337, 361.

**Agents and Peddlers.**—In *Davis Sew. Mach. Co. v. Dunbar*, 29 W. Va. 617, 623, 2 S. E. 91, the court



stake; than to those who are mere vagabonds and idlers.<sup>24</sup>

**F. FALSEHOOD AND PERJURY.** — a. *In General.* — The use of the maxim "he who speaks falsely on one point will speak falsely upon all" has been deprecated, as the statement in this bold form is inaccurate and misleading.<sup>25</sup> Not only does no such principle exist as a rule of law,<sup>26</sup> but it is notoriously untrue in point of

refused to indorse the facetious remark of counsel to the effect that "in the earlier works on evidence treating of the credibility, character, infamy, and general truthfulness of witnesses, it is true that sewing machine agents, lightning rod and patent right peddlers are not specifically named as *prima facie* unworthy of belief; but it must be remembered, these are avocations of comparatively recent origin and were unknown to and never dreamed of by writers of old standard works on evidence."

24. *McClung v. McClung*, 40 Mich. 493, 498. And see *Wilbur v. Flood*, 16 Mich. 40.

As to Seamen, see *infra*, III, 8, C.

Not one of the witnesses "seems to have been a steady worker at anything other than frequenting saloons and passing his time in such pursuits as are usually followed there." *People v. Shea*, 147 N. Y. 78, 97, 41 N. E. 595.

**Negro Minstrel Credited.** — "It has been suggested to you that the fact that Girard was a negro minstrel ought to discredit his evidence. I know of no rule of law to justify such a proposition. All men, until some reason to the contrary is shown, are presumed in law worthy of belief. The business in which a person is engaged, if it be an honest one, ought not to discredit him, no matter how humble it may be." *Robinson v. Gallier*, 2 Woods 178, 20 Fed. Cas. No. 11,951a, p. 1010.

**Witness a Stranger.** — "If the witness be a total stranger in the community where called and to the party against whom he gives evidence, and such evidence relates to an alleged fact of which several obtainable witnesses may and must know, but as to the existence or non-existence of which no other person gives testimony, this circumstance alone may justify the court

in refusing to find that the alleged fact has been established to its satisfaction." *United States v. Lee Huen*, 118 Fed. 442, 458.

25. *Wigmore on Ev.*, Vol. II, § 1008.

And see *Grand Rapids & I. R. Co. v. Martin*, 41 Mich. 667, 3 N. W. 173, where the court says: "It is well to suggest that while these cautions are very proper cautions, they belong to fact and not to law. So long as juries must determine for themselves what force to give to testimony and are not bound to reject testimony entirely, even though they believe some of it willfully false, such suggestions must be very guarded or they may become erroneous and misleading. Courts are not compelled to dwell upon or enlarge upon them."

26. *Lewis v. Hogdon*, 17 Me. 267.

"There has never been any positive rule of law, which excluded evidence from consideration entirely, on account of the wilful falsehood of a witness as to some portions of his testimony. Such disregard of his oath is enough to justify the belief that the witness is capable of any amount of falsification, and to make it no more than prudent to regard all that he says with strong suspicion, and to place no reliance on his mere statements; but when testimony is once before the jury, the weight and credibility of every portion of it is for them and not for the court to determine." *Knowles v. People*, 15 Mich. 408.

"The maxim '*falsus in uno, falsus in omnibus*' . . . is not a mandatory rule of evidence, but is rather a permissible inference that the jury may or may not draw when convinced that an attempt has been made by a witness to mislead them in some material respect."

fact<sup>27</sup> and invades the province of the jury to determine credibility.<sup>28</sup>

b. *Extent of Principle.* — (1.) **False Witness May Be Disregarded.** Although a few of the earlier cases held that the testimony of a witness wilfully false as to a material matter<sup>29</sup> should be entirely disregarded by the jury,<sup>30</sup> it is now generally held that the jury should be instructed<sup>31</sup> that they may disregard<sup>32</sup> his testimony, but

*Addis v. Rushmore*, 74 N. J. L. 649, 65 Atl. 1036.

A witness who admits that she previously swore falsely upon the particular point is not incompetent, but the jury may disbelieve her. *King v. Teal*, 11 East (Eng.) 307.

27. "The facts which a witness may utter may be many. In relation to each fact, its conformity or disconformity with truth will depend upon the clear amount of the aggregate force of interests acting upon the mind of the witness as to each separate fact. The witness may be exposed to the action of a different class of motives as to the several facts to which his testimony may relate. It is obvious, therefore, that of the testimony of the same witness part may be true and reliable and part false and mendacious." *Parsons v. Huff*, 41 Me. 410.

28. *Terry v. State*, 13 Ind. 70. "When competent evidence is before the jury, the degree of faith to be reposed in it, its effect in producing conviction, cannot be governed by any abstract and inflexible rule." *Com. v. Wood*, 97 Mass. 225.

"It would not be correct in law to say that if the plaintiff as a witness was found to be false in any part of her evidence then the presumption would be that she was false in all. Her credibility as a witness was wholly for the jury before whom she had given her evidence." *Root v. Boston El. R. Co.*, 183 Mass. 418, 67 N. E. 365; *Com. v. Reed*, 162 Mass. 215, 38 N. E. 364.

"The credit due to witnesses is a subject for the jury, and there is no rule which dictates the entire discredit of a witness who varies in his statements, unless the contradiction be satisfactorily explained by himself." *Miller v. Stem*, 12 Pa. St. 383.

29. See article "CREDIBILITY," Vol. III, pp. 777-779.

30. *Kansas.* — *Campbell v. State*, 3 Kan. 486, 496; *Hale v. Rawallie*, 8 Kan. 136, 142; *Gannon v. Stevens*, 13 Kan. 461 (all overruled in *Shellabarger v. Nafus*, 15 Kan. 547, 554).

*Nebraska.* — *Dell v. Oppenheimer*, 9 Neb. 454, 4 N. W. 51 (but see *Titterington v. State*, 75 Neb. 153, 106 N. W. 421).

*New York.* — *People v. Evans*, 40 N. Y. 1; *Dunlop v. Patterson*, 5 Cow. 243 (but see *Dunn v. People*, 29 N. Y. 523).

"What ground of judicial belief can there be left when the party has shown such gross insensibility to the difference between right and wrong, between truth and falsehood?" *The Santissima Trinidad*, 7 Wheat. (U. S.) 283, 339.

In *Stoffer v. State*, 15 Ohio St. 47, 54, the court speaks of the maxim as raising a presumption of law, *juris et de jure*, that such a witness should be deemed wholly unworthy of credit and that partial or fractional credit should not be given.

31. But the court should never pick out the testimony of a particular witness and charge that if his testimony is false to disregard it entirely. *State v. Stout*, 31 Mo. 406. But see *Heddlie v. City Elec. R. Co.*, 112 Mich. 547, 70 N. W. 1096.

Instructions for the plaintiff that jury may disbelieve a false witness is improper where the only witness for the defendant is uncontradicted and his testimony is not improbable. *Louisville, etc. R. Co. v. Tate*, 70 Miss. 348, 12 So. 333.

It has also been held that any instruction in relation to this matter is improper as being upon the weight of evidence. *State v. Musgrave*, 43 W. V. 672, 28 S. E. 813; *State v. Thompson*, 21 W. Va. 741.

32. In California (Code Civ.

need not necessarily do so,<sup>33</sup> but may give it such weight as they deem proper.<sup>34</sup>

(2.) *In Case of Corroboration.*—In some jurisdictions the rule is said to be that the witness' testimony must<sup>35</sup> or may be<sup>36</sup> disre-

Proc. § 2061), Montana (Code Civ. Proc. 1895, § 3390) and Oregon (Code Civ. Proc. 1892, § 845) the statutory provision is to the effect that the testimony is to be "dis-trusted." See *People v. Lon Yeck*, 123 Cal. 246, 55 Pac. 984; *Ex parte Vandiveer*, 4 Cal. App. 650, 88 Pac. 993; *People v. Stevens*, 141 Cal. 488, 75 Pac. 62.

33. *United States.*—*Sibley v. St. Paul F. & M. Ins.*, 9 Biss. 31, 22 Fed. Cas. No. 12,830; *Lee v. Guardian L. Ins. Co.*, 15 Fed. Cas. No. 8,190, p. 162.

*California.*—*People v. Sprague*, 53 Cal. 491; *People v. Hicks*, 53 Cal. 354; *People v. Wilder*, 134 Cal. 182, 66 Pac. 228.

*Illinois.*—*Taylor v. Felsing*, 164 Ill. 331, 45 N. E. 161; *Pollard v. People*, 69 Ill. 148, 152; *Dean v. Blackwell*, 18 Ill. 336.

*Kansas.*—*Shellabarger v. Nafus*, 15 Kan. 547 (*overruling Campbell v. State*, 3 Kan. 486; *Higbee v. McMillan*, 18 Kan. 133).

*Maine.*—*Parsons v. Huff*, 41 Me. 410.

*Massachusetts.*—*Com. v. Wood*, 11 Gray 85; *Com. v. Billings*, 97 Mass. 405.

*Michigan.*—*O'Rourke v. O'Rourke*, 43 Mich. 58, 2 N. W. 531; *Fisher v. People*, 20 Mich. 135, 146.

*Missouri.*—*State v. Dwire*, 25 Mo. 553; *State v. Mix*, 15 Mo. 153; *State v. Duffy*, 128 Mo. 549, 558, 31 S. W. 98; *Paulette v. Brown*, 40 Mo. 52.

*New Jersey.*—*Addis v. Rushmore*, 74 N. J. L. 649, 65 Atl. 1036.

*New York.*—*People v. Van Tassel*, 156 N. Y. 561, 51 N. E. 274; *Pease v. Smith*, 61 N. Y. 477; *Deering v. Metcalf*, 74 N. Y. 501.

*North Carolina.*—*State v. Brantley*, 63 N. C. 518; *State v. Williams*, 47 N. C. (2 Jones L.) 257 (*explaining and modifying State v. Jinn*, 12 N. C. (1 Dev. L.) 508).

*Ohio.*—*Mead v. McGraw*, 19

*Ohio St.* 55, 64 (*overruling Stoffer v. State*, 15 *Ohio St.* 47).

*Pennsylvania.*—*Com. v. Ieradi*, 216 Pa. St. 87, 64 Atl. 889.

34. *United States.*—*Sibley v. St. Paul Ins. Co.*, 9 Biss. 31, 22 Fed. Cas. No. 12,830, p. 63.

*Alabama.*—*Alabama G. S. R. Co. v. Frazier*, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28; *Childs v. State*, 76 Ala. 93; *Jordan v. State*, 81 Ala. 20, 1 So. 577; *Lowe v. State*, 88 Ala. 8, 7 So. 97.

*California.*—*People v. Oldham*, 111 Cal. 648, 44 Pac. 312.

*Illinois.*—*Reynolds v. Greenbaum*, 80 Ill. 416; *Pennsylvania Co. v. Conlan*, 101 Ill. 93, 108.

*Kentucky.*—*Letton v. Young*, 2 Met. 558, 565.

*Massachusetts.*—*Hill v. West End St. R. Co.*, 158 Mass. 458, 33 N. E. 582; *Com. v. Wood*, 11 Gray 85; *Com. v. Billings*, 97 Mass. 405.

*New York.*—*Dunn v. People*, 29 N. Y. 523, 529; *Moett v. People*, 85 N. Y. 373.

*Pennsylvania.*—*Com. v. Ieradi*, 216 Pa. St. 87, 64 Atl. 889.

*Wisconsin.*—*Mercer v. Wright*, 3 Wis. 645.

35. "The true rule is that if a witness swear wilfully and knowingly false, his testimony ought to be disregarded entirely unless it is so corroborated by circumstances or other evidence unimpeached as to be irresistible." *Skipper v. State*, 59 Ga. 63; *Pierce v. State*, 53 Ga. 305; *J. Day & Co. v. Crawford*, 13 Ga. 508; *Duncan v. State*, 97 Ga. 180, 25 S. E. 182.

36. *United States.*—*Robinson v. Gallier*, 2 Woods 178, 20 Fed. Cas. No. 11,951a, p. 1010.

*Arizona.*—*Trimble v. Territory*, 71 Pac. 932.

*Idaho.*—*State v. Waln*, 80 Pac. 221.

*Illinois.*—*Blanchard v. Pratt*, 37 Ill. 243; *Meixsell v. Williamson*, 35 Ill. 529; *United Breweries Co. v. O'Donnell*, 221 Ill. 334, 77 N. E. 547;

garded unless and except in so far as it is corroborated by other evidence.<sup>37</sup> In other jurisdictions this qualification is not made.<sup>38</sup>

c. *Time of False Swearing.*—The false swearing need not have been done in the particular trial though that is ordinarily the case. It is sufficient if it were done in a former action relating to the same subject-matter and between the same parties.<sup>39</sup>

Cicero, etc. R. Co. v. Brown, 193 Ill. 274, 61 N. E. 1093; Hoge v. People, 117 Ill. 35, 6 N. E. 796; Bevelot v. Lestrade, 153 Ill. 625, 38 N. E. 1056; Hill v. Montgomery, 184 Ill. 220, 56 N. E. 320; Mantonya v. Reilly, 184 Ill. 183, 192, 56 N. E. 425; Crabtree v. Hagenbaugh, 25 Ill. 214; West Chicago St. R. Co. v. Lieserowitz, 197 Ill. 607, 617, 64 N. E. 718.

Indiana.—Hauk v. State, 148 Ind. 238, 258, 46 N. E. 127, 47 N. E. 465.

Montana.—State v. Fuller, 34 Mont. 12, 85 Pac. 369, 8 L. R. A. (N. S.) 762; State v. De Wolfe, 29 Mont. 415, 74 Pac. 1084; Cameron v. Wentworth, 23 Mont. 70, 57 Pac. 68.

New Mexico.—Faulkner v. Territory, 6 N. M. 464, 30 Pac. 905.

New York.—Silva v. Low, 1 Johns. Cas. 184.

Wisconsin.—Miller v. State, 106 Wis. 156, 81 N. W. 1020; Bratt v. Swift, 99 Wis. 579, 75 N. W. 411; Mercer v. Wright, 3 Wis. 645; Allen v. Murray, 87 Wis. 41, 57 N. W. 979; Patnode v. Westenhaber, 114 Wis. 460, 487, 90 N. W. 467; Morely v. Dunbar, 24 Wis. 183.

"The evidence of a witness who is not credible, if corroborated and is not contrary to reason, ought not to be disregarded." Callanan v. Shaw, 24 Iowa 441.

In Illinois it is error to add to an instruction "unless corroborated by other credible evidence *which they do believe*" (Chicago & A. R. Co. v. Kelly, 210 Ill. 449, 71 N. E. 355; Dunn v. Critchfield, 214 Ill. 292, 73 N. E. 386); also to require corroboration by *competent* instead of *credible* evidence. Weston v. Teufel, 213 Ill. 291, 72 N. E. 908.

37. The corroboration of a false witness need not be by a *witness* but may be by circumstances. Dohmen Co. v. Niagara Fire Ins. Co., 96 Wis. 38, 51, 71 N. W. 69.

**Weight of Testimony of Corroborating Witnesses.**—The fact that one of several witnesses testifying to the same fact is shown to have sworn falsely is no reason, of itself, why the testimony of the others should be disregarded. Taft v. Kyle, 15 Nev. 416. But if there is any evidence of conspiracy or collusion between them the weight of the entire testimony will be affected. Adams v. Adams, 17 N. J. Eq. 324, 326.

38. State v. Sexton, 10 S. D. 127, 72 N. W. 84; Cole v. Lake Shore, etc. R. Co., 95 Mich. 77, 54 N. W. 638 (but see Heddle v. City Elec. R. Co., 112 Mich. 547, 70 N. W. 1096); Sumpter v. State, 45 Fla. 106, 33 So. 981; Gantling v. State, 40 Fla. 237, 247, 23 So. 857; Titterington v. State, 75 Neb. 153, 106 N. W. 421, explaining Denney v. Stout, 59 Neb. 731, 82 N. W. 18.

"If a witness has wilfully sworn falsely, as to a material fact, the jury are at liberty to disregard his entire testimony, notwithstanding he may have been corroborated as to that or any other fact to which he testified." Brown v. Hannibal, etc. R. Co., 66 Mo. 588, 599.

In Nebraska.—Corroborated testimony of false witness must be considered to the extent of determining what weight it is entitled to; it cannot be entirely disregarded. Johnson v. Johnson (Neb.) 115 N. W. 323.

39. People v. Evans, 40 N. Y. 1; Dunlap v. Patterson, 5 Cow. (N. Y.) 243 (here the former action was between different parties but for the same subject-matter); State v. Jim, 12 N. C. (1 Dev. L.) 508; Dunn v. People, 29 N. Y. 523 (previous testimony given before the magistrate); State v. Woody, 47 N. C. (2 Jones' L.) 276; State v. Williams, 47 N. C. (2 Jones' L.) 257.

"The rule gives to the conclusion

d. *Suppression or Exaggeration.*—The same rules apply where the witness has wilfully suppressed<sup>40</sup> or exaggerated the facts in the case.<sup>41</sup>

G. *BIAS, MANNER OF TESTIFYING, ETC.*—The bias,<sup>42</sup> interest,<sup>43</sup> motive<sup>44</sup> and manner of a witness while testifying<sup>45</sup> are all matters affecting his general credibility which are treated elsewhere.

of the jury the effect, and treats it as tantamount to a judicial conviction of perjury, and is put upon the single point,—are the jury satisfied that the witness has committed perjury? If so he is just as unworthy of belief as if he had been judicially convicted of it, without reference to the fact whether the perjury was committed upon a former trial of the issue, or before the committing magistrate or the grand jury, or the jury who are then trying the issue." *State v. Williams*, 47 N. C. (2 Jones' L.) 257.

**Reason for the Rule.**—"There is no difference in principle and should be none in practice, between a person heretofore judicially convicted of perjury and one who stands convicted, before the jury who are trying the issue, of a perjury committed in the case." *State v. Williams*, 47 N. C. (2 Jones' L.) 257.

40. *Lee v. Town of Cresco*, 47 Iowa 499.

"We do not understand how wilful exaggeration is anything but wilful false swearing." *Grand Rapids & I. R. Co. v. Martin*, 41 Mich. 667, 3 N. W. 173.

41. *Chicago City R. Co. v. Bundy*, 210 Ill. 39, 71 N. E. 28; *Heddle v. City Elec. R. Co.*, 112 Mich. 547, 70 N. W. 1096. And see *Chicago City R. Co. v. Allen*, 169 Ill. 287, 48 N. E. 414; *The St. John*, 54 Fed. 1015, 1017, 5 C. C. A. 16.

"Of course, if the court finds that any witness has wilfully or even recklessly sworn to an untruth, it will apply the maxim, *falsus in uno, falsus in omnibus*." *Sharon v. Hill*, 26 Fed. 337.

Testimony of a witness who has made untrue statements is unreliable, and whether the mistakes are due to design or stupidity is unimportant. *The Cambridge*, 2 Hask. 109, 4 Fed. Cas. No. 2,333.

A witness "reckless and extrava-

gant" in his statements cannot be relied upon. *Fluck v. Rea*, 51 N. J. Eq. 233, 27 Atl. 636.

**Exaggerations More Common Than Absolute Falsity.**—"It is probably within the experience of every trial lawyer, and of every judge, that willing witnesses, and even corrupt ones, unless they are phenomenal falsifiers, have a foundation of fact upon which they build their falsifications, and that their fabrications are apt to consist of exaggerations and distortions of the actual facts." *Brown v. Brown*, 63 N. J. Eq. 348, 50 Atl. 608.

42. See articles "BIAS," Vol II; "CREDIBILITY," Vol. III.

43. See article "PARTIES AND PERSONS INTERESTED AS WITNESSES," Vol. IX.

"No doubt there are conscientious witnesses who are made the more cautious by the existence of any ill-will under which they labor." *Skipper v. State*, 59 Ga. 63.

**Hostile Witness Testifying Adversely to His Own Interests.** "Where a hostile witness uses expressions favorable to the side he opposes, a court may properly attach more importance thereto than to the main purport of his narrative." *Fleming v. Howard*, 150 Cal. 28, 87 Pac. 908.

44. See articles "CREDIBILITY," Vol. III, pp. 768, 769; "HOMICIDE," Vol. VI, pp. 612, 613.

**Motive the Test of Testimony.** "The truth or falsehood of testimony depends upon the motives or the balance of motives, acting upon the witness at the time of its utterance. . . . The same motive may lead to truth or to falsehood. However sinister its direction, it may be controlled or overborne by others acting in a contrary direction." *Parsons v. Huff*, 41 Me. 410, 412.

45. See article "CREDIBILITY," Vol. III, p. 766.

H. OBSERVATION. — a. *Importance of Accurate Observation.* Nothing is more important or adds more to the weight of testimony given by a witness than the ability of the witness to impress upon the court or jury the fact that his original observations were true and accurate.<sup>46</sup>

b. *Variation in Witnesses.* — It is a well recognized fact that witnesses vary greatly in their power of accurate observation,<sup>47</sup> and

The importance attached to the appearance of a witness in determining the weight of his testimony is well shown in the opinion of Carver v. Louthain, 38 Ind. 530, where the court quotes from the Institutes of Hindu Law, as follows: "By external signs let him (the judge) see through the thoughts of men,—by their voice, color, countenance, limbs, eyes and action: from the limbs, the look, the motion of the body, the gesticulation, the speech, the changes of the eye and the face, are discovered the internal workings of the mind."

**Presumption of Manner of Testifying.** — "A witness is presumed to testify truly and to demean himself, while on the stand, in a manner to excite no adverse criticism, until the contrary is made to appear; and if counsel wish to strengthen the effect of the testimony of a witness by reference to his demeanor while upon the stand, they should themselves ask the proper instruction. It is no reflection upon the testimony of a witness that no reference is made to his demeanor while upon the stand." Johnson v. People, 140 Ill. 350, 29 N. E. 895, holding that an instruction was not defective for not telling the jury that they were to take the witness' demeanor into consideration.

46. Fox v. McDonogh's Succession, 18 La. Ann. 419, 451.

"The force of all human testimony depends as much upon the ability of the witness to observe the facts correctly as upon his disposition to describe them honestly, and if the mind of the witness is in such a condition that it cannot accurately observe passing events, and if erroneous impressions are thereby made upon the tablet of the memory, his story will make but a feeble impres-

sion upon the hearer, though it be told with the greatest apparent sincerity." Holcomb v. Holcomb, 28 Conn. 177, 181.

"Two things are to be regarded in weighing the testimony of all who testify—the ability of the witness to tell the truth, and his disposition to tell the truth. These do not always go together. The ability to tell the truth as to past transactions, or those events that have transpired, may depend, in the first place, upon the accuracy of the observation, and in the accuracy of the knowledge at the time; then upon the occasion that the party has to keep it in his mind and memory since; and in the tenacity of his memory, is his ability." Hayden v. Suffolk Mfg. Co., 11 Fed. Cas. No. 6,261, p. 904.

"Shall a witness who is in the dark be accorded as much weight as one of equal credit who had the aid of light to see the facts about which he deposes? Shall a blind man who swears he saw, or a deaf man who swears he heard, stand before the jury on an equal footing with a witness, otherwise equally credible, who is in the full possession of all his faculties? Certainly not." Grabill v. Ren, 110 Ill. App. 587.

47. Cunningham v. Burdell, 4 Bradf. (N. Y.) 343, 475.

"It is a matter of common observation that there is a radical difference between average people in power of accurate observation." Charlton v. St. Louis & S. F. R. Co., 200 Mo. 413, 435, 98 S. W. 529.

"The faculty of close observation of objects is largely a gift. Some persons may walk once along a street and be able without any special effort, to describe every prominent object upon and every projection into the street while others might go up and down the same street for a year, who could not describe such objects and projec-

this is so common an occurrence that slight variations are a source of strength rather than weakness to a case.<sup>48</sup>

c. *Opportunity for Observing*. — One of the elemental rules for weighing the testimony of witnesses, based on the principles just mentioned, is that the opportunity of the witness for seeing and knowing the matters as to which he testifies is to be considered,<sup>49</sup> and that the testimony of that witness is to be preferred whose means of observation were the best.<sup>50</sup>

tions." *Rouse v. Ledbetter*, 56 Kan. 384, 352, 43 Pac. 249, *quoted in* *McCabe v. Montana Cent. R. Co.*, 30 Mont. 323, 335, 76 Pac. 701.

"It is rarely that two persons relate alike the same occurrence; and in cases of accidental injury it is not unusual for the person injured correctly to perceive and accurately to remember some of the circumstances and to be unable to give a correct statement of all." *Hill v. West End St. R. Co.*, 158 Mass. 458, 33 N. E. 582.

48. "It is common observation that eye-witnesses to the whole or part of an incident that occurs unexpectedly and is in a considerable degree horrifying in its nature, testify to or otherwise relate what they saw, at considerable variance with one another," and this strengthens rather than weakens their evidence. *Washington Ice Co. v. Bradley*, 70 Ill. App. 313.

"When the vast inherent differences in individuals with respect to natural faculties and acquired habits of accurate observation, faithful recollection, and precise narration" are considered, it is not strange that entire agreement is not found among witnesses. *Queen v. Dowsey*, 6 Nova Scotia (2 Oldright) 93, 123.

49. *United States*. — *Keys v. The Ambassador*, 1 Bond 237, 14 Fed. Cas. No. 7,747; *Taylor v. Harwood*, 1 Taney 437, 23 Fed. Cas. No. 13,794, p. 776; *The Newfoundland*, 89 Fed. 510; *United States v. The Anna*, 24 Fed. Cas. No. 14,457 (a leading rule of evidence).

*Alabama*. — *Hitt v. Rush*, 22 Ala. 563.

*Connecticut*. — *Johnson v. Scribner*, 6 Conn. 185.

*Delaware*. — *Jemnienski v. Lobdell Car Wheel Co.*, 5 Penne. 385,

63 Atl. 935; *Green v. Council of Newark*, 5 Penne. 316, 62 Atl. 792; *Garrett v. People's R. Co.*, 64 Atl. 254.

*Georgia*. — *Jeter v. Haviland*, 24 Ga. 252; *Mathis v. State*, 18 Ga. 343; *Corniff v. Cook*, 95 Ga. 61, 22 S. E. 47, 51 Am. St. Rep. 55.

*Illinois*. — *Chicago & A. R. Co. v. Gretzner*, 46 Ill. 74, 80; *Brady v. Thompson*, 17 Ill. 270; *Meyer v. Mead*, 83 Ill. 19; *Long v. Little*, 119 Ill. 600, 8 N. E. 194.

*Indian Territory*. — *Atoka Coal & M. Co. v. Miller*, 7 Ind. Ter. 104, 104 S. W. 555.

*Iowa*. — *Madden v. Saylor Coal Co.*, 133 Iowa 699, 111 N. W. 57.

*Louisiana*. — *Delafield v. Sherwood*, 15 La. (O. S.) 271.

*Missouri*. — *Schloemer v. St. Louis Transit Co.*, 204 Mo. 99, 112, 102 S. W. 565; *Michel v. Tinsley*, 69 Mo. 442, 446.

*Pennsylvania*. — *Richards v. Willard*, 176 Pa. St. 181, 210, 35 Atl. 114 (setting aside a verdict because testimony of such witnesses was not followed).

*Texas*. — *Coles v. Perry*, 7 Tex. 109, 140.

*Virginia*. — *Rowt's Admx. v. Kile's Admr.*, 1 Leigh 238, 249.

*Wisconsin*. — *Bierbach v. Good-year Rubber Co.*, 54 Wis. 208, 214, 11 N. W. 514, 41 Am. Rep. 19; *Draper v. Baker*, 64 Wis. 450, 21 N. W. 527.

"The opportunity for observation was very brief and far from favorable; it was after dark on a foggy November evening; it is said there was a moon but this was obscured by clouds." *The Ramleh*, 157 Fed. 769.

50. "All things being equal, the witnesses who from their position at the time of the collision, had the best opportunity of seeing the occur-

d. *Matters Affecting*. — (1.) *Observation of Actor*. — Another elemental rule upon this subject is that the observation of the person who took an active part in the occurrence is more likely to be accurate than the observation of other persons,<sup>51</sup> and is more to be relied upon.<sup>52</sup>

rences to which they swear, are more entitled to credit than the relations of those whose opportunity of observation was less favorable." *Barrett v. Williamson*, 4 McLean 589, 2 Fed. Cas. No. 1,051.

The positive, unimpeached testimony of persons who from the very nature of their connection with the transaction are in a position to know the facts, is entitled to greater weight than the testimony of persons who speak only from inference. *Chicago Gen. St. R. Co. v. Capek*, 68 Ill. App. 500, 504.

Where the issue was the alteration of a will, the court said of the testimony of the person who drew the will and saw it executed: "His testimony, where we consider the means of knowledge he possessed upon the subject, ought to outweigh the testimony of a dozen witnesses who speak only from an inspection of the will as it now appears." *Malin v. Malin*, 1 Wend. (N. Y.) 625, 659.

**Persons on Board a Steamer.** "Usually more weight is to be given to the testimony of the witnesses on board of a vessel as to what occurred there than to that of witnesses elsewhere." *In re Rapid Transit Ferry Co.*, 124 Fed. 786, 792. And see *Dunton v. Allan S. S. Co.*, 119 Fed. 590, 55 C. C. A. 541; *The Hortensia*, 2 Hask. 141, 12 Fed. Cas. No. 6,760; *The Hope*, 4 Fed. 89.

**Distance and Standpoint of a witness** from the place of the accident is to be considered. *Chicago & A. R. Co. v. Kemp*, 25 Ill. App. 39; *Paauhau Plantation Co. v. Palapalo*, 127 Fed. 920, 62 C. C. A. 552.

**Witness Present Part of the Time Only.** — Account given by witnesses who were present all the time is weightier than an account given by several witnesses each of whom was present only part of the time. *Stoomvaart Maatschappij Nederland*

*v. Peninsular & O. Nav. Co.*, 5 App. Cas. (Eng.) 876, 897. And see *Delafield v. Sherwood*, 15 La. (O. S.) 271.

**One Eye-Witness** is worth more than ten hearsay witnesses. *Jackson v. Kniffen*, 2 Johns. (N. Y.) 31, 35.

**Rule Not Inflexible.** — Witnesses who have had superior opportunities for knowing the facts are not necessarily to be believed where in other elements of credibility they are inferior. *Gregory v. State*, 80 Ga. 269, 7 S. E. 222.

**51. Canada.** — *Northrup v. Canadian Pac. R. Co.*, 32 N. Bruns. 365, 370 (locomotive engineer).

**United States.** — *The Stephen Decatur*, 108 Fed. 446; *The Startle*, 115 Fed. 555, 563; *The Ottoman*, 74 Fed. 316, 319, 20 C. C. A. 214; *The Milwaukee*, 17 Fed. Cas. No. 9,626, p. 431; *Dunn v. The Young America*, 14 Phil. 532, 8 Fed. Cas. No. 4,178.

**Louisiana.** — *Perez & Betancourt v. New Orleans Mut. Ins. Co.*, 28 La. Ann. 682; *LeBlanc v. Sweet*, 107 La. 355, 366, 31 So. 766, 90 Am. St. Rep. 303.

**Pennsylvania.** — *Holden v. Pennsylvania R. Co.*, 169 Pa. St. 1, 16, 32 Atl. 103.

"But above all in this case take the testimony of the witnesses who were actors in it." *Jameson v. Weld*, 93 Me. 345, 358, 45 Atl. 299.

Testimony of an attorney who drew a deed, that it was a substantial copy of another, is of more weight than testimony based upon conversations stating the contents of the first deed to be different from the first one. *Mason v. Harkins*, 82 Ark. 569, 102 S. W. 228.

**52. Illustrations.** — Where the issue was whether locomotive signals had been given or not, the court said: "The best evidence of the fact in dispute would be the testimony of those persons who on



(2.) **Common Occurrences.**—The observation of common routine events is very likely to be uncertain,<sup>53</sup> and it is not unusual for them to be entirely ignored.<sup>54</sup>

(3.) **Attention of Observer.**—(A.) **IN GENERAL.**—A witness whose attention was attracted to the parties before the event in question

the particular occasion in question, had the custody or management of the bell or whistle." *Greang v. Long Island R. Co.*, 101 N. Y. 419, 5 N. E. 425.

Witnesses who did the work were said to have had the best opportunity of knowing how far the face stone of a wall extended inward, and the court was justified in relying upon their testimony. *Vermont St. Church v. Brose*, 104 Ill. 206.

"The notary, who was most conversant with the facts recited in his certificate, was of all persons the most competent to testify on that subject, whether in support or in impeachment of the verity of its statements" *Mays v. Pryce*, 95 Mo. 603, 612, 8 S. W. 731.

Where the question was whether a passenger in a street car had his arm outside of the window or not at the time he was injured, the court remarked that the passenger ought to know if any one could. *Goorin v. Allegheny Tract Co.*, 179 Pa. St. 327, 36 Atl. 207.

Where there is a quarrel between two persons, one of the participants is more likely to notice whether his adversary is armed with a pistol than a mere bystander. *Fitzgerald v. State*, 12 Ga. 213.

"The rule so often applied to testimony in regard to the apparent movement of vessels in the water is clearly applicable here, namely, that a vessel's own witnesses as to her movements must be credited rather than the testimony as to her apparent changes, given by those on board another vessel, unless the testimony of the former is in some way discredited, inconsistent, or improbable." *The Cambusdoon*, 30 Fed. 704, 708.

**In Admiralty—Collision Cases,** the rule is often applied. See article "ADMIRALTY." Vol I, pp. 334, 335.

<sup>53.</sup> *Louisville & N. R. Co. v.*

*Deason*, 29 Ky. L. Rep. 1259, 96 S. W. 1115.

"It is probably within the knowledge of every reflecting person that familiar sounds within his hearing often fail to be noticed by him at all, where the circumstances are such that he has no occasion to notice them. The striking of a clock, and the customary railway signals are familiar illustrations; the sound strikes the ear without securing mental attention and immediately afterwards the person cannot say he heard it at all. If one under such circumstances swears that there was no sound, because if there had been he would have heard it, he testifies very carelessly unless, indeed, he had his mind on the signal at the time and was awaiting it. . . . A careful and conscientious witness is not likely to give such testimony." *Marcott v. Marquette, etc. R. Co.*, 49 Mich. 99, 13 N. W. 374.

"People sit for hours in their own quiet homes without hearing the clock strike. Few of the dwellers in the larger cities hear the alarms from the fire department stations, or the whistling of tugs in the harbor. But the clock strikes every hour or oftener; the alarms are sounded frequently, and the tugs blow their blasts almost constantly." *Kielback v. Chicago, etc. R. Co.*, 70 Neb. 571, 575, 97 N. W. 750.

<sup>54.</sup> An employe testified that she did not know of a trap door in the floor of a mill, and the court said: "Her testimony is hard to believe, no doubt, as she passed over the door many times a day, and as the wheels of her bobbin box probably jolted as they went over its hinges, but we cannot say that she must have known it. She may have been unusually absent minded." *Hogarth v. Pocasset Mfg. Co.*, 167 Mass. 225, 45 N. E. 629.

occurred,<sup>55</sup> or who was watching affairs with interest and close attention,<sup>56</sup> will observe the facts more accurately than a mere casual observer.<sup>57</sup>

(B.) *DIVERTED ATTENTION.* — (a.) *In General.* — And where the attention of the observer is occupied with other matters which may appear to him at the time to be more important, his observation of the event is very likely to be inaccurate.<sup>58</sup>

(b.) *Conversation.* — Persons in conversation are not in a position to observe other matters as accurately as they otherwise would.<sup>59</sup>

(4.) *Excitement.* — Nothing tends more to inaccuracy of observa-

55. *Fitzhugh v. The Commerce*, 9 Fed. Cas. No. 4,841; *Foster v. The Miranda*, 6 McLean 221, 9 Fed. Cas. No. 4,977.

56. *The H. B. Moore, Jr.*, 155 Fed. 380; *In re Ames' Will*, 40 Or. 495, 503, 67 Pac. 737.

"A man on trial for his life ordinarily would be instinctively quick to observe and complain of any manifestation of bias or prejudice against him on the part of the jurors upon whose decision his fate depended." *Trombley v. State*, 167 Ind. 231, 78 N. E. 976.

A person watching intently may be able to see things, although his line of vision was partially impaired. *Collins v. Janesville*, 117 Wis. 415, 425, 94 N. W. 309.

"The degree of attention will affect the value of the evidence, but the fact that the witness was not given his direct attention at the time for the purpose of learning whether signals were given, will not destroy the value of the evidence if he was present at the crossing, was conscious, and in the possession of his ordinary senses, and testifies positively that he heard no signal." *Cotton v. Willmar & S. F. R. Co.*, 99 Minn. 366, 109 N. W. 835, 8 L. R. A. (N. S.) 643.

Testimony of persons who were waiting for a street car, that the headlight was not burning, and that the alleged signals were not given, is not negative testimony; and such testimony is entitled to much weight from the fact that the witnesses had their attention called to the facts at the time. *Cox v. Schuylkill Val. Tract. Co.*, 214 Pa. St. 223, 63 Atl. 599.

57. *The Isaac Bell*, 9 Fed. 842; *Derby v. Derby*, 21 N. J. Eq. 36, 45.

Persons not listening for a signal — failure to hear it is of little consequence. *Durkee v. President, etc. Canal Co.*, 88 Hun 471, 34 N. Y. Supp. 978.

And see *supra*, notes III, 9, H, d, (2).

58. *The "Cutch,"* 2 British Col. 357, 362; *Chicago & A. R. Co. v. Kemp*, 25 Ill. App. 39.

"Omissions are generally capable of explanation by the consideration that the mind may be so deeply impressed with and the attention so riveted to, a particular fact, as to withdraw attention from concomitant circumstances or prevent it from taking note of what is passing. . . . The murder of the captain of the vessel under the circumstances detailed by the witnesses, would naturally leave the mind incapable of receiving any other impression than that fixed upon it by the horror of the event." *Queen v. Dowsey* (2 Oldright) 6 Nova Scotia 93, 124.

On *Cross-Examination*, the fact whether a witness was in a situation to give undivided attention may be brought out. *McCoy v. Milwaukee St. R. Co.*, 88 Wis. 56, 59 N. W. 453.

59. *Durkee v. President, etc. Canal Co.*, 88 Hun 471, 34 N. Y. Supp. 978.

"Men instinctively and unconsciously look towards those with whom they talk and allow their minds to become absorbed in the conversation." *The George W. Childs*, 67 Fed. 269.

tion of the details of an event<sup>60</sup> than the hurry and excitement under which it occurs,<sup>61</sup> and this is often given by the courts as their reason for disbelieving testimony.<sup>62</sup>

(5.) **Observer Suffering Pain.**—Where the result of an accident is the injury to a person causing him severe pain, he is in no condition to testify with accuracy to the events causing his injury.<sup>63</sup>

(6.) **Observer Intoxicated.**—The power of accurate observation of a person under the influence of intoxicants is generally impaired more or less according to the degree of intoxication.<sup>64</sup>

60. *Nephler v. Woodward*, 200 Mo. 170, 98 S. W. 488.

61. *Green v. The Adelaide*, Taney 575, 10 Fed. Cas. No. 5,752; *Kelly v. State*, 68 Fed. 652, 661; *Erhard v. Metropolitan St. R. Co.*, 58 App. Div. 613, 68 N. Y. Supp. 457 (testimony as to sequence of events).

The question being whether cattle were struck by a train at a crossing or within the right of way, the court observed: "The whole occurrence was within the space of a few seconds, and when all the circumstances are taken into account it must be apparent that there was a chance for the most observing person to be at fault in this particular." *Chicago & A. R. Co. v. Kemp*, 25 Ill. App. 39.

Confusion and bustle preparatory to leaving a steamer would tend to prevent a person on board from noting how many times a whistle blew. *Rusk v. The Freestone*, 2 Bond 234, 21 Fed. Cas. No. 12,143; *Morrison v. City of Toronto*, 12 Ont. L. 333, 341.

**Identification of Robber.**—Where a person had been robbed the court said: "Smith's appearance and manner could scarcely have been impressed upon Matthews in those few seconds, sufficiently to enable him to furnish the officer with special idiosyncracies and distinguishing characteristics of the defendant." *People v. Smith*, 55 Hun 606, 7 N. Y. Supp. 841.

**Collision of Vessels.**—*Keys v. The Ambassador*, 1 Bond 237; 14 Fed. Cas. No. 7,747. Passengers on a boat who are awakened suddenly by a collision, are of course in no condition to see or relate facts with precision. *Barrett v. Williamson*, 4

McLean 589, 2 Fed. Cas. No. 1,051.

62. *The Glannibanta*, L. R. 1 P. (Eng.) 283, 289.

Where witnesses testified that they did not see or hear a train, the court said: "Charity requires that their testimony on this subject should be regarded as the result of a very high state of excitement into which they were naturally thrown by the occurrence of the accident. It was serious enough to distract the thoughts and the attention of the most self-possessed and cool headed persons." *Floyd v. Philadelphia & R. R. Co.*, 162 Pa. St. 29, 35, 29 Atl. 396.

63. *Goorin v. Allegheny Tract Co.*, 179 Pa. St. 327, 36 Atl. 207.

Where the defendant, a surgeon, had set a broken arm, the court remarked: "It is quite probable that the defendant was in a better condition to know and to remember what he did to the plaintiff, who was nervous and afflicted with pain." *Carpenter v. Blake*, 75 N. Y. 12, 18; *Baltimore & P. R. Co. v. Landri-gan*, 191 U. S. 461, 477.

64. *Cox v. Eayres*, 55 Vt. 24, 35; *Wabash R. Co. v. Prast*, 101 Ill. App. 167.

"It would certainly have been competent to show that the witness was not in fact present, or that, although present, he was blind, or asleep or in a condition of stupefaction, so that he could not apprehend what was going on about him. The proof that he was intoxicated is of the same general character. It is not strictly impeaching, but it tends to show that his faculties of observation were either entirely gone or much impaired." *Mace v. Reed*, 89 Wis. 440, 62 N. W. 186.

(7.) **Occupation or Similar Infirmary.**—The occupation of the observer may naturally call his attention to matters which might not be noticed by other persons,<sup>65</sup> and so the facts that the witness suffered from an infirmity similar to that of the person he was observing, may cause and explain unusual accuracy of observation.<sup>66</sup>

(8.) **Interest.**—Persons having some special grounds of interest in an event will naturally observe it more closely than others.<sup>67</sup>

(9.) **Subject-Matter.**—The extent as well as the accuracy of observation depends largely upon the nature and limitations of the matter observed.<sup>68</sup>

I. **MEMORY.**—a. *In General.*—In weighing the testimony of

The fact that a person was drunk, "might also account for his conflicting statements as to how he was injured." *Louisville & N. R. Co. v. Deason*, 29 Ky. L. Rep. 1259, 96 S. W. 1115.

**Opium.**—In *People v. Webster*, 139 N. Y. 73, 87, 34 N. E. 730, the court refers to opium as a narcotic whose well known properties are to distort the vision and induce mental confusion."

And see *supra*, III, 8, G.

65. "The business of the witness would tend to direct his attention to the buggy and enable him to recognize the peculiar noise made by it." *State v. Rainsbarger*, 74 Iowa 196, 37 N. W. 153 (a wagonmaker allowed to identify a buggy by its peculiar rattle).

66. *Hurley v. Metropolitan St. R. Co.*, 120 Mo. App. 262, 96 S. W. 714 (a witness stated that he noticed particularly how plaintiff got off of a street car because the plaintiff was lame and he was himself similarly incapacitated).

67. "Another rule was that the witness who had the most interest in noticing and remembering the facts was to be believed in preference to the one that had no interest in taking notice of the facts." *Jeter v. Haviland*, 24 Ga. 252.

Where the testimony was as to the nature of certain tracks left by an animal, the observation of a person interested pecuniarily was said to be likely to be more accurate than that of a person looking out of mere curiosity. *Savannah, F. &*

*W. R. Co. v. Gray*, 85 Ga. 825, 11 S. E. 1022.

**Interest Affecting Weight of Testimony**, in general; see article "PARTIES AND PERSONS INTERESTED AS WITNESSES," Vol. IX, p. 505.

"Men are prone to see what they want to see. Polonius saw in the cloud first a camel, then a weasel, and something very like a whale, as Hamlet bade him." *Ideal Stopper Co. v. Crown Cork & S. Co.*, 131 Fed. 244, 255, 65 C. C. A. 436.

68. "The accuracy of knowledge at the time, as well as the ability of the man to testify to the truth, depend very much upon the subject-matter." *Hayden v. Suffolk Mfg. Co.*, 11 Fed. Cas. No. 6,261, p. 904, a patent case, holding that the mere sight of a complicated machine would not enable the witness to testify as to its construction unless he understood it thoroughly at the time and took particular notice of it.

**Observation of Object Moving Directly to or Away From the Person.**

"It is a well known fact that a person, standing in a straight line with a train that is approaching or receding is often unable to discern that it is moving." *Conley's Admr. v. Cincinnati, etc. R. Co.*, 89 Ky. 402, 12 S. W. 764. See *Colorado Midland R. Co. v. Robbins*, 30 Colo. 449, 71 Pac. 371; *Huntress v. Boston & M. R. Co.*, 66 N. H. 185, 34 Atl. 154, 49 Am. St. Rep. 600.

Where a railroad track ran parallel with a road, testimony of a person on a train that a team on the road was standing still was likely

witnesses probably the most important matter to be considered is the completeness and accuracy of their recollection.<sup>69</sup> And in view of the well-grounded distrust and suspicion of all testimony embodying the mere recollection of the witness, evinced by the courts,<sup>70</sup> it is important to analyze the subject and discover, if

to be mistaken. *Peoria, P. & J. R. Co. v. Siltman*, 88 Ill. 529.

69. Cross-examination to discover the strength of memory of a witness is allowable because the credit to be given to a witness "may depend very much upon the accuracy of his memory as well as upon his disinterestedness and honesty." *Kelsey v. Universal L. Ins. Co.*, 35 Conn. 225, 234.

"The memory of these witnesses . . . does not seem to be of that tenacious and accurate character to enable us to trust to it with implicit reliance." *Walmsey v. Griffith*, 10 Ont. App. 327, 331.

70. *United States*.—*Lalace v. Habermann Mfg. Co.*, 53 Fed. 375, 379; *Pettibone v. Pennsylvania Steel Co.*, 133 Fed. 730, 735; *Young v. Wolfe*, 120 Fed. 956, 959.

*Georgia*.—*Carey v. Jones*, 8 Ga. 516, 519 ("with most men, no faculty is more treacherous than memory").

*Illinois*.—*Frizell v. Cole*, 29 Ill. 465.

*Louisiana*.—*Secola v. Chess-Carley Co.*, 39 La. Ann. 344, 352, 1 So. 824 ("the natural unreliability of human memory").

*Maryland*.—*Weems v. Weems*, 19 Md. 334, 348; *Welty v. Welty*, 8 Md. 15, 22.

*Mississippi*.—*Stone v. Montgomery*, 35 Miss. 83, 105.

*Missouri*.—*Cornet v. Bertelsmann*, 61 Mo. 118, 127.

*New Jersey*.—*Riddle v. Clabby*, 59 N. J. Eq. 573, 579, 44 Atl. 859.

*North Carolina*.—*Clement v. Clement*, 54 N. C. (1 Jones' Eq.) 184 ("the slippery memory of witnesses").

*Pennsylvania*.—*Miller v. Cohen*, 173 P. St. 488, 494, 34 Atl. 219; *Com. v. Mellet*, 196 Pa. St. 243, 46 Atl. 434.

*Virginia*.—*Burton v. Scott*, 3 Rand. 399, 402.

"Every day's experience must

bring home to the conviction of all men, the insecurity of reliance on mere recollection." *Dennis v. Barber*, 6 Serg. & R. (Pa.) 420, 426.

"No one with opportunity for observation of judicial proceedings has failed to notice the lamentable infirmities of human recollection, and the tendency after the lapse of time to believe that which it is the interest of the witness to have appear as the truth." *Miller v. Cohen*, 173 Pa. St. 488, 494, 34 Atl. 219.

"How frail and fallible is memory! History records a few examples of men of whom it may be said that whatever knowledge they acquired, either sensible or intellectual, remained as indelibly fixed upon their minds as if it were engraved on a rock. . . . But these are rare instances. Usually the impressions made on the memory resemble much more the trackless track of the arrow through the air than the enduring hieroglyphics upon the pyramids and obelisks of ancient Egypt. Many memories are mere sieves." *Lumpkin J.*, in *Miller v. Cotten*, 5 Ga. 341, 348.

**Superior Value of Writings.**—"I would sooner trust the smallest slip of paper for truth than the strongest and most retentive memory ever bestowed on mortal man." *Lumpkin J.*, in *Miller v. Cotten*, 5 Ga. 341, 349. "How much more reliable and trustworthy as a monument of title, is the solemn official record of a fact, made at the time of its occurrences, than the mere recollection of witnesses." *Strauch v. Hathaway*, 101 Ill. 11, 14. "The memory of man as to facts is not as satisfying to the mind as a writing, in an investigation involving past events." *Whitaker v. Parker*, 42 Iowa 585. And see *supra*, III, 5, A.

**Cases Requiring Clear Proof.**—In cases where clear proof is required, courts will seldom act on evidence

possible, the marks of strength as well as of weakness of such testimony.<sup>71</sup>

b. *Extraordinary Memory*. — In rare cases prodigious feats of memory are reported and credited,<sup>72</sup> but ordinarily, the testimony of a witness who professes to remember events, the actual recollection of which would require the possession of an unusual and remarkable memory, is seriously discredited.<sup>73</sup>

c. *Forgetfulness*. — On the other hand, a statement of a witness to the effect that his memory is poor and unreliable is much more likely to receive credit<sup>74</sup> as being more in accord with the nature

consisting solely of testimony based on recollection of long past events. *Wooster v. Trowbridge*, 115 Fed. 722, 731; *Nicoll v. Mason*, 49 Ill. 358, 363; *Philpot v. Penn*, 91 Mo. 38, 3 S. W. 386 (to establish resulting trust).

71. *Laws Which Regulate the Human Memory*. — "To those who know, from experience and reflection, the laws which regulate the human memory, it does not seem singular that several persons in speaking of a past transaction do not each reproduce it, in description with the same fullness of detail; but such is not the vulgar notion. Among the ignorant, the strongest proof of the truth of testimony derived from several witnesses is the fact that the statement of each is nearly identical with those of the others." *Adams v. Adams*, 17 N. J. Eq. 324, 335.

72. *Miller v. Cotten*, 5 Ga. 341, 349 (case contains many illustrations).

73. *Canada*. — *Armstrong v. Gage*, 25 Grant Ch. 1, 36.

*United States*. — *Willett v. Fister*, 18 Wall. 91, 98; *Pierce v. Feagans*, 39 Fed. 587, 591.

*California*. — *McFadden v. Wallace*, 38 Cal. 51, 57.

*Iowa*. — *Holmes v. Connable*, 111 Iowa 298, 305, 82 N. W. 780.

*New Jersey*. — *Midmer's Exrs.*, 26 N. J. Eq. 299, 307.

*New York*. — *In re Duffy's Will*, 51 Misc. 543, 101 N. Y. Supp. 974.

*Ohio*. — *Williams v. Robson*, 6 Ohio St. 510, 516.

*Pennsylvania*. — *McReynolds v. Longenberger*, 57 Pa. St. 13, 33.

*Virginia*. — *Thomas v. Ribble*, 24 S. E. 241.

*West Virginia*. — *Board v. Callihan*, 33 W. Va. 209, 220, 10 S. E. 382.

"Truthful witnesses do not have such extraordinary memories as we are asked to believe in, here." *Grosvenor v. Harrison*, 54 Mich. 194, 199, 19 N. W. 951.

"Amazing if not miraculous memory" not credited. *Mack v. Spencer Optical Mfg. Co.*, 52 Fed. 819 (that a witness should remember details of a tool made by him thirty-four years before).

A witness identified a pneumatic hammer which he had not seen for ten years by the number stamped on it. The court remarked: "The prodigious feat of memory involved in this identification is apparent and requires no comment. To my mind, however, it trenches so far on the improbable as to greatly affect the credibility of the testimony." *Standard Sanitary Mfg. Co. v. Mott Iron Wks.*, 152 Fed. 635, 639.

Where a witness testified to facts evincing an extraordinary memory, his testimony must be perfectly consistent to be believed and it will be closely scrutinized. *Parker v. Chambers*, 24 Ga. 518, 527.

**Susceptibility to Development.** "No human faculty is probably so susceptible to development as the memory, but to attain distinction in this direction, requires constant practice, which presupposes an exercise of will power." *Dean v. Dean*, 42 Or. 290, 297, 70 Pac. 1039.

74. "How many people, young as well as old, have habits and ways of forgetfulness? It is a trait of human character, different in different people. Most men in active life, of sound mind and strict

and probabilities of the case;<sup>75</sup> but alleged complete forgetfulness of comparatively recent events of some interest to the witness is often disbelieved by the courts.<sup>76</sup>

d. *Matters Tending To Prove Inaccuracy.* — (1.) **Remoteness.** — As a general rule, the credit to which the accounts of witnesses are entitled diminishes in direct proportion as the facts themselves recede in point of time,<sup>77</sup> and the lapse of time is the first point to be considered in weighing the testimony.<sup>78</sup>

business habits, have traits of forgetfulness. Especially is this true of professional men." President, etc. of Bowdoin College *v.* Merritt, 75 Fed. 480, 491.

"I have known and heard of many extraordinary instances of forgetfulness of matters as likely to make a lasting impression as a fall from a wagon"; relating also an instance within the knowledge of the judge where a witness forgot that he ever had had scarlet fever. *Miller v. Confederation Life Assn. Co.*, 11 Ont. 120, 136.

75. *Penn. Mut. L. Ins. Co. v. Mechanics' Sav. B. & T. Co.*, 72 Fed. 413, 442, 19 C. C. A. 286.

76. *Trimpe v. Trimpe* (N. J. Eq.), 65 Atl. 744; *Greenleaf v. Grounder*, 84 Me. 50, 24 Atl. 461. And see *In re Willford's Will* (N. J. Eq.), 51 Atl. 501.

**Feigned Forgetfulness** of a recent fact may be very satisfactory proof of its existence. *Haydock v. Haydock*, 33 N. J. Eq. 494, 500. And see *Harter v. People*, 204 Ill. 158, 68 N. E. 447.

77. *United States.* — *Peck v. Burns*, 5 Ben. 537, 19 Fed. Cas. No. 10,889.

*California.* — *In re Irvine's Estate*, 102 Cal. 606, 36 Pac. 1013.

*Georgia.* — *Parke v. Foster*, 26 Ga. 465, 470.

*Illinois.* — *City of LaSalle v. Evans*, 111 Ill. App. 69, 71.

*Maryland.* — *Maryland L. & P. Homestead Assn. v. Moore*, 80 Md. 102, 109, 30 Atl. 605, 33 Atl. 59.

*New Hampshire.* — *Minot v. Boston & M. R. Co.*, 74 N. H. 230, 66 Atl. 825.

*New Jersey.* — *Wilson's Exr. v. Cobb's Exr.*, 28 N. J. Eq. 177, 182; *Ward v. Cooke*, 17 N. J. Eq. 93, 95.

*Wisconsin.* — *McClellan v. Sanford*, 26 Wis. 595, 606.

**Complete Transactions.** — "Few persons are so gifted in memory, as to retain in vivid recollection the details of a past transaction, after it has been long dismissed from attention as finished work. The mind is wont to disincumber itself of burdens which it esteems as no longer possessing a living, vital force." *Smith v. Wert*, 64 Ala. 34.

78. "Lapse of time obscures all recollections, the best as well as the worst." *Wilson's Exrs. v. Cobb's Exrs.*, 28 N. J. Eq. 177, 182.

"Lapse of time, three years for instance in most cases impairs the recollection and weakens the confidence that we place in human testimony." *Watson v. Walker*, 23 N. H. 471, 496.

**Illustrations.** — Four months was said to be "a period too short, according to ordinary experience and observation for a material fact in an important transaction, to fade from the memory of a person who was under a special duty to remember it." *Robbins v. Robbins*, 50 N. J. Eq. 742, 26 Atl. 673.

After five years "it would be far more surprising to find that they had remembered them than to find that they had entirely forgotten them." *Homeopathic Mut. L. Ins. Co. v. Marshall*, 32 N. J. Eq. 103, 111.

"In eight months the recollection is much impaired." *Derby v. Derby*, 21 N. J. Eq. 36, 45.

**Rule Not Inflexible.** — "We are aware of no rule that mere lapse of time requires the evidence to be rejected, or limits the credibility of evidence, unless there be reasons impairing its force." *Ryder v. Emrich*, 104 Ill. 470.

(2.) **Routine Matters.**—The routine matters of a person's life are seldom carried in mind for any considerable length of time,<sup>79</sup> and

**Where More Recent Events Have Been Forgotten.**—Where a witness testifies that he has forgotten certain transactions, his testimony as to more remote transactions of the same general nature is entitled to little weight. *Walmsley v. Griffith*, 10 Ont. App. 327, 332.

**79. Canada.**—*Scott v. Crerar*, 11 Ont. 541, 562 (witness of common-law marriage. And see *Bell v. Graham*, 13 Moore P. C. 242, 260, 15 Eng. Reprint 91).

**United States.**—*Pierce v. Feagans*, 39 Fed. 587, 591; *Mack v. Spencer O. Mfg. Co.*, 52 Fed. 819; *Kraatz v. Tieman*, 79 Fed. 322.

**Georgia.**—*Davant v. Carlton*, 53 Ga. 491 (service of papers by sheriff).

**Illinois.**—*The Calumet C. & D. Co. v. Russell*, 68 Ill. 426, 431 (acknowledgment of one of many deeds by a married woman); *Chicago, R. I. & P. R. Co. v. Stickman*, 95 Ill. App. 4 (signals given by locomotive engineer); *Booker v. Booker*, 208 Ill. 529, 537, 70 N. E. 709, 100 Am. St. Rep. 250.

**Kentucky.**—*Louisville & N. R. Co. v. Deason*, 29 Ky. L. Rep. 1259, 96 S. W. 1115.

**Maryland.**—*National F. Ins. Co. v. Crane*, 16 Md. 260, 295.

**Massachusetts.**—*Thatcher v. Miller*, 13 Mass. 270; *Shove v. Wiley*, 18 Pick. 558.

**Michigan.**—*Stevenson v. Kurtz*, 116 Mich. 95, 74 N. W. 304; *Matter of Wool*, 36 Mich. 299 (recollection of an acknowledgment by a notary).

**Missouri.**—*State v. Kansas City R. Co.*, 70 Mo. App. 634 (railroad signals).

**New Jersey.**—*Carlisle v. Cooper*, 19 N. J. Eq. 256, 266.

**New York.**—*People v. Biglizen*, 12 App. Div. 225, 98 N. Y. Supp. 361; *Tauger v. New York City R. Co.*, 104 N. Y. Supp. 681 (signal given at a particular street by the conductor would not be remembered by the motorman); *Willets v. Buffalo, etc. R. Co.*, 14

*Barb.* 585, 591 (collecting fare of passenger by conductor).

"There is no class of occurrences which people are less likely to notice or remember than those with which from frequent repetition they are familiar, or those which happening at stated intervals or in connection with other familiar happenings are expected." *Kielbeck v. Chicago, etc. R. Co.*, 70 Neb. 571, 575, 97 N. W. 750.

"Is it probable that any human intellect can retain with accuracy for thirty years the petty details of an eventless and humdrum occupation?" *Mack v. Spencer O. Mfg. Co.*, 52 Fed. 819.

"Little reliance can be placed on the general recollection of persons in regard to ordinary occurrences under their immediate observation when their memory is not charged with the matter at the time." *Pennsylvania R. Co. v. Central R. Co.*, 59 Fed. 190.

**Notary's Acts** are not likely to make any permanent impression on his memory. *Bliss v. Payne*, 11 Mich. 92, 99; *Ford v. Osborne*, 45 Ohio St. 1, 12 N. E. 526; *Pierce v. Feagans*, 39 Fed. 587, 590; *White v. Fisher*, 77 Ind. 65; *Com. v. Mellet*, 196 Pa. St. 243, 46 Atl. 434; *Matter of Wool*, 36 Mich. 299; *Komp v. State*, 129 Wis. 20, 108 N. W. 46.

**Lawyer in Active Practice** is very apt to forget ordinary transactions. *Baur v. Cron*, 71 N. J. Eq. 743, 66 Atl. 585; *Booker v. Booker*, 208 Ill. 529, 70 N. E. 709, 100 Am. St. Rep. 250; *Hupsch v. Resch*, 45 N. J. Eq. 657, 660, 18 Atl. 372; *Goodwin v. Dean*, 50 Conn. 517 (drawing of deeds); *Stines v. Hays*, 36 N. J. Eq. 364.

**Persons Who Often Act as Subscribing Witnesses** seldom remember individual transactions. *Woodhouse v. Balfour*, L. R. 13 P. (Eng.) 2; *Matter of Kellum*, 52 N. Y. 517; *Den v. Matlack*, 17 N. J. L. 354.

**Event Unusual in One Witness' Experience But Common to Another.** An occurrence may be unusual in the experience of some witnesses,



often they pass without making any noticeable impression at the time.<sup>80</sup>

(3.) **Business Activity.**—A person who is immersed in active business life will be likely to forget many matters which a person with more leisure might be expected to remember.<sup>81</sup>

(4.) **Bias.**—The interest or bias of a witness is recognized as greatly affecting the accuracy of his memory,<sup>82</sup> and this, too, often unconsciously to himself.<sup>83</sup>

and common to the experience of others, so that it will be remembered by the former though forgotten by the latter; and so testimony of these two classes of witnesses apparently in conflict is not necessarily to be regarded as contradictory. *Louisville & N. R. Co. v. Deason*, 29 Ky. L. Rep. 1259, 96 S. W. 1115. And see *Mutual R. F. L. Assn. v. Cleveland Mills*, 82 Fed. 508, 512, 27 C. C. A. 212; *Platt v. Stewart*, 13 Blatchf. 481, 19 Fed. Cas. No. 11,220, p. 856.

**Unusual Occurrence in a Routine Transaction, Remembered.**—Where a local letter had a two cent stamp on it, while a one cent stamp would have been sufficient, it is not strange that the postal clerk observed it and remembered it. *People v. Strollo*, 191 N. Y. 42, 83 N. E. 573, 575.

80. See *supra*, III, 9, H.

81. *Parke v. Foster*, 26 Ga. 465, 470.

"Where an event not deemed important at the time has been crowded from the memory and obscured by the ever varying incidents of an active life, it is not difficult to imagine that even an honest man may be led erroneously to persuade himself that the fact accords with his inclination concerning it." *Thayer v. Hart*, 20 Fed. 693.

**Business Activity** of one party to a transaction may be so great as to render his forgetting the facts more likely than that the other person would do so, he being less occupied. *House v. Clemens*, 16 Daly 3, 9 N. Y. Supp. 484.

82. *United States v. Mayer*, 26 Fed. Cas. No. 15,753; *Shorter v. Sheppard*, 33 Ala. 648, 657; *Miller v. Miller*, 100 Mich. 563, 59 N. W. 242; *Warwick v. Marlatt*, 25 N. J.

Eq. 188; *McNulty v. Hurd*, 86 N. Y. 547, 553; *Thomas v. Ribble (Va.)*, 24 S. E. 241, 245.

"The strong bias of interest upon a mind long pondering over and much excited upon one subject has doubtless produced genuine convictions of the truth of the things to which he testifies." *In re Mayo*, 4 Hughes 382, 16 Fed. Cas. No. 9,353.

"It is comparatively easy when witnesses are testifying concerning a transaction that occurred six years ago, and that has become indistinct in the memory, to make their recollection of the details of the occurrence conform to their present interest." *Pierce v. Feagans*, 39 Fed. 587, 590.

In *Miller v. Cohen*, 173 Pa. St. 488, 494, 34 Atl. 219, the court notices "the tendency after the lapse of time to believe that which it is the interest of the witness to have appear as the truth."

False impressions are "deepened with their original coloring after years have passed away." *Fisler v. Porch*, 10 N. J. Eq. 243, 255.

**Witnesses Whose Memories Are Prodded** by the eagerness of interested parties to elicit testimony favorable to themselves are not usually to be depended upon for accurate information." *The Barbed Wire Patent*, 143 U. S. 275, 284 (*quoted in Kemp v. M'Bride*, 129 Fed. 382, 385).

83. *Riddle v. Clabey*, 59 N. J. Eq. 573, 579, 44 Atl. 859 ("the unconscious influence of present interest").

Recollection of biased witnesses "is almost sure to be highly (though it may be insensibly) colored in favor of the side on which it is offered, and it is a very unsafe foundation for the judgment of a

(5.) **Imagination.**—The very effort,<sup>84</sup> of even a conscientious witness<sup>85</sup> to recollect a more or less indistinct transaction is sure to result in blending with what is actually remembered, more or less matter which the witness naturally<sup>86</sup> imagines he remembers<sup>87</sup> through his knowledge of subsequently occurring facts.<sup>88</sup>

court." *Poague v. Spriggs*, 21 Gratt. (Va.) 220, 229.

"The reproduction of the words of another by memory is a difficult undertaking, and when the memory is influenced by the unconscious bias of personal interest, its recollection is to be received with great circumspection." *Ramsdell v. Streeter*, 62 N. J. Eq. 718, 48 Atl. 575.

"The court cannot resist the conclusion that the mind of the witness has become so imbued with the idea that the defendant's conduct was unfair, that he has, unwittingly perhaps, permitted imagination to take the place of facts and has substituted what he thinks the agreement should have been for what the agreement actually was." *Lalanc & Grosjeon Mfg. Co. v. National E. & S. Co.*, 108 Fed. 77, 79.

<sup>84.</sup> *Swedish Bark Adolph*, 4 Fed. 730, 741; *Hodge v. Amerman*, 40 N. J. Eq. 99, 103, 2 Atl. 257.

<sup>85.</sup> *Hodge v. Amerman*, 40 N. J. Eq. 99, 103, 2 Atl. 257; *Matter of Wool*, 36 Mich. 299, 302; *New Jersey Zinc & Iron Co. v. Morris Canal Co.*, 44 N. J. Eq. 398, 412, 15 Atl. 227, 1 L. R. A. 133.

<sup>86.</sup> "It is human nature to believe that one has foreseen such an event, and I doubt not the witnesses unconsciously speak more of their present than their then existing impressions of that which was indicated." *The Wilhelm*, 47 Fed. 89; *Marshall v. Union Ins. Co.*, 2 Wash. C. C. 357, 16 Fed. Cas. No. 9,133; *United States v. American Bell Tel. Co.*, 167 U. S. 224, 261.

<sup>87.</sup> *Rosencrans v. Schnacke*, 13 Ill. App. 216 (testimony was said to be "more the outgrowth of imagination than memory"); *West Jersey R. Co. v. Thomas*, 23 N. J. Eq. 431, 438.

"The testimony of the two Messrs. Clabby as to the exact words used at that time, is probably

their present recollection of what was likely to occur." *Riddle v. Clabby*, 59 N. J. Eq. 573, 579, 44 Atl. 859.

<sup>88.</sup> See *United States v. Stinson*, 197 U. S. 200, 206; *Hardy v. Harbin*, 154 U. S. 598; *Martin v. Tuttle*, 80 Me. 310, 14 Atl. 207; *Wolcott v. Holcomb*, 31 N. Y. 125; *Pierce v. Feagans*, 39 Fed. 587, 591.

"After having seen what has been done, the mind is very apt to blend the subsequent information with prior recollection and confuse them together." *Howe v. Underwood*, 12 Fed. Cas. No. 6,775, p. 685.

"It is a very common thing for an honest witness to confuse his recollection of what he actually observed with what he has persuaded himself to have happened, from impressions and conclusions not really drawn from his own actual knowledge." *Matter of Wool*, 36 Mich. 299, 302.

Often the real meaning of what is seen is not understood until afterwards, but in such case a full cross-examination is allowed since "it is only by thorough sifting that it can be known how much a witness has allowed his memory to be warped by subsequent suspicions." *Hamilton v. People*, 29 Mich. 173, 182; *Thomas v. Ribble (Va.)*, 24 S. E. 241, 245.

"It sometimes happens in case of severe personal injuries that the injured party undertakes to narrate in minute detail the precise manner in which the accident took place. But a careful analysis of his narrative and a comparison of it with the established or conceded facts of the case will perhaps in most of these instances show that what he is telling is the theory of the occurrence which he has subsequently reasoned out and which he honestly mistakes for actual recollection." *Taylor v. General Acc. A. Corp.*, 208 Pa. St. 439, 444, 57 Atl. 830.

(6.) **Habit.**— Another fact to be considered in testing the memory, is the liability of the witness to believe he has an actual remembrance of matters when in fact he is testifying to his habit of acting or the usual course of his business.<sup>89</sup>

(7.) **Confusion With Similar Matters.**— The memory of a busy person<sup>90</sup> is very apt to confuse his recollection of an event of no very great importance with his recollection of other more or less similar matters<sup>91</sup> happening at about the same time.<sup>92</sup>

(8.) **Discussion of Event.**— Nothing is more likely to affect the accuracy of a witness' memory of any event than a repeated narration of it to others,<sup>93</sup> or his frequently hearing the impressions made upon other persons by the same event.<sup>94</sup>

**Documentary Evidence Already in the Case May Warp Witness' Memory.**— Nicoll v. Mason, 49 Ill. 358, 362.

In Patent Cases, where the defense is prior use, the witness is usually familiar with the machine which has been subsequently patented and it is natural for him in testifying to the construction of the earlier machine to state that it had similar qualities. *Campbell Prtg. Press & Mfg. Co. v. Marden*, 64 Fed. 782, 785.

89. *Mutual R. F. L. Assn. v. Cleveland Mills*, 82 Fed. 508, 512, 27 C. C. A. 212. And see *Platt v. Stewart*, 13 Blatchf. 481, 19 Fed. Cas. No. 11,220, p. 856; *The Ellen McGovern*, 27 Fed. 868. But compare *supra*, II, 3, C.

90. See *supra*, III, 9, I, d. (3.)

91. See *supra*, III, 9, I, d. (2.)

92. *United States v. McKee*, 26 Fed. Cas. No. 15,683, p. 1103; *The Gran Canaria*, 16 Fed. 868, 872; *Electrical Acc. Co. v. Julien Elec. Co.*, 38 Fed. 117, 127.

Speaking of a man who had taken out thirty patents and written five thousand articles on scientific subjects in the preceding twenty-five years, the court said: "That such a man, with his intention engrossed to such a phenomenal extent, should be able to recall with perfect accuracy experiments and results made and reached by him in nearly a quarter of a century ago seems amazing. He may be mistaken; he may have confused experiments unintentionally; he may have exaggerated

ed results." *Electrical Acc. Co. v. Julien Elec. Co.*, 38 Fed. 117, 127.

93. "Things are told to persons till they verily believe that they witnessed them; and we repeat events until we are ready to swear, in the utmost sincerity, that we are spectators of their occurrence." *Miller v. Cotten*, 5 Ga. 341, 349.

94. *United States v. Flint*, 4 Sawy. 42, 25 Fed. Cas. No. 15,121; *Willett v. Fister*, 18 Wall. (U. S.) 91, 97; *In re Goold*, 2 Hask. 34, 10 Fed. Cas. No. 5,604, p. 768; *Martin v. Letty*, 18 B. Mon. (Ky.) 573, 581; *In re Bailey*, 111 App. Div. 909, 98 N. Y. Supp. 725; *Hale & K. Mfg. Co. v. Norcross*, 199 Pa. St. 283, 289, 49 Atl. 80.

A warm imagination may make "narrations, often repeated by a good friend, seem as if they were of facts seen by the witness." *Johns v. Norris*, 22 N. J. Eq. 102, 105.

"We know that great variations take place in the recollection of individuals not accustomed to business, more especially after much gossiping talk has been had in the neighborhood upon the subject on which they afterwards give their evidence. Suggestions of idle or designing persons get to be mixed up with the recollections which become fainter and fainter, till at last their own fancy helps to mislead them." *M'Gregor v. Topham*, 3 H. L. Cas. 132, 148, 10 Eng. Reprint 51.

Even a disinterested witness is liable, in attempting to reproduce a conversation after a considerable lapse of time, "to substitute expressions recently made by other

*e. Matters Tending To Prove Accuracy.* — (1.) **Attention.** — (A.) **IN GENERAL.** — The value of testimony drawn from the memory of a witness is increased where it appears that his attention was upon the event when it occurred,<sup>95</sup> and any diversion of attention detracts from the value of the evidence to a similar extent.<sup>96</sup>

(B.) **ATTENTION AFTER EVENT.** — If the immediate effect of the occurrence of an event is to draw attention to it, this is to be considered when the memory of the witness is being tested,<sup>97</sup> although

persons for those of the speaker. whose words he is attempting to repeat." *Hodge v. Amerman*, 40 N. J. Eq. 99, 103, 2 Atl. 257.

"The impressions gained by subsequent conversations by the witnesses with the parties, is liable to color any statement of what then occurred." *Riddle v. Clabby*, 59 N. J. Eq. 573, 579, 44 Atl. 859.

**Witnesses Placed Under the Rule.** The purpose is to keep their memory from being affected by hearing the narrations of other persons. *Louisville & N. R. Co. v. York*, 128 Ala. 305, 310, 30 So. 676; *Rainwater v. Elmore*, 1 Heisk. (Tenn.) 363. And see article "WITNESSES," Vol. XIV.

<sup>95.</sup> *In re Ames' Will*, 40 Or. 495, 503, 67 Pac. 737.

"Impressions made upon the mind are deep and lasting or shallow and transitory, just in proportion to the degree of attention which a person given to the facts perceived or the truths conceived. To direct the attention in a particular channel, or to keep it concentrated for a reasonable time upon a given subject, requires an exercise of the will, which makes impressions upon the mind that are reproduced by the association of ideas." *Dean v. Dean*, 42 Or. 290, 297, 70 Pac. 1039.

"The value of his recollection would depend entirely upon the degree of attention with which he observed the facts, and the reasons which operated upon his mind to excite that attention and fix the facts in his memory." *Angell v. Rosenbury*, 12 Mich. 241, 257, quoted in *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99, 106.

"Memory of conditions that the witness has no occasion to recollect, and which must have been observed

without careful attention is not entirely acceptable." The *Queen Elizabeth*, 100 Fed. 874, 878.

**Casual Though Frequent Attention.** — "The picture remaining before an ordinary memory of what was seen casually, though frequently, as long ago as fifteen or twenty years can rarely be implicitly relied upon." *McConnell v. American Bronze P. Mfg. Co.*, 41 N. J. Eq. 447, 456, 5 Atl. 785.

**Definite Purpose.** — Act done with a definite purpose in view likely to be accurately remembered (*Ex parte Fitz*, 2 Lowell 519, 9 Fed. Cas. No. 4,837. *Bugbee v. Howard*, 32 Ala. 713, 717), while an act done without any definite object in view will soon be forgotten. See *Socla v. Chess-Carley Co.*, 39 La. Ann. 344, 351, 1 So. 824.

<sup>96.</sup> *United States v. The Anna*, 1 Taney 549, 24 Fed. Cas. No. 14,458, p. 827; *Stark v. Stephenson*, 7 Manitoba 381, 387.

A witness may be asked what he was doing immediately preceding the time at which the facts he testified to occurred, since it is always proper to show whether his attention was entirely focused on the matter in issue. *Stewart v. State*, 19 Ohio 302.

<sup>97.</sup> *Knowlden v. Knowlden* (N. J. Eq.), 52 Atl. 377; *Troeder v. Lorsch*, 150 Fed. 710, 716, 80 C. C. A. 376; *St. Louis, etc. R. Co. v. Manly*, 58 Ill. 300, 309 (remembrance by engineer after accident whether he gave statutory signals); *Haverstick v. Pennsylvania R. Co.*, 171 Pa. St. 101, 106, 32 Atl. 1128 (same); *In re Berwind-White Coal Min. Co.*, 116 Fed. 51 (whether warning was given by fellow-servant just before the accident occurred).

it does not strengthen the testimony as would evidence of attention given while the event was actually occurring.<sup>98</sup>

(2.) **Interest.**— Nothing tends more to induce reliance upon the memory of a witness than a showing that he was interested in the event or transaction at the time of its occurrence, as this insures accuracy of observation<sup>99</sup> as well as faithful recollection.<sup>1</sup>

(3.) **Recurrence to Mind.**— Recollection of matters which the wit-

*Compare Tauger v. New York City R. Co.*, 104 N. Y. Supp. 681.

Where the identity of a murderer was in issue, ten years after the crime had been committed, the court remarked: "It may seem strange at first thought that the witnesses are enabled to remember and identify these men after so long a time. . . . But it must be borne in mind that in consequence of the sudden and dreadful shock produced by the death of Barron, every person in that community immediately sought to reproduce in his own mind the presence and appearance of all strangers seen on that eventful day. . . . The startling event, shrouded in mystery during all these years, has served to stamp upon their minds and memories the impressions received at the time; and their testimony is but the reproduction of what they saw and noted, and even discussed, when every circumstance was fresh in their recollection." *State v. Stain*, 82 Me. 472, 481, 20 Atl. 72.

98. "If immediately after an occurrence an eye-witness has the subject brought to his attention in such a manner as particularly to impress it upon his memory, while it is still fresh and vivid, it is competent for him, when the facts become material, to state the circumstance then occurring," and though it would not be so important as something occurring while the transaction was going on, it is still to be considered. *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99, 107.

99. See *infra*, III, 9, H, d, (8.)

1. *United States.*— *Farwell v. Steamboat J. H. Starin*, 2 Fed. 100; *The John H. May*, 52 Fed. 882; *Pierce v. Feagans*, 39 Fed. 587, 591; *Smith v. Yellow Pine Lumber*, 2 Fed. 396; *Westinghouse Elec. &*

*Mfg. Co. v. Mutual L. Ins. Co.*, 129 Fed. 213, 217; *Curtice v. Crawford County Bank*, 118 Fed. 390, 393, 56 C. C. A. 174; *Willett v. Fister*, 18 Wall. 91, 98; *Rusk v. The Freestone*, 2 Bond 234, 21 Fed. Cas. No. 12,143, p. 20.

*California.*— *Landers v. Bolton*, 26 Cal. 393, 411.

*Illinois.*— *Ryder v. Emrich*, 104 Ill. 470.

*Louisiana.*— *Chandler v. Hough*, 7 La. Ann. 440.

*Michigan.*— *Miller v. Miller*, 100 Mich. 563, 59 N. W. 242.

*New Jersey.*— *White's Admrs. v. Williams*, 3 N. J. Eq. 376, 382; *Bailey v. Stiles*, 2 N. J. Eq. 220, 234; *Taylor v. Coriell*, 66 N. J. Eq. 262, 272, 57 Atl. 810; *Carlisle v. Cooper*, 19 N. J. Eq. 256, 266; *Homeopathic Mut. L. Ins. Co. v. Marshall*, 32 N. J. Eq. 103, 111; *Kline v. Grannis*, 61 N. J. Eq. 397, 48 Atl. 566.

*New York.*— *Jackson v. Loomis*, 12 Wend. 27; *Barranco v. Law*, 87 App. Div. 626, 84 N. Y. Supp. 421.

*Texas.*— *Hutcheson v. Meazell*, 64 Tex. 604.

*Virginia.*— *Thomas v. Ribble (Va.)*, 24 S. E. 241.

**Illustrations.**— "As he was the owner of the land, it was natural that his observation of its condition should have been somewhat closer and more thorough than that of a person having no interest in it, and that his recollection of what he saw should be more perfect, and remain with him longer, than that of a person casually looking at the land, with neither interest nor object." *New Jersey Zinc Co. v. Morris Canal Co.*, 44 N. J. Eq. 398, 410, 15 Atl. 227, 1 L. R. A. 133.

Interest in observing an event may make negative testimony more to be relied upon than positive testimony

ness has had no occasion to call to mind<sup>2</sup> is always considered to be less clear and accurate than his recollection of other matters which have occasionally come before him for consideration, since their actual occurrence, either directly or indirectly.<sup>3</sup>

(4.) **Reason for Remembering.**—A witness may state the facts which enable him to recollect a matter,<sup>4</sup> and ordinarily if the reason he gives has a close connection with the event<sup>5</sup> his testimony will be greatly strengthened,<sup>6</sup> and failure to give any reason for remembering sometimes leads to a disregarding of his testimony.<sup>7</sup>

**Association of Ideas** in a person's mind and memory is the basis of the above rules.<sup>8</sup>

of a witness not so interested. *Daubert v. Delaware, etc. R. Co.*, 199 Pa. St. 345, 49 Atl. 72.

2. *New Jersey Zinc Co. v. Morris Canal Co.*, 44 N. J. Eq. 398, 15 Atl. 227, 1 L. R. A. 133; *Pierce v. Feagans*, 39 Fed. 587, 591; *Thompson v. Simpson*, 128 N. Y. 270, 281, 28 N. E. 627.

3. "No man is apt to forget facts in which he has a constant and lively interest." *Consolidated Fruit Jar Co. v. Bellaire Co.*, 27 Fed. 377, 380.

"His memory has been kept fresh by being called upon to testify on several occasions, beginning with the interference proceedings which were soon afterwards." *Westinghouse Elec. & Mfg. Co. v. Roberts*, 125 Fed. 6, 11.

4. *Cole v. Lake Shore, etc. R. Co.*, 105 Mich. 549, 63 N. W. 647; *Tomlinson v. Town of Derby*, 43 Conn. 562; *Street v. Sinclair*, 71 Ala. 110; *O'Hagan v. Dillon*, 76 N. Y. 170; *State v. Fox*, 25 N. J. L. 566, 575, 602; *Elgin, etc. R. Co. v. Hoadley*, 122 Ill. App. 165, 168; *Peck v. Atwater Mfg. Co.*, 61 Conn. 31, 23 Atl. 699. And see article "CREDIBILITY," Vol. III, pp. 764, 765, 766.

"It is often the case, that a witness is allowed to state in evidence an irrelevant fact, not as tending to prove a disputed fact, but in order to show that his mind is retentive of an important relevant fact deposited to by him." *Birmingham Elec. R. Co. v. Clay*, 108 Ala. 233, 19 So. 309.

"A witness may be allowed to testify to any collateral fact that may tend to enable him to remember the principal fact or strengthen his

conviction of its truth." *Louisville, etc. R. Co. v. Hart*, 2 Ind. App. 130, 28 N. E. 218.

**Limitation to Rule.**—It has been held that the reason for remembering a transaction cannot be stated by a witness where it involves the hearsay statement of a third person as to the occurrence of the event in question. *McBride v. Cicotte*, 4 Mich. 478, 491; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99. *Contra, State v. Fox*, 25 N. J. L. 566, 575, 602.

**Practice Not Favored.**— "The practice of admitting statements of no evidential value except to show that the witness had good grounds for his recollection should be followed with caution and should not obtain at all in instances where the falsity of the statement cannot be detected. . . . To permit a witness to support his assertions of fact with the narration of the unuttered thoughts which accompanied his observation of the occurrence in question would certainly open the door to harmful and unjust consequences." *Fulton v. Metropolitan St. R. Co.*, 125 Mo. App. 239, 102 S. W. 47.

5. See *infra*, III, 9, I, t, (4.)

6. *Knowlden v. Knowlden* (N. J. Eq.), 52 Atl. 377, 379; *Spellmyer v. Gaff*, 112 Ill. 29.

7. *Warwick v. Marlatt*, 25 N. J. Eq. 188; *Foster v. The Miranda*, 6 McLean 221, 9 Fed. Cas. No. 4977.

"There appears to be no reason why he should have remembered such an occurrence at so great a distance of time." *Warwick v. Marlatt*, 25 N. J. Eq. 188.

8. "It is frequently the case

**f. Physical Condition.** — (1.) **At Time of Transaction.** — (A.) **ILLNESS.** Illness of a person at the time the transaction in relation to which he testifies, occurred, may have been such as to require his testimony to be viewed with extreme caution.<sup>9</sup>

(B.) **INSANITY.** — Mental derangement, though insufficient to render a witness incompetent<sup>10</sup> may seriously affect the weight of his evidence.<sup>11</sup>

(C.) **INTOXICATION.** — While a person who was intoxicated at the time the event occurred is not to be entirely discredited on account of that fact as matter of law,<sup>12</sup> nevertheless it is always recognized

that an abstract or isolated fact, that could not be remembered of itself, is impressed upon the memory by incidents or collateral facts more or less intimately associated therewith in the mind of the witness. The force of these impressions as to the main fact will, of course, depend more or less upon the logical sequence or connection with the incidental matters associated therewith. Human experience teaches us that certain ideas or thoughts are interlinked with classes of ideas or thoughts, and according to mental philosophers, one idea or thought has its association with other ideas and thoughts, and one suggestion may become the prolific parent of a chain of ideas or thoughts. Of course, these become more or less cogent as they appear to be interwoven or there is a logical connection between them." *Bice v. State*, 37 Tex. Crim. 38, 41, 38 S. W. 803.

Memory is sometimes, "in a measure, mechanical, and whenever one link in the chain of circumstances is touched, the whole subject again passes through the mind." *Clark v. Fisher*, 1 Paige (N. Y.) 171, 175 (especially true of childhood recollections made by an elderly person.)

**On the Other Hand.** — The very fact that some matters would be likely to be remembered from their association with each other, may furnish a reason why another and independent fact would be more likely to be forgotten. *Washburn & M. Mfg. Co. v. Beat-Em-All Barb Wire Co.*, 33 Fed. 261, 271.

9. *Rice v. R. R. Bank*, 7 Humph. (Tenn.) 39, 43.

10. See articles "COMPETENCY,"

Vol. III, p. 200; "INSANITY," Vol. VII, pp. 479, 480.

11. "The insanity of a witness at the time of the transaction about which he is called to testify, does impair the force of his testimony, and is a matter proper to be considered by the triers to whom his testimony is submitted." *Holcomb v. Holcomb*, 28 Conn. 177.

**Nervous Diseases.** — "The vagaries and delusions of persons who suffer from nervous afflictions are well recognized." *People v. Donohue*, 114 App. Div. 830, 100 N. Y. Supp. 202, 205.

12. *Leach v. State*, 99 Tenn. 584, 42 S. W. 195.

"It does not follow that the capacity of observation and the powers of memory are destroyed by intoxication, which is not to the degree producing stupor. While it must be admitted that intoxication does not destroy credibility, it undoubtedly impairs it." *State v. Castello*, 62 Iowa 404, 17 N. W. 605.

"But if the evidence of one who was intoxicated at the time of the occurrences of which he testifies is corroborated, or his recollection of the transaction appears to be distinct and clear, he is entitled to belief." *State v. Castello*, 62 Iowa 404, 17 N. W. 605.

Story of a witness who at the time of the occurrence was "betwixt and between" was credited, his memory appearing to be good as to what transpired. *McGrail v. McGrail*, 48 N. J. Eq. 532, 537, 22 Atl. 582.

A statement of a witness that he was too drunk to know anything would be worthless where he narrates the circumstances leading up to the assault. *Northwestern Benev.*

as an important matter to be considered in testing his memory.<sup>13</sup>

(D.) PAIN.—Statements made by a person soon after receiving an injury and while suffering severe pain, are entitled to receive but slight weight and credit<sup>14</sup> and this in spite of the fact that they

Soc. v. Dudley, 27 Ind. App. 327, 61 N. E. 207. And see State v. Cronin, 64 Conn. 293, 29 Atl. 536.

13. *Alabama*.—Morris v. State, 39 So. 589.

*Louisiana*.—State v. Sejours, 113 La. 676, 37 So. 599.

*New Jersey*.—Bannister v. Jackson, 45 N. J. Eq. 702, 706, 17 Atl. 692.

*New York*.—People ex rel. McCormick v. Partridge, 95 App. Div. 323, 88 N. Y. Supp. 657, 660.

*Tennessee*.—Railroad v. Lawson, 105 Tenn. 639, 646, 58 S. W. 480; Fleming v. State, 5 Humph. 564.

*Vermont*.—Cox v. Eayres, 55 Vt. 24, 35.

*Virginia*.—Latham v. Latham, 30 Gratt. 307, 315.

*Wisconsin*.—Abraham v. Karger, 100 Wis. 387, 76 N. W. 330; Mace v. Reed, 89 Wis. 440, 62 N. W. 186; Kuenster v. Woodhouse, 101 Wis. 216, 77 N. W. 165.

"Intoxication naturally tends to stupefaction, impairing the mental faculties, including the memory." Kuenster v. Woodhouse, 101 Wis. 216, 219, 77 N. W. 165.

Drunken witnesses of a transaction are unfit "properly to take cognizance of, or to report what transpired." Mercer v. State, 17 Ga. 146, 170.

"If he was drunk (when injured) that may account for his not remembering where he was and not remembering what occurred after the injury, until he left the next day." Louisville & N. R. Co. v. Deason, 29 Ky. L. Rep. 1259, 96 S. W. 1115.

Where the question was how a robbery was executed, the court in speaking of the plaintiff's theory said: "The testimony is, that though a sober man, he was not a total abstainer, and had been drinking that evening. Did he get more than he thought and is his recollection thereby beclouded? Or did he lock and bolt the door, as he thinks, and did the beer get him up again in a confused condition of mind and was his

open door the result of this?" Shultz v. Wall, 134 Pa. St. 262, 275, 19 Atl. 742, 19 Am. St. Rep. 686, 8 L. R. A. 97.

**Cross-Examination** of a witness as to how much beer he had drunk and whether he was intoxicated at the time of the accident was held proper, since "it was the plaintiff's right to examine him as to the condition of his mind, memory, and facilities of knowing what occurred." International & G. N. R. Co. v. Dyer, 76 Tex. 156, 159, 13 S. W. 377.

14. The Illinois, 63 Fed. 161; Enright v. Pittsburg J. R. Co., 204 Pa. St. 543, 54 Atl. 317; Wall v. New York, etc. R. Co., 56 App. Div. 599, 67 N. Y. Supp. 519; Columbia R. Co. v. Cruik, 20 App. Cas. (D. C.) 521; Chicago & A. R. Co. v. O'Leary, 126 Ill. App. 311, 316.

"Sudden and extreme pain drives from the memory what immediately preceded it, to a greater or less extent." New Jersey R. Co. v. Palmer, 33 N. J. L. 90.

Where a witness' testimony contradicted statements made by him soon after the accident occurred, the court said: "It is not an uncommon thing for other men who saw the thing done, to be able to tell better than the man himself how the accident happened. The shock and pain may have the effect of rendering the man quite incapable of telling just exactly how the thing took place, so if you find the man at different times making somewhat different statements it does not at all follow that it was his intention to mislead." Inland & S. C. Co. v. Tolson, 139 U. S. 551.

**Eye-Witness Superior.**—Testimony of eye-witnesses to an accident, in which the plaintiff's intestate was run over by a train, held to outweigh statements made by the decedent shortly after the injury. Chicago & A. R. Co. v. O'Leary, 126 Ill. App. 311, 316.

**May Be Believed When Corroborated.**—Declarations of a boy who



contain an admission of contributory negligence on his part.<sup>15</sup>

(2.) **At Time of Testifying.** — (A.) **FATIGUE AND ILLNESS.** — A witness who at the time of testifying is physically exhausted<sup>16</sup> is not expected to exhibit a clear recollection of matters. And where the witness is ill<sup>17</sup> and suffering great pain, considerable allowance must be made for his condition.<sup>18</sup>

(B.) **INTOXICATION AND STUPEFACTION.** — That a witness is intoxicated or under the influence of narcotics though not to such an extent as to render him incompetent<sup>19</sup> is to be considered as lessening the value which is to be accorded to his recollection.<sup>20</sup>

had been struck by a street car, made immediately after the accident and while suffering intense pain, were believed by the court as they were somewhat corroborated by the other evidence and were probable. *Schutt v. Shreveport Belt R. Co.*, 109 La. 500, 514, 33 So. 577.

15. *Levins v. Bancroft*, 114 La. 105, 38 So. 72; *Chicago, etc. R. Co. v. Clarkson*, 147 Fed. 397, 77 C. C. A. 575; *Louisville, etc. R. Co. v. Berry*, 9 Ind. App. 63, 35 N. E. 565, 36 N. E. 646; *Copley v. Union Pac. R. Co.*, 26 Utah 361, 73 Pac. 517.

"The circumstances of her admitting that she was in fault after being told that her arm was on the window, will have but little weight with the jury. She was not in a position to judge of the facts, and therefore her admissions should be cautiously received." *Curtis v. Central R. Co.*, 6 McLean 401, 6 Fed. Cas. No. 3,501.

16. **Exhaustion From Cross-Examination.** — A witness may be so tired out by a long cross-examination that his entire memory may leave him. *Weldon v. Third Av. R. Co.*, 3 App. Div. 370, 38 N. Y. Supp. 206, 209. And see *The Ship Fortitude*, 3 Sumn. 228, 262, 9 Fed. Cas. No. 4,953, p. 491; *M'Claskey v. Barr*, 54 Fed. 781, 784.

**Contradictions in the testimony of a witness with statements made by him on a former trial may be explained by showing that he was "excited, embarrassed, or under a pressure that would naturally affect his understanding and recollection."** *LaFlam v. Missisquoi Pulp Co.*, 74 Vt. 125, 140, 52 Atl. 526.

17. *Graham v. Graham*, 50 N. J. Eq. 701, 25 Atl. 358, 364.

A witness was too ill to attend

the trial, and the court adjourned to his home where his testimony was taken. His memory appeared weak and he was strong enough to answer only a few questions. His testimony was held to be of little weight. *Mellick v. Mellick* (N. J. Eq.), 19 Atl. 870, 876.

18. In *United States v. Chaffee*, 2 Bond 147, 25 Fed. Cas. No. 14,773, the court regarded the fact that a witness was suffering severe bodily pain at the time of testifying, a sufficient explanation of his failure to remember a material fact, and a new trial was granted. And see *Brown v. State*, 32 Miss. 433, 448 (dying declaration discredited because declarant was suffering severely at the time).

**Dying Declarations** affected by bodily condition of declarant, see *supra*, III, 6, F, a, (1), (E).

19. See article "COMPETENCY," VI, 3, B.

20. *People v. O'Neil*, 51 Hun 640, 4 N. Y. Supp. 410; *The Excelsior*, 102 Fed. 652. See article "CREDIBILITY," Vol. III, under III, 3.

Persons are excluded from testifying "who are besotted with intoxication, at the time they are offered as witnesses, for it is a temporary derangement of the mind and it is impossible for such men to have such a memory of events of which they may have had a knowledge, as to be able to present them fairly and faithfully." *Hartford v. Palmer*, 16 Johns. (N. Y.) 143.

**Witness May Be Cross-Examined** as to whether he has been drinking. *Armour & Co. v. Skene*, 153 Fed. 241, 82 C. C. A. 385.

**Admissions Made While Drunk.**

(C.) PARALYSIS.—The fact that a witness has suffered an attack of paralysis since the event occurred may be shown to explain lapses of memory,<sup>21</sup> or to weaken the force of the testimony.<sup>22</sup>

g. *Excitement*.—The recollection of a witness of matters occurring expectedly and with great rapidity,<sup>23</sup> or which cause great excitement to the individual<sup>24</sup> or to the public at large<sup>25</sup> is not expected to be entirely accurate.<sup>26</sup>

"It does not follow necessarily that because the party was much intoxicated his reason was so far de-throned as to disable him from comprehending the effect of his admissions, or from giving a true account of the occurrence to which they had reference." *Eskridge v. State*, 25 Ala. 30.

**Opium**.—Testimony of witnesses who were under the influence of opium both at the time of the occurrence in question and when testifying is very unreliable. *State v. White*, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442.

It was held improper to show that a witness was in the habit of taking laudanum, unless it was shown that her mind was impaired by it or that she was under the influence of it while testifying. *McDowell v. Preston*, 26 Ga. 528. See *Botkin v. Cassady*, 106 Iowa 334, 76 N. W. 722.

21. *Dorchester v. Dorchester*, 50 Hun 600, 3 N. Y. Supp. 238, 239.

The testimony of a witness was allowed to go to the jury although he professed to be unable to answer questions on his cross-examination because he could not remember what he had said on his direct examination on account of an injury to his mind occasioned by sunstroke, which sometimes completely impaired his memory. *Lewis v. Eagle Ins. Co.*, 10 Gray (Mass.) 508.

22. *Dominion Loan Soc. v. Darling*, 27 Grant Ch. (Can.) 68, 73.

In *Ex parte Whalen*, 32 N. Bruns. 274, 278, the excuse of a witness that he could not remember because two years before he had had his skull cracked and at times could remember nothing was regarded as farcical.

23. *The Sitka*, 132 Fed. 861, 863.

"It is common observation that eye-witnesses to the whole or part

or an incident that occurs unexpectedly and is in a considerable degree horrifying in its nature, testify to or otherwise relate what they saw at considerable variance with one another. And yet it has never been held that because they did so, they were unreliable or partial persons." *Washington Ice Co. v. Bradley*, 70 Ill. App. 313, 316.

"Some allowance should be made for imperfect recollection in the rapid passage of events." The *Olinde Rodrigues*, 174 U. S. 510, 529.

24. A finding that certain words were used in a conversation, over the testimony of a witness—one of the speakers that they were not, does not imply perjury in the witness. "She was in anger and doubtless very much excited and may have used the objectionable words and may not have remembered it." *Smith v. Slocum*, 62 Ill. 354.

"Mrs. Espey admits that because of the fall (from the street-car) she became confused and did not distinctly carry in her mind all that occurred." *Empey v. Grand Ave. Cable Co.*, 45 Mo. App. 422.

"In cases of accidental injury it is not unusual for the person injured, correctly to perceive and accurately to remember some of the circumstances and to be unable to give a correct statement of all." *Hill v. West End St. R. Co.*, 158 Mass. 458, 33 N. E. 582.

**Man Who is Frightened**, not likely to remember well and accurately. *Queen v. Dowsey*, 6 Nova Scotia, 93, 123.

25. Difficulty of remembering facts accurately is "increased where parties are present at a scene of great public excitement, where events are rapidly transpiring and where confusion prevails." *People v. Judson*, 11 Daly (N. Y.) 1, 82.

26. *The General Rucker*, 35 Fed.

**h. Aged Witness.**—The memory of aged persons is not to be relied upon to any great degree, though of course the credit to which their testimony is entitled will vary with each individual case.<sup>27</sup> Their recollection of more remote facts is likely to be better than their recollection of those which have occurred more recently on account of the greater attention which they received at the time.<sup>28</sup>

**i. Childhood Events.**—Childhood happenings are commonly supposed to be remembered by a person in his maturer years with peculiar clearness,<sup>29</sup> but while this may be true of facts which were of peculiar interest to the child,<sup>30</sup> it does not hold true in respect to matters of ordinary life as to which the child may be supposed to have but but little knowledge or understanding.<sup>31</sup> As to such matters the principle of remoteness applies with special force.<sup>32</sup>

152, 156. See *United States v. Ryecraft*, 27 Fed. Cas. No. 16,211; *Giltner v. Gorham*, 4 McLean 402, 10 Fed. Cas. No. 5,453, p. 431; *Davis v. People*, 114 Ill. 86, 29 N. E. 192.

27. *Rosencrans v. Schnacke*, 13 Ill. App. 216; *Kent v. Lasley*, 24 Wis. 654; *Jackson v. Etz*, 5 Cow. (N. Y.) 314.

"A defect of memory is probably the first evidence of an impairment of the mental faculties." *Dean v. Dean*, 42 Or. 290, 296, 70 Pac. 1039.

28. See *supra*, III, 9, A, b.

"The clearness and exactness which often characterizes the statements of those advanced in years in reference to events of their early life." *McClaskey v. Barr*, 54 Fed. 781.

29. *Parke v. Foster*, 26 Ga. 465, 470.

30. *Ferrie v. Public Admr.*, 4 Bradf. (N. Y.) 28, 79.

31. "It is scarcely possible to imagine that a child of eight years could receive impressions, positive, definite and fixed, of an event such as this, in which he could have no interest and which he certainly could not understand. The impressions of childhood as to matters of business detail are of the most fleeting, evanescent and imperfect character." *Lewars v. Weaver*, 121 Pa. St. 268, 292, 15 Atl. 514.

**Business Matters Not Remembered.**—*Mesick v. Mesick*, 7 Barb. (N. Y.) 120, 126; *Cutting v. Burns*, 57 App. Div. 185, 68 N. Y. Supp. 269

(child who saw a receipt may when grown up remember it as a deed.)

**Conversations Not Remembered.** *Kinney v. Murray*, 170 Mo. 674, 705, 71 S. W. 197; *McElvain v. McElvain*, 171 Mo. 244, 257, 71 S. W. 142; *Holmes v. Connable*, 111 Iowa 298, 305, 82 N. W. 780; *Dean v. Anderson*, 34 N. J. Eq. 496, 506; *Walker v. Boughner*, 18 Ont. 448, 455.

**Testimony That a Man and Woman** lived together as husband and wife not credited. *Rooney v. Rooney*, 54 N. J. Eq. 231, 245, 34 Atl. 682.

**Interest To Forget.**—*Wetzel v. Minnesota R. Trans. Co.*, 65 Fed. 23, 27, 12 C. C. A. 490.

**Effect of Moving Away While Young.**—*In re Sheehan's Estate*, 139 Pa. St. 168, 20 Atl. 1003, 1007.

32. *Bowen v. Preferred Acc. Ins. Co.*, 82 App. Div. 458, 81 N. Y. Supp. 840; *Keasbey v. American M. & C. Co.*, 143 Fed. 490, 74 C. C. A. 510; *Chandler v. Hough*, 7 La. Ann. 440; *People v. Hancock*, 7 Utah 170, 181, 25 Pac. 1093; *Walker v. Boughner*, 18 Ont. 448, 455; *Van Barcom v. Kip*, 26 N. J. L. 351, 357.

"While we will not even say that there may not be a memory capable of retaining facts and circumstances occurring at so tender an age, through a long life, yet we will say, that the testimony of such a witness ought to be perfectly consistent throughout, to show that it proceeds from such a memory, and such tes-

j. *Memory of Actor*.—The memory of the person who performed an act or took part in a conversation is generally more clear and accurate in regard to the matter than the memory of any other person.<sup>33</sup>

k. *Illiterate and Infirm Witnesses*.—Illiterate persons, who are driven to complete reliance upon their memory alone, often exhibit superior powers in this direction.<sup>34</sup>

*Loss of Some of the Senses* does not necessarily, as is commonly supposed, increase the ability and accuracy of the memory of a person.<sup>35</sup>

timony will be carefully scrutinized." *Parker v. Chambers*, 24 Ga. 518, 527 (witness fifty-nine years old testifying to what occurred when he was six years old).

33. *Canada*.—*Deverill v. Coe*, 11 Ont. 222, 229.

*United States*.—The Rhode Island, 2 Blatchf. 113, 20 Fed. Cas. No. 11,745, p. 651 (master and pilot of a boat as to the steering of the boat); *Ex parte Fitz*, 2 Lowell 519, 9 Fed. Cas. No. 4,837; *Jordan v. Eaton*, 2 Hask. 236, 13 Fed. Cas. No. 7,520.

*Alabama*.—*Bugbee v. Howard*, 32 Ala. 713, 717 (person making a tender should have the best recollection of the amount tendered).

*Maryland*.—*National F. Ins. Co. v. Crane*, 16 Md. 260, 295.

*New Jersey*.—*In re Gilham's Will*, 64 N. J. Eq. 715, 52 Atl. 690 (physician has better remembrance of amount of morphine administered a patient than casual visitors); *West Jersey R. Co. v. Thomas*, 23 N. J. Eq. 431, 438 (party to a conversation).

*New York*.—*Carpenter v. Blake*, 75 N. Y. 12, 18 (surgeon should know what he did in setting a broken arm better than patient); *Hankins v. New York, etc. R. Co.*, 142 N. Y. 416, 422, 37 N. E. 466, 40 Am. St. Rep. 616, 25 L. R. A. 396 (train dispatcher who sends an order more likely to remember it than anyone else).

*Pennsylvania*.—*Sandford v. Hes-tonville, etc. R. Co.*, 136 Pa. St. 84, 94, 20 Atl. 799.

"It is more likely that the party who made the motion (before the court) should know what he meant and what he said, than any other person." *Blight v. Ashley*, Pet. C.

C. 15, 3 Fed. Cas. No. 1,541, p. 703.

"A party generally knows and comprehends his own statements; but it is quite often the case that a witness when called upon to repeat what has been said in his presence is quite incorrect in his testimony in relation thereto." *Jordan v. Eaton*, 2 Hask. 236, 13 Fed. Cas. No. 7,520, p. 1100.

*Lawyer's Testimony* as to the contents of a lost instrument which he drew up, is entitled to great weight. *Warmoth v. Durand*, 57 N. J. Eq. 160, 42 Atl. 168; *Knapp v. Golden*, 28 N. J. Eq. 605.

34. See *Davis v. Meaux*, 15 Ky. L. Rep. 308, 22 S. W. 324.

"It has been observed by those who have given the subject careful consideration, that the person who cannot write usually retains a better knowledge of the details of a business transaction than one who commits the general outlines thereof to paper; and this is so because the former must necessarily rely upon his memory, while the latter depends upon his memoranda." *Dean v. Dean*, 42 Or. 290, 297, 70 Pac. 1039.

"Marriage is always considered so important an event, that most persons always remember it with certainty, and also the age at which it occurs. These things are seldom forgotten while memory lasts, by even the most illiterate; and those who can neither read nor write generally know and seldom forget their own ages. And mothers of that description are believed to remember the ages of their children quite as well as the educated and more gifted." *Harrer v. Wallner*, 80 Ill. 197.

35. *Loss of Hearing*.—"Shut off

1. *Vocation of Witness.* — The memory of a witness is generally better in relation to matters which he would be more likely to notice on account of their interest to him in his business or professional life.<sup>36</sup>

m. *Memory Confessedly Weak.* — The recollection of a witness who admits a weakness of memory either expressly<sup>37</sup> or by his conduct<sup>38</sup> is to be closely scrutinized.

n. *Refreshed Memory.* — In another volume of this work will be found a complete discussion of the circumstances under which a witness will be allowed to refresh his memory by reference to written instruments and memoranda, and the nature and value of testimony so given.<sup>39</sup>

A Sudden and Unexplained refreshing of the recollection by which the witness is enabled to remember matters as to which he formerly had no recollection is always regarded with great suspicion.<sup>40</sup>

o. *Accident Causing Loss of Memory.* — Personal injuries suffered by a person are sometimes of such a nature as to cause a loss of all memory as to how the injury was inflicted and of all the surrounding circumstances.<sup>41</sup>

to a certain extent by the loss of his hearing from external communication, habits of attention would diminish, and habits of abstraction increase. Coupling this with the usual indifference of senility to recent impressions, we should look for an inactive memory on topics of minor importance." Carroll v. Norton, 3 Bradf. (N. Y.) 291, 312.

**Loss of Sight.** — "The loss of distinct vision very naturally tends to withdraw as it were, the mind within itself. The necessity of depending entirely upon the memory, would, it is true, lead to the preservation of that faculty, but likewise to greater care in precisely understanding what was said to him." Weir v. Fitzgerald, 2 Bradf. (N. Y.) 42, 63.

36. "A Carpenter's Description of a compound wound dynamo seen by him ten years before might well be received with grains of allowance; but if the question were whether a book-case built by him at that time was provided with glass doors or curtains, his statement would probably be received without cavil." National Casket Co. v. Stoltz, 157 Fed. 392, 85 C. C. A. 300.

A witness testifying to acts which occurred in his own business is scarcely likely to be mistaken. Na-

tional Casket Co. v. Stoltz, 157 Fed. 392, 85 C. C. A. 300.

"The transactions in their nature were such as were likely to impress themselves on his trained professional mind." Westinghouse Elec. & Mfg. Co. v. Roberts, 125 Fed. 6.

37. Buckheit v. Smith (N. J. Eq.), 3 Atl. 91; Shotwell v. Shotwell, 24 N. J. Eq. 378, 382 (memory of date).

38. **Witness Relying on Memoranda.** — Grant v. Bradstreet, 87 Me. 583, 607, 609, 33 Atl. 165.

39. See article "REFRESHING MEMORY," Vol. XI.

40. Sinclair v. Backus, 4 Fed. 539, 542; United States v. Montgomery, 3 Sawy. 544, 551, 26 Fed. Cas. No. 15,800; Hawes v. Antisdell, 2 Ban. & A. 10, 11 Fed. Cas. No. 6,234, p. 859; Stanford v. Lyon, 37 N. J. Eq. 94, 105.

"No circumstances are mentioned by which his recollections may, in the intervening time, have been refreshed. It is a bold, positive and unexplained contradiction, and it would be unsafe to give to the testimony of such a witness any weight." Malin v. Malin, 1 Wend. (N. Y.) 625, 651.

**Explanation May Be Satisfactory.** Allaire v. Allaire, 37 N. J. L. 312, 329.

41. United States v. Pollack, 27

p. *Discrepancies Between Witnesses*.—Slight discrepancies in the stories told by various witnesses are an element of strength rather than weakness, and lead to the conclusion that their memories are substantially accurate.<sup>42</sup>

Fed. Cas. No. 16,061, p. 582; Chicago & N. W. R. Co. v. Weeks, 99 Ill. App. 518, 529; Bauer v. North Jersey St. R. Co., 74 N. J. L. 624, 65 Atl. 1037; Laidlaw v. Sage, 158 N. Y. 73, 91, 52 N. E. 679, 44 L. R. A. 216.

"From the severity of the injuries which were chiefly to the head and especially the jaw, the infant plaintiff appeared at the trial to have no recollection of anything that happened after he got the case on the elevator and commenced the ascent." Jones v. Morton Co., 14 Ont. L. 402, 409.

The plaintiff "was so seriously injured by the collision that he has now no recollection of anything that took place at the time he was hurt. He can give no account of the transaction and never has been able to do so since the accident." Peoria, P. & J. R. Co. v. Siltman, 88 Ill. 529.

"It is admitted that the daughter would testify that she had no recollection whatever of any of the facts that occurred. That is not a remarkable circumstance gentlemen. It seems to be a merciful dispensation of Providence to paralyze the faculties and the feelings, so that, so far as it has been possible to investigate the matter, the general opinion of those who have given attention to it is that even in the most dangerous and apparently painful accidents there may be little actual pain or suffering at the time, but rather an unconsciousness, which renders the sufferer unable, in most instances, to recollect anything that occurred." Griffith v. Baltimore & O. R. Co., 44 Fed. 574.

**May Add Credit to the Testimony.**

"It is true that the plaintiff was unable to tell how he came to fall, and that he did not remember being hit by anyone. This only goes to show the man's integrity and that he was unwilling to color the scene, or assert a recollection to his own advantage which the fall had obliterated." Weiler v. Manhattan R.

Co., 53 Hun 372, 6 N. Y. Supp. 320.

But in Lammers v. Great Northern R. Co., 82 Minn. 120, 123, 84 N. W. 728, failure of a witness to remember what occurred just before the accident was held to justify a belief that she was not frank or candid in her story.

42. *Canada*.—Minhinnick v. Jolly, 29 Ont. 238.

*United States*.—Crawford v. The Buffalo, 6 Fed. Cas. No. 3,365a.

*District of Columbia*.—Alexander v. Blackman, 26 App. Cas. 541.

*Illinois*.—Strauch v. Hathaway, 101 Ill. 11, 14.

*Indiana*.—Peter v. Wright, 6 Ind. 183, 193.

*Massachusetts*.—Hill v. West End St. R. Co., 158 Mass. 458, 33 N. E. 582 ("it is rarely that two persons relate alike the same occurrence").

*New Jersey*.—Adams v. Adams, 17 N. J. Eq. 324, 335.

*New York*.—*In re Lyddy's Will*, 53 Hun 629, 5 N. Y. Supp. 636, 638; Klein v. Interurban St. R. Co., 55 Misc. 211, 105 N. Y. Supp. 95.

*Pennsylvania*.—Hodder v. Philadelphia Rapid Tr. Co., 217 Pa. St. 110, 117, 66 Atl. 239.

*Wisconsin*.—Collins v. Janesville, 117 Wis. 415, 426, 94 N. W. 309.

"The circumstance that the witnesses for appellee varied in their version of the occurrence tends to corroborate their truthfulness rather than to discredit them." Washington Ice Co. v. Bradley, 70 Ill. App. 313.

"Exact agreement in details, even to the use of the same words in their testimony, conveys the impression of collusion on their part." Graham v. State, 92 Ala. 55, 9 So. 530.

"It is the judgment of intelligent and observant critics that one of the strong proofs of the absence of manufactured evidence among a class bearing testimony to a common, central fact, is the existence of some discrepancies in their state-

q. *Details Forgotten.*—While a narration of comparatively recent events which contains some particulars and details, indicates an accurate memory,<sup>43</sup> still nothing but the main facts and characteristics of more remote matters is expected to be remembered,<sup>44</sup> and the testimony of a witness who does more is justly suspected and discredited.<sup>45</sup>

ments as to minor details." *Glover v. United States*, 147 Fed. 426, 428, 77 C. C. A. 450.

"Advocates' argument is familiar that if witnesses agree in details their stories have been fixed up, and if they disagree in details neither is to be believed in respect to the vital matters about which they are in accord." *Diamond Meter Co. v. Westinghouse Co.*, 152 Fed. 704, 711, 81 C. C. A. 630.

**Agreement May Be Satisfactorily Explained.**—Three witnesses testified in nearly identical language. It was contended that their evidence should not count for more than that of a single witness. But the court said: "The sameness may be accounted for, we think. The witnesses lived together. In all probability they spent most of their time in the same room. The episode was probably the most exciting in their lives. They must have talked it over a great deal among themselves and told the story of it to others over and over again in each other's presence. Under these circumstances there is nothing very surprising if they have fallen into the habit of telling the story pretty much in the same words." *Fatjo v. Seidel*, 109 La. 699, 33 So. 737. And see *Mullery v. Hamilton*, 71 Ga. 720.

**Agreement in Depositions Not Suspicious.**—"The coincidence of statement and similarity of language and expression may well have arisen from the fact that their testimony was taken under the act of Congress *ex parte*," and in answer to stereotyped leading questions. *Walsh v. Rogers*, 13 How. (U. S.) 283.

43. *Brigham v. Bussey*, 26 La. Ann. 676; *Losee v. Morey*, 57 Barb. (N. Y.) 561; *Meehan v. Rourke*, 2 Bradf. (N. Y.) 385, 391; *Brink v. Lyons*, 18 Fed. 605. See *Glenn v. Augusta R. & E. Co.*, 121 Ga. 80, 48 S. E. 684; *Quock Ting v. United*

*States*, 140 U. S. 417; *Wilson v. Halstead*, 9 Ky. L. Rep. 623, 6 S. W. 21; *Waters-Pierce Oil Co. v. Van Elderen*, 137 Fed. 557, 569, 70 C. C. A. 255.

The discredit due a witness depends partly upon "the accuracy with which he is able to remember and state minute and apparently trivial and unimportant incidents connected therewith." *Eames v. Eames*, 41 N. H. 177.

A witness who testifies with particularity will be considered to have observed more accurately and closely than one who states mere general facts. *Emery v. Cichero*, 9 App. Cas. (Eng.) 136.

44. *United States v. Stinson*, 197 U. S. 200; *Clark v. Clark*, 52 N. J. Eq. 650, 656, 30 Atl. 81; *Matter of Pepoon*, 91 N. Y. 255; *Den v. Matlack*, 17 N. J. L. 86, 109; *Hoyt v. Hoyt*, 27 N. J. Eq. 399.

"How often is it, that the memory errs with respect to unimportant circumstances but is correct with respect to the principal subject." *Chacon v. Eighty Nine Bales*, 1 Brock. 478, 5 Fed. Cas. No. 2,568, p. 394.

"It does not follow that his memory is not deserving of reliance upon a subject in which his mind was engaged although it may be defective as to secondary circumstances." *Brush v. Holland*, 3 Bradf. (N. Y.) 461, 474.

**Slight Inaccuracies May Strengthen Testimony.**—"Sometimes immaterial discrepancies or misstatements by a witness strengthen our conviction of his veracity, for it is the common experience that persons perfectly truthful, who take distinct and correct impressions of the material facts, often have incorrect impressions and recollections of the immaterial incidents, even when their recollection of these seems to them to be distinct." *United States v. Hughes*, 34 Fed. 732.

45. *Pierce v. Feagans*, 39 Fed. 587,

r. *Failure To Recollect.* — Repeated failure of a witness to recollect matters of which he would naturally have some recollection, is viewed with suspicion.<sup>46</sup> And a witness who purports to remember some one matter but has no recollection of other similar matters occurring at or about the same time, is to be distrusted.<sup>47</sup>

**Positive Testimony** showing a recollection of the happening of an event is not even contradicted by negative testimony that the witness has no recollection of its occurrence,<sup>48</sup> since there is room for

591; *Graham v. State*, 92 Ala. 55, 9 So. 530; *McFadden v. Wallace*, 38 Cal. 51; *Miller v. Miller*, 100 Mich. 563, 59 N. W. 242. And see *supra*, III, 9, I, b.

"The particularity and positiveness with which he stated the place of his birth in San Francisco was evidently the result of instruction for his examination on this proceeding, and not a statement of what he had learned from his parents in years past." *Quock Ting v. United States*, 140 U. S. 417.

"The law is well settled that a witness may very seriously impair his credibility by swearing positively and minutely to occurrences which were not of such a nature to impress themselves forcibly upon his memory." *Lee Sing Far v. United States*, 94 Fed. 834, 35 C. C. A. 327; *Willett v. Fister*, 18 Wall. (U. S.) 91, 97.

**In Exceptional Cases**, a remembrance of even collateral matters may be looked for. *Clark v. Clark*, 52 N. J. Eq. 650, 658, 30 Atl. 81.

46. *Driver v. Driver*, 28 N. J. Eq. 393, 395; *Burt v. Gotzain*, 102 Fed. 937, 943, 42 C. C. A. 59.

47. *United States*. — *United States v. Lee Huen*, 118 Fed. 442, 460; *Quock Ting v. United States*, 140 U. S. 417.

*Alabama*. — *Smith v. Wert*, 64 Ala. 34.

*California*. — *Davis v. California Powder Wks.*, 84 Cal. 617, 624, 24 Pac. 387.

*Kentucky*. — *Todd's Heirs v. Wickliffe*, 12 B. Mon. 289, 300.

*Louisiana*. — *Socola v. Chess-Carley Co.*, 39 La. Ann. 344, 352, 1 So. 824.

*Maine*. — *Grant v. Bradstreet*, 87 Me. 583, 33 Atl. 165.

*New Jersey*. — *Clark v. Clark*, 52 N. J. Eq. 650, 659, 30 Atl. 81.

*New York*. — *Maverick v. Reynolds*, 2 Bradf. 360, 368; *In re Duffy's will*, 51 Misc. 543, 101 N. Y. Supp. 974; *Jackson v. Etz*, 5 Cow. 314.

Witness is discredited who claims to remember date of particular deed but cannot remember date of other similar deeds. *Thomas v. Ribble* (Va.), 24 S. E. 241.

Testimony as to a conversation which occurred thirty-five years before, where "the lapse of time had caused every other circumstance connected with the event of which he was speaking to fade from his memory," is a very weak sort of proof. *Grantham v. Gossett*, 182 Mo. 651, 81 S. W. 895.

"A shrewd witness, who is swearing falsely to something which cannot be disproved by direct testimony, will confine his recollection wholly to that single fact, professing a want of recollection of all the facts and circumstances attending it. An inexperienced witness whose willingness to oblige his friend exceeds his judgment, will endeavor to give verisimilitude to his tale by a recital of imaginary circumstances." *Luco v. United States*, 23 How. (U. S.) 515, 535.

"**An Honest Witness** who has sufficient memory to state but one fact connected with an important transaction and that a material one cannot be safely relied upon, as such weakness of memory not only leaves the case incomplete, but throws doubt upon the accuracy of the statement made." *United States v. Lee Huen*, 118 Fed. 442, 461.

48. *Vanpelt v. Hutchinson*, 114 Ill. 435, 2 N. E. 491 (occurrence of a conversation). But see article "POSITIVE AND NEGATIVE TESTIMONY," Vol. IX, p. 870.



failure of the recollection of the latter witness, while to disbelieve the former would involve an imputation of perjury,<sup>49</sup> and this is always to be avoided.<sup>50</sup>

s. *Contradictory Statements.* — (1.) *In General.* — Where a witness who is not a party has made different or contradictory statements in relation to a transaction, those statements made prior to the trial and nearest in point of time to the transaction may well be regarded, as the more accurate,<sup>51</sup> and the effect of the contradiction will be to seriously impeach the credit of the witness;<sup>52</sup> but the

Testimony that a person cannot recollect is mere negative testimony and is not weighty. *McClellan v. Sanford*, 26 Wis. 595.

49. *Ralph v. Chicago & N. W. R. Co.*, 32 Wis. 177, 181; *Lane v. Jackson*, 20 Beav. (Eng.) 535, 539; *Johnson v. Scribner*, 6 Conn. 185.

50. See *infra*, III, 10, K.

51. Two letters written "while the transactions were recent, are so inconsistent with his statements made nine years afterwards as to raise a violent presumption that he was mistaken in his recollection of every material fact touching the pinch of the case, and this conclusion appears to be so irresistible that the jury were warranted in disregarding his entire deposition." *State Bank v. McGuire*, 14 Ark. 530, 536.

A witness' statement was rejected "as no reason is given or pretended why his later statement should be more correct than the one made so shortly after the transaction took place to which both relate. As the difficulty of his position pressed upon him he seems to have become more reckless in his statements." *Douglass v. Ward*, 11 Grant Ch. (U. C.) 39, 51.

"It is safer to trust to the narrative of a sailor made when all the incidents were fresh in his memory than condemn on testimony given a year subsequent." *The Douglass*, 7 Fed. Cas. No. 4,031.

52. *Canada.* — *Brouse v. Stayner*, 16 Grant Ch. 553.

*United States.* — *Flagg v. Mann*, 2 Sumn. 486, 9 Fed. Cas. No. 4,847, p. 211; *Lee v. Guardian Life Ins. Co.*, 15 Fed. Cas. No. 8,190, p. 162; *United States v. Candler*, 65 Fed. 308; *Palmer v. Lansburgh*, 102 Fed.

376; *Brahn v. Ramapo Iron Wks.*, 35 Fed. 63.

*Alabama.* — *Garrett v. Garrett's Heirs*, 29 Ala. 439.

*California.* — *In re Irvine's Estate*, 102 Cal. 606, 36 Pac. 1013.

*Florida.* — *Schultz v. Pacific Ins. Co.*, 14 Fla. 73, 97.

*Minnesota.* — *Klason v. Rieger*, 22 Minn. 59.

*New Jersey.* — *Morris v. Taylor*, 22 N. J. Eq. 438; *Hannas v. Hawk*, 24 N. J. Eq. 124; *Van Houten v. Post*, 33 N. J. Eq. 344, 351; *Baier v. Camden & S. R. Co.*, 68 N. J. L. 42, 52 Atl. 215.

*New York.* — *Egan v. Berkshire Apart. Assn.*, 10 N. Y. Supp. 116; *People v. Brockett*, 32 N. Y. Supp. 511.

*Pennsylvania.* — *Arnold v. Life Ins. Co.*, 22 Pa. Super. 575.

"He who under one oath knowingly affirms a proposition, and under another oath knowingly negates the same proposition, is not to be credited in either instance. The one statement neutralizes the other, and in a court of justice his evidence is entitled to no weight unless corroborated." *Johnston v. Sochurek*, 104 Ill. App. 350.

The fact that a witness testifies with greater particularity as to details in a second trial than he did in the first, "does not add weight to his testimony." *Cleveland Target Co. v. Empire Target Co.*, 97 Fed. 44, 66.

Witness may be cross-examined as to statements made on a former trial to test his memory. *Illinois Cent. R. Co. v. Johnson* (Ky.), 115 S. W. 798. And see article "CONTRADICTION OF WITNESSES," Vol. III.

**Witness Not Questioned About the Matter.** — The excuse of the witness that he was not questioned about

contradiction will not furnish affirmative evidence of any fact.<sup>53</sup>

(2.) **By a Party.**—Where such statements are made by a party to the action, the earlier statements, when credited by the jury, are admissions and may be used as evidence in the case.<sup>54</sup>

t. *Subject-Matter*—(1.) **In General.**—The nature of the subject-matter of an event or transaction will determine to a large extent the degree of recollection a witness ought to retain concerning it.<sup>55</sup>

(2.) **Conversations and Oral Statements.**—Oral statements are very difficult to remember with any degree of accuracy.<sup>56</sup>

(3.) **Dates.**—Memory of dates is proverbially weak<sup>57</sup> and is to

the matter, as to which he testified for the first time on a later trial, does not prevent the jury from considering this fact in passing on his credibility. *State v. Rosa*, 71 N. J. L. 316, 58 Atl. 1010.

**Contradictory Testimony Not Necessarily Fatal** to belief in a witness; the jury may believe one or the other of the stories. *Van Salvellergh v. Green Bay Tr. Co.*, 132 Wis. 166, 111 N. W. 1120; *Bruger v. Princeton & St. M. Ins. Co.*, 129 Wis. 281, 109 N. W. 95.

**Contradictions May Be Explained.** In commenting on discrepancies in a witness' testimony with the testimony of the same witness on a former trial, the court said: "Much depends upon the mode of examining a witness and the distinctness with which his attention is called to the particular aspect of the case." Witnesses often become confused under the severities of cross-examination and incapable of giving explanations. *Miller v. Stem*, 12 Pa. St. 383, 390.

53. *Plyer v. German Am. Ins. Co.*, 121 N. Y. 689, 24 N. E. 929.

54. *Tarbell v. Forbes*, 177 Mass. 238, 58 N. E. 873; *Whalen v. Millholland*, 89 Md. 199, 210, 43 Atl. 45, 44 L. R. A. 208.

"The mere fact that a party to a suit gave evidence in a former action between the same parties contradicting his evidence in the latter action, does not conclude him, as a question of law, but the effect to be given to his evidence is a question for the jury." *In re Hess' Estate*, 57 Minn. 282, 59 N. W. 193; *Hahn v. Bettingen*, 84 Minn. 512, 88 N. W. 10.

**Testimony Changed To Meet Objections.**—"Testimony upon a vital

point in the case, materially changed to obviate objections pointed out by the court on a former appeal, unless a sufficient and legitimate explanation is given, is discredited testimony." *Adams v. New York City R. Co.*, 125 App. Div. 551, 109 N. Y. Supp. 1019; *Edall v. New England R. Co.*, 40 App. Div. 617, 57 N. Y. Supp. 914; *Healy v. United Tr. Co.*, 115 App. Div. 868, 101 N. Y. Supp. 331.

55. *Hitt v. Rush*, 22 Ala. 563.

"The accuracy of knowledge at the time, as well as the ability of the man to testify to the truth, depend very much upon the subject-matter. Some things that men have a full, clear and perfect knowledge of at the time they transpire may not be of that interesting character that they retain them in their memory." *Hayden v. Suffolk Mfg. Co.*, 11 Fed. Cas. No. 6,261.

**Color and Size of Seal.**—"Reasonable men might doubt the reliability of the recollection of the witnesses as to the color and size of a seal last seen by them at least ten years before." *Stevens v. Stevens*, 72 N. H. 360, 56 Atl. 916.

56. See *supra*, III, 6, F, a, (1), (B.).

"The narration of conversations correctly is the most difficult feat of memory and of expression, and of all evidence the narration of a witness of his conversation with a dead person is esteemed in justice the weakest." *Succession of Piffet*, 37 La. Ann. 871.

57. "All know that it is with great difficulty that even a record date can be proved satisfactorily from memory alone. It is easily forgotten unless the mind is especially called to and charged with the fact."

be little relied upon,<sup>58</sup> unless the statement of the witness as to date is corroborated by reference to some collateral fact,<sup>59</sup> the date

Russell v. Baptist Theological Union, 73 Ill. 337.

A mere date "of all facts slides the easiest from the memory." McArthur v. Sears, 21 Wend. (N. Y.) 190.

The court spoke of the question as to the date of a certain transaction as being "a subject upon which the human memory is proverbially treacherous." Wilson v. Anderson (Tenn. Ch. App.), 37 S. W. 1100.

58. *United States*.—Willett v. Fister, 18 Wall. 91, 97; Thomson-Houston Elec. Co. v. Lorain Steel Co., 110 Fed. 654, 660; Pettibone, M. & Co. v. Pennsylvania Steel Co., 133 Fed. 730, 735; Brahn v. Ramapo Iron Wks., 35 Fed. 63; Sinclair v. Backus, 4 Fed. 539, 542; Wing v. Richardson, 2 Cliff, 449, 30 Fed. Cas. No. 17,869; Flagg v. Mann, 2 Summ. 486, 9 Fed. Cas. No. 4,847.

*Alabama*.—Black v. Black, 38 Ala. 111.

*California*.—Davis v. California Powder Wks., 84 Cal. 617, 624, 24 Pac. 387.

*Georgia*.—Lucas v. Parsons, 27 Ga. 593, 619.

*Iowa*.—Wyland v. Frost, 75 Iowa 209, 39 N. W. 241.

*Kentucky*.—Louisville & N. R. Co. v. Deason, 29 Ky. L. Rep. 1259, 96 S. W. 1115.

*Louisiana*.—Chandler v. Hough, 7 La. Ann. 440.

*Maine*.—Marcotte v. Lewiston, 94 Me. 233, 47 Atl. 137; Pierce v. Bangor & A. R. Co., 94 Me. 171, 177, 47 Atl. 144.

*New Jersey*.—Kohl v. State, 59 N. J. L. 445, 36 Atl. 931, 37 Atl. 73; Goble v. Grant, 3 N. J. Eq. 629.

*New York*.—McArthur v. Sears, 21 Wend. 190, 192; People *ex rel.* Wieland v. Knox, 78 App. Div. 344, 79 N. Y. Supp. 989, 995; Sarvent v. Hesdra, 5 Redf. 47, 54; Feeter v. Heath, 11 Wend. 477, 485.

*Pennsylvania*.—Jones v. Murphy, 8 Watts & S. 275, 298; Com. v. Orr, 138 Pa. St. 276, 20 Atl. 866.

**Witness Who Does Not Pretend To Fix a Date.**—The fact that a

witness does not pretend to fix a date with accuracy only strengthens his credibility. Martin's Estate, 19 Pa. Co. Ct. 209.

**Unusual Memory of Dates.**—A witness may demonstrate that his memory of dates is good. Thomson-Houston Elec. Co. v. Lorain Steel Co., 110 Fed. 654, 659.

**Not Well Remembered by Children.**—McClaskey v. Barr, 54 Fed. 781, 784.

**Failure To Cross-Examine.** Where a date is important, the failure to cross-examine a witness who testifies to the date will be taken as proof that the adverse party is satisfied that the date was accurately stated. Roemer v. Headley, 19 Fed. 205; Appert v. Brownsville Plate Glass Co., 144 Fed. 115, 119.

59. *United States*.—Weisgerder v. Clowney, 131 Fed. 477, 482; Covert v. Covert, 106 Fed. 183, 188; Brown v. Zaubitz, 105 Fed. 245.

*Alabama*.—Birmingham Elec. R. Co. v. Clay, 108 Ala. 233, 19 So. 309.

*Missouri*.—Ritter v. Springfield Bank, 30 Mo. App. 652.

*New Jersey*.—White v. White, 64 N. J. Eq. 84, 53 Atl. 23; Adams v. Wells, 64 N. J. Eq. 211, 53 Atl. 610.

*New York*.—Flynn v. Powers, 54 Barb. 551, 553.

*Texas*.—Bice v. State, 37 Tex. Crim. 38, 41, 38 S. W. 803.

*Wisconsin*.—Menn v. State, 132 Wis. 61, 112 N. W. 38.

"The human memory is proverbially treacherous even in regard to very recent dates, and little reliance can be placed on the sworn testimony of living witnesses in such matters, unless they are able to associate the date given with some more striking fact." South West School Dist. v. Williams, 48 Conn. 504.

**The Date That Payments were made** was shown by proving that the money used was obtained in certain other transactions with other persons and then proving by these persons the date on which

of which can itself in some manner be established with certainty.<sup>60</sup>

(4.) **Time.** — (A.) **TIME OF DAY.** — The time of day at which an event occurred is not likely to be remembered except in the most general way.<sup>61</sup>

(B.) **INTERVALS OF TIME.** — Intervals of time are also intrinsically difficult to measure and remember,<sup>62</sup> especially when they are of

they occurred. *Estes v. Fry*, 22 Mo. App. 53, 57.

60. *Pettibone, M. & Co. v. Pennsylvania Steel Co.*, 133 Fed. 730, 735; *Thayer v. Hart*, 20 Fed. 693.

"The occurrence of two events upon the same day proves nothing as to the time, unless the date of one of them be known." *Cunningham v. Burdell*, 4 Bradf. (N. Y.) 343, 457.

"She says she knows it was in April, 1865, because she was cleaning shad and wanted change; but she may as well have been cleaning shad in 1866 as in 1865." *Willett v. Fister*, 18 Wall. (U. S.) 91, 97.

"Testimony that something occurred 'about a month' preceding a day unestablished, except by the unsupported recollection of an interested witness twelve years after, is too indefinite and uncertain to be accepted." *Bettendorf Patents Co. v. Little Co.*, 123 Fed. 433, 59 C. C. A. 473.

61. *Com. v. Orr*, 138 Pa. St. 276, 284, 20 Atl. 866; *Minneapolis S. & D. Co. v. Great Northern R. Co.*, 83 Minn. 370, 86 N. W. 451 (mere estimate of the time of day an engine passed a point is very unreliable); *Woodward v. Woodward*, 41 N. J. Eq. 224, 228, 4 Atl. 424 ("scarcely any species of evidence is less reliable").

"All experience, however, proves that but little reliance can be placed upon the recollection of witnesses as to the exact moment of any occurrence. Men generally take so little note of the passing of time that an approach to accuracy is all that can be expected." *McCann v. State*, 13 Smed. & M. (Miss.) 471, 494.

**Opinion of Witness** as to the time of day an event occurred is admissible although the witness carried

no watch. *Campbell v. State*, 23 Ala. 44, 68.

**Differences in Watches.** — Slight differences as to the time of an accident "may be easily accounted for by the fact that different clocks were referred to by the witnesses." *The Ottoman*, 74 Fed. 316, 20 C. C. A. 214. And see *Cummins v. Holmes*, 11 Ill. App. 158, 162; *Johnson v. State*, 128 Ga. 102, 57 S. E. 353; *Painter v. People*, 147 Ill. 444, 461, 35 N. E. 64.

62. "Nothing is more uncertain and unreliable than the testimony of witnesses as to the time occupied in a transaction. There are situations when moments seem hours, and others when time flies imperceptibly; and witnesses should not be discredited because of a difference of opinion or judgment on such a point." *McGrail v. McGrail*, 48 N. J. Eq. 532, 536, 22 Atl. 582.

"There is nothing about which honest men swear so vaguely and contradictory as the times which mark the progress of an exciting incident." *Sanderson v. The Columbus*, 21 Fed. Cas. No. 12,299.

Estimates of times and distances "are always and necessarily vague and indefinite, being generally made from recollection afterwards, and always vary to some extent, when made by different men in relation to the same transaction." *Cohen v. The Mary T. Wilder*, Taney 567, 6 Fed. Cas. No. 2,965.

**Mood of Person Important.** "When a witness speaks of minutes, in recalling periods of time not actually measured by a time-piece, it is necessarily uncertain; the seeming length of the interval depends upon the mood of the witness at the time." *Ridge v. Pennsylvania R. Co.*, 58 N. J. Eq. 172, 179, 43 Atl. 275.

**Time Passing While Asleep.** — "It must be conceded, we think, that the evidence even of reliable wit-

short duration;<sup>63</sup> though even in such cases it can usually be determined whether an appreciable interval of time existed,<sup>64</sup> and whether the space of time was comparatively long or short.<sup>65</sup>

nesses as to the lapse of time in the night, when they are abed, at an hour when consciousness is likely to be dulled and when there is nothing to impress time particularly upon judgment or memory, is not a satisfactory basis upon which to erect an alibi." *State v. Lambert*, 97 Me. 51, 65, 53 Atl. 879. And see *The Ville Du Havre*, 7 Ben. 328, 28 Fed. Cas. No. 16,943.

**Negroes Especially Unreliable.** "It is notorious that the most intelligent witnesses find difficulty in estimating time but negroes seem to be most unreliable in this respect." *The General Rucker*, 35 Fed. 152, 157.

**Time Required to Read an Instrument.**—An estimate of the time a person took to read a will through was disbelieved. In the *Matter of Darrow*, 95 N. Y. 668.

63. "Nothing is so generally unsatisfactory in the course of judicial investigations as the attempt to fix so fleeting a thing as time. Unless the attention of a witness is called to the exact period of time when the event occurs, or unless he is enabled to estimate from a given point the period at which a subsequent event occurred, very little value is to be attached to the effort of his memory. We take cognizance of the great divisions of the day, and may say whether an event occurred in the morning, at noon, or in the evening; but when a witness undertakes to swear positively, from mere memory, to the fractions of hours or to minutes, we may well distrust his testimony and doubt his sincerity." *People v. Judson*, 11 Daly (N. Y.) 1, 82.

"People differ widely as to the estimation of passing time—particularly is this so in naming the minutes or seconds that may be thought to expire on any particular occasion." *Culbertson v. Chicago*, etc. R. Co., 50 Mo. App. 556, 562.

**Excitement and Alarm Affect Accuracy.**—"When it comes down to the point of estimating duration of time by one or two minutes or the

fraction of a minute, under exciting circumstances, the testimony of the average witness as to accuracy is of little value." *Erickson v. Kansas City O. & S. R. Co.*, 171 Mo. 647, 660, 71 S. W. 1022. And see *Tolman v. Syracuse*, etc. R. Co., 98 N. Y. 198 (time between blowing of whistle and collision); *Elliott v. The James Nelson*, 8 Fed. Cas. No. 4,393.

**Estimates of Short Periods Likely to be Excessive.**—"The whole thing occupied but a second. In telling it it seems longer, and the effort of the witness to analyze the sudden jerk and whirl makes it appear slower than the almost instantaneous event." *Lewis v. President*, etc. Canal Co., 145 N. Y. 508, 522, 40 N. E. 248. "Estimates of the duration of short periods into which much experience is crowded are notoriously inexact, and are apt to be excessive." *Davis v. Central R. Co.*, 67 N. J. L. 660, 52 Atl. 561. But see *The Devonian*, 150 Fed. 831, 838.

**Time a Car Stopped.**—Testimony that a street car stopped a minute and a half to allow passengers to alight, was doubted in *Evansville Elec. R. Co. v. Lerch*, 40 Ind. App. 147, 81 N. E. 225, the court remarking that "there is nothing more uncertain or unreliable than the estimate made by the average man of the flight of time under such circumstances." And see *Chicago*, etc. R. Co. v. *Stormont*, 90 Ill. App. 505.

64. *Anderson v. Ross*, 2 Sawy, 91, 1 Fed. Cas. No. 361.

65. "The testimony of the Mee-hawken's pilot is that his signals were given with great rapidity. He thinks that not more than three seconds intervened between his first and second signals, and not more than two seconds between his second signal and his alarm signal, and that the alarm whistle was given within two seconds after giving his second signal. Of course accuracy is not to be predicated of such testimony, but his testimony

Ordinarily recollection will be given greater credit where the witness measures the time with reference to what he did or could do in the interval rather than by making an abstract estimate of the time.<sup>66</sup>

(5.) **Sequence of Events.**—The exact sequence of events which follow each other with great rapidity,<sup>67</sup> or in relation to which the

shows very satisfactorily that but an extremely short interval could have elapsed between the time of the first signal and the collision." *The Pavonia*, 26 Fed. 106, 109. And see *Chaffee v. Old Colony R. Co.* (R. I.), 35 Atl. 47.

66. *Evansville Elec. R. Co. v. Lerch*, 40 Ind. App. 147, 81 N. E. 225.

"Witnesses differ materially in their ideas in the length of time elapsing between given events, but when they state that the time was taken by them in doing a certain thing or in going a certain distance the jury can generally get an idea of the real length of time between the given events." *Louisville & N. R. Co. v. Ueltschi's Exrs.*, 29 Ky. L. Rep. 1136, 97 S. W. 14. And see *The Garden City*, 26 Fed. 766, 778.

"According to the known operations of the intellect, time cannot any more than a straight line be measured by the senses regarding its continuity, and is best fixed in the memory by the relation or succession of events." *Sherwood v. Sherwood*, 21 Fed. Cas. No. 12,780.

"The judgment is quite as likely to be correct when the length of time is stated as being as long as it would take to walk a given distance as when it is stated in minutes or seconds." *Bayley v. Eastern R. Co.*, 125 Mass. 62, 66.

**Effect of Failure to Explain What Was Done in the Interval.**—Inability of the master of a boat who testified that he heard the signals of another boat five or six minutes before a collision, to tell what he did in the interval lead the court to believe that the actual interval of time was not more than one or two minutes. *The Patria*, 92 Fed. 411. An estimate of the time during which a telegraph wire was broken was held to be worthless where no events by

which it was marked or could be accurately measured were disclosed. *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549, 556.

67. *Keys v. The Ambassador*, 1 Bond 237, 14 Fed. Cas. No. 7,747; *Ehrhard v. Metropolitan St. R. Co.*, 58 App. Div. 613, 68 N. Y. Supp. 457; *Davis v. People*, 114 Ill. 86, 29 N. E. 192.

"Recollection generally extends to the substance of event, but is less tenacious of their precise order, when nearly contemporaneous in occurrence." *Rieben v. Hicks*, 3 Bradf. (N. Y.) 353.

Speaking of an accident to a street-car passenger in alighting, the court said: "The impression of a witness seeing an accident of this kind, even when testifying in entire good faith as to the transaction, is not always accurate as to the sequence of events occurring within a few seconds of time, in a moment of excitement caused by the happening of such an accident." *Ehrhard v. Metropolitan St. R. Co.*, 58 App. Div. 613, 68 N. Y. Supp. 457.

"The exact sequence of startling events crowded into a brief period of time, and productive of excitement and confusion, is often a matter of doubt, even in the most honest and accurate memory; and in the reiterated narration of such occurrence, in chief and on cross-examination, the most candid witnesses sometimes fall into apparently confused and inconsistent statements." *Kohler v. Pennsylvania R. Co.*, 135 Pa. St. 346, 356, 19 Atl. 1049.

**Signals on Vessels** which collide soon afterwards are likely to be remembered inaccurately. *The City of Atlanta*, 26 Fed. 456, 460; *The Pennland*, 23 Fed. 551, 554; *The Nereus*, 23 Fed. 448, 461.

witness had no special interest at the time,<sup>68</sup> is another matter as to which the memory of the witness is apt to be mistaken.

(6.) **Quantities and Values.**—Another class of matters which most persons find it difficult to remember, consists of the quantities, numbers and values of articles.<sup>69</sup>

(7.) **Nature of Events.**—Events either of an extremely pleasant or of an extremely unpleasant nature will be remembered better than those having no distinct and individual character.<sup>70</sup>

(8.) **Complicated Matters.**—Complex matters poorly understood by the person at the time will also be poorly remembered by him.<sup>71</sup>

(9.) **Contents of Lost Instrument.**—It is rarely the case that a witness can remember any more than the substance of the contents

68. "A detailed statement from memory, giving minutely and in succession incidents which at the time could have had no special interest for the observers, would have been loudly suggestive of falsehood." *Martin's Estate*, 19 Pa. Co. Ct. 209.

69. *Pierce v. Bangor & A. R. Co.*, 94 Me. 171, 177, 47 Atl. 144; *Livingston v. Home Mut. F. Ins. Co.*, 50 Mich. 207, 15 N. W. 85; *Feeter v. Heath*, 11 Wend. (N. Y.) 477, 485 (numbers, quantities and sums); *Wolcott v. Heath*, 78 Ill. 433 (amounts and prices); *Nelson v. Mayor*, 53 Hun 630, 5 N. Y. Supp. 688, 692 (articles and quantities).

"Quantities and values are retained in the mind with great difficulty." *Insurance Companies v. Weides*, 14 Wall. (U. S.) 375, 380; *Owens v. State*, 67 Md. 307, 314, 10 Atl. 210, 302.

Former values of property cannot be recalled with accuracy, especially where there has been a large appreciation of prices. *Baldwin v. Dunton*, 40 Ill. 188, 196.

**Iron Safe Clause** in fire insurance policies, reasonable, since the inventories and accounts required to be kept there are of such a nature that it would be impossible to reproduce them from memory. *Gillum & Co. v. Fire Assn.*, 106 Mo. App. 673, 679, 80 S. W. 283.

70. **Extremely Unpleasant Events** are likely to be well and long remembered. *Gaines v. New Orleans*, 6 Wall. (U. S.) 642, 705 (seduction of sister); *Bussom v. Forsyth*, 32 N. J. Eq. 277, 282 (birth of child before marriage); *Winans v. Winans*,

19 N. J. Eq. 220, 224 (wife of clergyman would not forget charge of defauling against him). But probably events which were pleasurable to as great a degree would be as well carried in the mind.

71. *Kneale v. Kneale*, 28 Mich. 344 (testimony of young children to acts of adultery); *Hemolin Co. v. Harway Dyewood Co.*, 131 Fed. 483 (knowledge of chemistry by ignorant person); *LaLance v. Habermann Mfg. Co.*, 53 Fed. 375, 379 (a complicated process of manufacture could not be easily remembered).

Structure of a machine not likely to be well remembered because the witness very likely did not observe it very closely, or if he did he had no minute knowledge of its construction at the time. *Hayden v. Suffolk Mfg. Co.*, 11 Fed. Cas. No. 6,261.

**Construction of Stove.**—"It requires something more accurate than the average human memory to carry in the recollection through a long series of years, those little resemblances or differences in construction or arrangement which distinguish things and which are necessary to be recalled in order to make the testimony of any value." *Thatcher Heating Co. v. Carbon Stove Co.*, 4 Ban. & A. 68, 23 Fed. Cas. No. 13,864.

**Construction of Sewing Machine.** "It is doubted if a single sewing woman in the country can recall the minute details of the driving gear of a sewing machine which she has not seen for thirty years. . . . Human memory is incapable of performing such miraculous feats."

of a lost instrument,<sup>72</sup> and any attempt at literal accuracy tends to discredit him.<sup>73</sup>

**10. Miscellaneous Matters.**—A. PARTY PRODUCING EVIDENCE. The fact that a witness is produced by the plaintiff rather than by the defendant, does not entitle him to either more or less value from that reason alone.<sup>74</sup>

B. PARTY OR HIS OWN WITNESS.—Ordinarily a party whose own testimony shows that no right to a recovery exists cannot aid his case by the testimony of other witnesses.<sup>75</sup> On the other hand, a party who establishes a *prima facie* case by his own testimony

Singer Mfg. Co. v. Schenck, 68 Fed. 191, 194.

**Involved Business Transaction.** After the lapse of a considerable time it is not to be expected that "even the most tenacious memory could recall the details of a transaction that may have taken several conferences of the parties to agree upon." Nicoll v. Mason, 49 Ill. 358, 363.

**72.** Parks v. Caudle, 58 Tex. 216; Veghte v. Raritan Water P. Co., 19 N. J. Eq. 142. See article "LOST INSTRUMENTS," Vol. VIII.

"Rarely, if ever, can a witness recollect the precise terms of a paper or give more than his general impression of the substance from the perusal, when many important particulars may not have attracted his attention and must, almost necessarily, have escaped his recollection." Mariner v. Saunders, 10 Ill. 113, 123.

"Of all the methods of proving the contents of a lost writing the resort to the memory of one who has read it, is the most desperate. . . . The memory of the witness ought at least to reproduce the contents of the paper, with such approach to completeness and accuracy, that no doubt shall be left of the character and scope of the instrument." Bolton's Estate, 14 Pa. Co. Ct. 575.

"How little reliance is to be placed upon our recollection of the language or even the substance of a written instrument after many years have gone by." Todd's Heirs v. Wickliffe, 12 B. Mon. (Ky.) 289, 300.

"Parties, after the lapse of time, and under other circumstances, may differ widely as to the terms of an agreement, and experience has dem-

onstrated the necessity of preserving them in a repository more safe than the recollection of witnesses. A written instrument is made a repository for that purpose." Adams v. Robertson, 37 Ill. 45, 64.

**73.** See Apperson v. Dowdy, 82 Va. 776; Tunnard v. Littell, 23 N. J. Eq. 264.

"The very effort at literal accuracy touching documents so ancient, about which we all know the great mass of men have but faint memories, discounts such evidence to the point of rendering it weak and untrustworthy." Whitney v. Jasper Land Co., 119 Ala. 497, 24 So. 259.

**74.** "It cannot be said as a matter of law that the defendant's witnesses should be believed rather than the plaintiff." Murphy v. Chicago, etc. R. Co. (Iowa), 118 N. W. 390.

"The consideration that the witness was produced by one party rather than the other was never deemed a criterion of the credibility of his testimony or the weight to which it is entitled." Garny v. Katz, 89 Wis. 230, 61 N. W. 762.

**75.** Deane v. St. Louis Transit Co., 192 Mo. 575, 91 S. W. 505.

"As plaintiff's own evidence demonstrates that the alleged fact upon which he predicates his right of action could not exist, it cannot be said that the testimony of one of the witnesses that such fact does exist is any substantial evidence thereof." Demaet v. Fidelity, etc. Co., 121 Mo. App. 92, 104, 96 S. W. 1045.

"If the plaintiff's own testimony had shown that he was negligent, he could not complain if the court took his case as he made it, although another witness had done



is not to be defeated merely because the testimony of his other witnesses fails to support the case as made.<sup>76</sup>

C. EVIDENCE INTRODUCED BY ADVERSE PARTY. — Evidence introduced generally<sup>77</sup> by a party, is in the case for all purposes and may be used by either party.<sup>78</sup>

D. EVIDENCE INTRODUCED FOR LIMITED PURPOSE. — Evidence will be presumed to have been admitted generally,<sup>79</sup> but counsel

better for him than he had for himself." *Kohler v. Pennsylvania R. Co.*, 135 Pa. St. 346, 357, 19 Atl. 1049.

76. "Where his own testimony made out a clear case, the contradictory testimony of another witness would not destroy it as a matter of law, even though such witness had been called by himself. Possibly the jury might believe plaintiff's account rather than that of his witness and he was entitled to have them do so if they would." *Kohler v. Pennsylvania R. Co.*, 135 Pa. St. 346, 357, 19 Atl. 1049.

Evidence is for the jury although a hostile witness introduced by the plaintiff contradicts her. *Collins v. Wells, Fargo & Co. (Iowa)*, 118 N. W. 401.

77. See *infra*, III, 10, D.

78. *United States*. — *Morgan v. Cox*, 27 Fed. 36.

*Kansas*. — *Federal Betterment Co. v. Reeves*, 77 Kan. 111, 93 Pac. 627.

*Maryland*. — *Western Assur. Co. v. Chesapeake L. & T. Co.*, 105 Md. 232, 65 Atl. 637.

*Minnesota*. — *Richards v. White*, 7 Minn. 345.

*Missouri*. — *Kiernan v. Robertson*, 116 Mo. App. 56, 92 S. W. 138.

*Montana*. — *Nord v. Boston & M. Min. Co.*, 30 Mont. 48, 75 Pac. 681; *Murray v. City of Butte*, 35 Mont. 161, 88 Pac. 789.

*New York*. — *Painton v. Northern Cent. R. Co.*, 83 N. Y. 7.

*North Carolina*. — *Wachovia Loan & T. Co. v. Forbes*, 120 N. C. 355, 27 S. E. 43.

*Pennsylvania*. — *Porter v. Seiler*, 23 Pa. St. 424, 431.

"The party upon whom rests the burden of the issue, may, if he so elects and there be no objection thereto, proceed to offer evidence upon all the issues in the case pro and con. If, however, he produces evidence which, un rebutted, defeats

his cause of action, or if he does his opponent the service of setting up a straw man and omits to knock him down, he does so at his own peril." *Kibby v. Gibson*, 72 Kan. 375, 83 Pac. 968.

**Erroneous Instruction.** — An instruction that a defendant pleading justification could not be excused unless he produced such evidence as in the opinion of the jury as created a preponderance in his favor, was properly refused as being inaccurate as "the defendant is required to produce such evidence only as, when taken in connection with any other evidence that may have been produced by the plaintiff upon the same line would amount to a preponderance." *Anderson v. Savannah Press Pub. Co.*, 100 Ga. 454, 460, 28 S. E. 216. See *Kenney v. Central R. Co.*, 61 Ga. 590.

**Rule Applies in Criminal Cases.** A defendant in a criminal case is not limited in proving his defenses to his personal testimony; it is immaterial from what source the testimony comes. *Keith v. State*, 50 Tex. Crim. 63, 94 S. W. 1044; *Sowell v. State*, 32 Tex. Crim. 482, 24 S. W. 504.

**Objection to Its Introduction Immaterial.** — The plaintiff can take advantage of any evidence introduced by the defendant, although she objected to its introduction at the time. *Berniaud v. Beecher*, 71 Cal. 38, 11 Pac. 802.

79. "In the absence of an express understanding that evidence is to be limited to a particular matter, the court will be authorized to consider it for any purpose for which it is competent and relevant to the issues." *Sears v. Starbird*, 78 Cal. 225, 20 Pac. 547.

"When evidence is let in generally without objection, and no attempt is made in the trial court to limit or

may by express limitation confine its use to some one particular fact of issue, at least in so far as to limit its use against the party against whom it is offered.<sup>80</sup>

**E. INCOMPETENT EVIDENCE.**—Incompetent evidence, admitted without objection, is entitled to full weight and may establish the fact in issue.<sup>81</sup>

**F. PARTIAL BELIEF ACCORDED TO WITNESS.**—By taking as true any evidence given by a witness, the court or jury is not required to credit any other portion of his evidence,<sup>82</sup> except perhaps where

confine its effect, it is in for all purposes and must be allowed its full force." *Chesapeake Brew. Co. v. Goldberg* (Md.), 69 Atl. 37.

80. *Henry v. Everts*, 29 Cal. 610; *Cooper v. Eastern Trans. Co.*, 75 N. Y. 116; *Pringle v. Leverich*, 97 N. Y. 181, 187.

**Contrary Ruling.**—"We are not prepared to say that counsel is bound by the declaration of a limited purpose, so as to be estopped, after the introduction of evidence, from drawing from it other deductions than that suggested by the terms of the offer. Indeed, counsel has no power to limit the effect of evidence; it would hardly be contended that the opposite party cannot use it in any legitimate manner before the jury. The statement of a 'purpose' is only a reason addressed to the court, why the particular evidence should be admitted; the effect of the evidence is to be limited in proper cases, in the charge to the jury." *Sill v. Reese*, 49 Cal. 294, 340. But see *White v. Merrill*, 82 Cal. 14, 22 Pac. 1129; *Riverside Water Co. v. Gage*, 108 Cal. 240, 41 Pac. 299.

"Counsel for plaintiffs, however, in offering these deeds in evidence, stated that they were offered for the purpose of showing that both parties claimed from a common source of title; but we think that the rule is well settled that whatever may be the declared purpose for which a piece of evidence, either oral or documentary, may be introduced, it is entitled to have whatever effect it would have if no such purpose had been declared." *Reeves v. Brayton*, 36 S. C. 384, 400, 15 S. E. 658.

81. *United States*.—*Paine v. Willson*, 146 Fed. 488, 77 C. C. A. 44.

*Florida*.—*Montgomery v. State*, 55 Fla. 97, 45 So. 879.

*Iowa*.—*Jaffray v. Thompson*, 65 Iowa 323, 21 N. W. 659.

*Minnesota*.—*Goodall v. Norton*, 88 Minn. 1, 92 N. W. 445; *Webb v. O'Donnell*, 28 Minn. 369, 10 N. W. 140; *Lindquist v. Dickson*, 98 Minn. 369, 107 N. W. 958, 6 L. R. A. (N. S.) 729.

*Texas*.—*Gray v. Fussell* (Tex. Civ. App.), 106 S. W. 454 (hearsay).

*Wisconsin*.—*Teegarden v. Calcedonia*, 50 Wis. 292, 6 N. W. 875.

See article "OBJECTIONS," Vol. IX. "Parties have an undoubted right to try their case on illegal evidence, if they so desire; and, if illegal evidence is admitted without objection, it is the right and duty of the jury to give it such consideration as it would be entitled to if legal evidence." *Birmingham R. & E. Co. v. Wildman*, 119 Ala. 547, 24 So. 548.

Oral proof that certain property had been deeded to defendant was held sufficient where it was not objected to and the defendant did not deny it. *Gruett v. Dibble*, 126 Mich. 623, 86 N. W. 120.

**Testimony of Incompetent Witness.**—"The fact that the statute (concerning transactions with deceased persons) makes her an incompetent witness should be considered in determining the weight to be given to her testimony," where it was admitted without objection. *Weidenhoff v. Primm*, 16 Wyo. 340, 94 Pac. 453. But see article "TRANSACTIONS WITH DECEASED PERSONS," Vol. XII, p. 1047.

82. *Louisville & N. R. Co. v. Truett*, 111 Fed. 876, 50 C. C. A. 42; *State v. Heck*, 1 Marv (Del.) 524, 41 Atl. 142; *Cook v. State*, 114 Ga. 523,

it is an integral part of that which has already been credited.<sup>83</sup>

**G. EFFECT OF REJECTED EVIDENCE.** — Evidence rejected or discredited cannot in and of itself furnish affirmative evidence of the converse of the proposition.<sup>84</sup>

46 S. E. 703; *Com. v. Kendall*, 162 Mass. 221, 38 N. E. 504; *Minot v. Boston & M. R. Co.*, 74 N. H. 230, 66 Atl. 825; *Nicks v. State*, 40 Tex. Crim. 1, 48 S. W. 186 (confession); *Galveston, etc. R. Co. v. Eckles*, 25 Tex. Civ. App. 179, 60 S. W. 830.

"Every tribunal passing on facts must act on the belief which the testimony creates. That belief does not usually, as it certainly does not with us in this case, involve either the rejection or the acceptance of all that is said by any particular witness." *Matter of Wool*, 36 Mich. 299.

Jury could believe statement of a witness than an inspection of the car had been made and disbelieve his statement that no defect was found. *Missouri, etc. R. Co. v. Harris* (Tex. Civ. App.), 101 S. W. 506.

"They are to weigh all the evidence and while they may not pervert or distort it by rejecting integral parts of a statement, they may accept or reject each distinct statement. They may thus find proved a state of facts to which as a whole no single witness has testified and which in some particular is contrary to the account given by every individual witness." *Hill v. West End St. R. Co.*, 158 Mass. 458, 33 N. E. 582.

**Rule Stated.** — "A jury may disregard the evidence introduced by plaintiff and base a conclusion favorable to him upon the testimony furnished by his adversary . . . or it may take a part of the testimony of the defendant as true and regard the balance as false though it be the testimony of the same witness, and join what is taken as true to a part of the testimony of the plaintiff and base its conclusions upon such portions of the testimony of each party." *Galveston, etc. R. Co. v. Murray* (Tex. Civ. App.), 99 S. W. 144.

**Rule Applies to Written Evidence.** "The jury were not bound to believe all that any witness said, nor

were they bound to accept such writings as were put in as disclosing all that was done and intended, and all that was authorized. Words are sometimes used to conceal as well as to disclose purposes and actions." *Metallic Roofing Co. v. Jose*, 14 Ont. L. 156.

83. *Hill v. West End St. R. Co.*, 158 Mass. 458, 33 N. E. 582.

"While it is doubtless true that a portion of the testimony of a witness may be credited by a jury and a portion discredited, still when a part of the evidence is modified or qualified by another portion, it is far from clear that one portion may be rejected and the other given credit." *Laidlaw v. Sage*, 158 N. Y. 73, 91, 52 N. E. 679, 44 L. R. A. 216.

84. *Missouri*. — *Boatmen's Sav. Bank v. Overall*, 16 Mo. App. 510, 514; *Shoninger v. Day*, 53 Mo. App. 147 ("impeaching evidence is not independent evidence").

*New York*. — *Williams v. Van Norden Trust Co.*, 104 App. Div. 251, 93 N. Y. Supp. 821 (where the witness was a party to the action); *Miller v. Smith*, 20 App. Div. 507, 47 N. Y. Supp. 49; *Siefke v. Siefke*, 6 App. Div. 472, 39 N. Y. Supp. 601 (effect of disbelieving a witness is merely to blot his evidence from the case); *Second Nat. Bank v. Weston*, 172 N. Y. 250, 64 N. E. 949; *Fordham v. Smith*, 46 N. Y. 683; *Shotwell v. Dixon*, 161 N. Y. 43, 57 N. E. 178.

*North Carolina*. — *White v. White*, 20 N. C. (4 Dev. & B.) 401 ("jury cannot capriciously mangle the testimony so as to convert it into evidence of what it does not prove").

*Texas*. — *Wells, Fargo & Co. v. Waites*, 29 Tex. Civ. App. 560, 69 S. W. 450.

*Wisconsin*. — *Mercer v. Wright*, 3 Wis. 645.

"The jury may refuse to give credit to the statement of a witness but they are not at liberty to infer from the rejected testimony alone, and because they do discredit it, a

H. VALUE OF CROSS-EXAMINATION. — Cross-examination is recognized both in theory and in actual practice, as being the best means of eliciting the truth concerning matters in issue,<sup>85</sup> and courts give great weight to testimony adverse to the interest of the witness obtained upon such examination.<sup>86</sup>

I. TESTIMONY ELICITED BY LEADING QUESTIONS. — Testimony given in answer to leading questions<sup>87</sup> is recognized as being of inferior value,<sup>88</sup> though the extent to which such evidence should be discredited will depend largely upon the character and intelligence of the particular witness.<sup>89</sup>

J. IMPORTANCE OF TRIVIAL FACTS. — In cases where the evidence is strongly in conflict, very small and insignificant facts are sometimes seized upon as influencing the judgment and leading to a satisfactory decision of the case.<sup>90</sup>

fact the very reverse of what has been sworn to by the witness." *Baltimore & O. R. Co. v. State*, 71 Md. 590, 600, 18 Atl. 969.

The jury were not "warranted in assuming that because they decided the defendant's narrative to be false they were entitled to jump to the conclusion that the converse of such narrative must be true." *Ramsay v. Ryerson*, 40 Fed. 739.

"A disbelief in a fact testified to by a witness does not necessarily warrant an inference of the existence of a contrary fact, not testified to by anybody." *New York Bank Note Co. v. McKeige*, 17 App. Div. 294, 45 N. Y. Supp. 197.

<sup>85.</sup> *Lee Sing Far v. United States*, 94 Fed. 834, 35 C. C. A. 327.

A stringent and searching cross-examination by able and ingenious counsel, "forms the best possible criterion to judge of the value of testimony." *Turner v. Hand*, 3 Wall. Jr. 88, 24 Fed. Cas. No. 14,257, p. 363.

"The testimony of a witness is no stronger than it is made by his cross-examination." *Kopf v. Monroe Stone Co.*, 133 Mich. 286, 296, 95 N. W. 72.

<sup>86.</sup> Testimony of parties who have withstood a strong cross-examination is to be taken as true. *The Monterey*, 153 Fed. 935, 938.

Courts will "give great weight to statements made upon cross-examination, when these statements have every appearance of being the real truth, though reluctantly told."

*Western & A. R. Co. v. Evans*, 96 Ga. 481, 486, 23 S. E. 494.

<sup>87.</sup> See article "LEADING QUESTIONS," Vol. VIII.

<sup>88.</sup> *Beauclerk v. Beauclerk*, (1891) P. (Eng.) 189, 201.

"Words are at times especially significant. If counsel are permitted to so frame a question put to their own witness as to suggest the answer desired, there is always imminent danger of getting before the jury phrases and ideas not really those of the witness." *Nurnberger v. United States*, 156 Fed. 721, 735, 84 C. C. A. 377.

"Comparatively small weight in any case, is due to testimony as to critical facts," elicited by leading questions. *The Cambusdoon*, 30 Fed. 704, 708.

"Leading questions were put where it was of the utmost importance that the witness should testify without suggestion of any kind as to the answer." *Ward v. Tallman*, 65 N. J. Eq. 310, 316, 55 Atl. 225.

**Presumption Where Testimony Is Weak.** — "It is to be presumed that this testimony—weak as it is—would have been still weaker if it had not been drawn out by these leading questions." *Frieske v. Frieske*, 138 Mich. 458, 463, 101 N. W. 632.

<sup>89.</sup> "We all know men who may be safely examined as witnesses by leading questions." *Rogers v. McCune*, 19 Mo. 557, 570.

<sup>90.</sup> *The Phoenix*, 34 Fed. 760.

"Usually . . . there are many

K. WHERE DISBELIEF WOULD IMPUTE PERJURY.—Where the testimony of a witness who may be mistaken conflicts with the testimony of a witness who if he is not testifying truly is committing perjury, the testimony of the latter is to be accorded the greater weight.<sup>91</sup>

L. MISTAKES BY WITNESSES.—Mistakes shown to have been made by witnesses, as to immaterial details, should have little effect upon their testimony as to the main facts.<sup>92</sup> But a mistake in relation to a material point in the case will affect their entire testimony.<sup>93</sup>

M. IMPOSSIBILITY OF CONTRADICTION.—Where, for any reason, it is impossible to obtain and introduce evidence in contradiction of that already introduced, this evidence is to be closely scrutinized and weighed with great care.<sup>94</sup>

little things, which in the abstract are mere trifles, so small as to be difficult to describe as separate matters, but which, when combined and considered in the concrete, exercise a very potent influence upon the judgment." *Haydock v. Haydock*, 33 N. J. Eq. 494, 501.

"Facts and circumstances, small and inconsiderable in themselves, often lead to unerring conclusions." *Zimmerman v. Bannon*, 101 Wis. 407, 77 N. W. 735. And see article "CIRCUMSTANTIAL EVIDENCE," Vol. III, p. 113, note 77.

91. *Palmer v. Baird*, 29 N. Bruns. 42, 55; *M'Gregor v. Topham*, 3 H. L. Cas. 132, 147, 10 Eng. Reprint 51; *Beisiegel v. New York Cent. R. Co.*, 40 N. Y. 9; *Washburn & M. Mfg. Co. v. Beat-Em-All Barb Wire Co.*, 33 Fed. 261, 271.

"If the witnesses are equally credible, and one may be mistaken without imputing to him an intention to state a falsehood, and the statement of the other cannot be untrue without imputing to him wilful perjury, the rule is that the statement of the latter is rather to be taken." *United States v. Fifty Barrels of Whiskey*, 25 Fed. Cas. No. 15,091.

If "we can readily perceive how one may be mistaken, and that the other, if the testimony be untrue, must have committed perjury, the law inclines to the more charitable conclusion, that the one is mistaken rather than that the other has committed this crime." *Hitt v. Rush*, 22 Ala. 563, 565.

Presumption That Testimony is

True.—Where testimony must be taken as deliberately true or deliberately false—there being no room for mistake—there is a strong presumption that it is true. *Swain v. Edmunds*, 53 N. J. Eq. 142, 148, 32 Atl. 369. And see article "CREDIBILITY," Vol. III, p. 755.

Duty to Reconcile Testimony, see *infra*, V, B, b, (1.)

92. *Delaware & H. R. Co. v. Wilkins*, 153 Fed. 845, 850, 83 C. C. A. 27; *Turner v. Hand*, 3 Wall, Jr. 88, 24 Fed. Cas. No. 14,257; *Hughes & Co. v. Coleman*, 73 Ky. 246, 249.

"In weighing evidence the court must distinguish between obvious and conjectural facts. . . . The fact that a witness guesses wide of the mark (as to the distance between vessels) may tend to impeach his judgment but not his veracity." *Jacobsen v. Dalles P. & A. Nav. Co.*, 106 Fed. 428, 431.

93. *The Leopard*, 2 Lowell 238, 15 Fed. Cas. No. 8,263.

Where there is a conflict in the evidence, "it is indisputable that superior credit is due to those witnesses whose testimony upon other material points is in accord with the facts otherwise proved, rather than to those witnesses whose testimony on those points is shown to be incorrect." *The Florence P. Hall*, 14 Fed. 408, 413.

Mistakes proven to have been made by a witness who swears with great positiveness justify disbelief of the entire testimony of the witness. *Barcalow v. Sanderson*, 17 N. J. Eq. 460.

94. *In re Bailey*, 111 App. Div.

**N. ORDINARY MANIFESTATIONS AS PROOF OF EXISTENCE OF FACT.** The presence of those signs by which the existence of a fact is ordinarily manifested is strong evidence of the actual existence of the fact itself.<sup>95</sup>

**11. Weight on Appeal.**—**A. GENERAL RULE.**—The rule that the judgment of the trial court on conflicting evidence, will not be set aside unless clearly against the weight of the evidence is elementary<sup>96</sup> and is based upon the superior opportunities of the trial court to arrive at a correct and accurate judgment.<sup>97</sup>

**B. EXCEPTIONS.**—The rule as stated above should never be used as an excuse by the appellate court to enable it to shirk its duty of carefully reviewing and weighing the evidence.<sup>98</sup> And in cases where the nature of the evidence is such that the appellate court is in as good a position to judge of its force and effect as the trial court, the rule itself loses much of its force.<sup>99</sup>

909, 98 N. Y. Supp. 725 (the only person who could contradict, dead). And see *supra*, III, 9, G, a, (1), (F).

A story may appear weak from the very fact that it could easily have been manufactured. *Alexander v. Blackman*, 26 App. Cas. (D. C.) 541, 551.

**95.** Ordinary, but not necessary manifestations of the existence of a thing is competent evidence of the fact of such existence but they will not convince the mind when contradicted by other evidence which experience teaches will more surely lead to truth." *Whitaker v. Parker*, 42 Iowa 585.

**Electricity.**—"The presence of an electric current is usually determined by the phenomenon its presence produces." *Garretson v. Tacoma R. & P. Co.*, 50 Wash. 24, 96 Pac. 511.

**96.** *Calvert v. Carpenter*, 96 Ill. 63; *Keyes v. Kimmel*, 186 Ill. 109, 57 N. E. 851; *Sager v. Tupper*, 42 Mich. 605, 4 N. W. 555; *Baird v. Mayor*, 96 N. Y. 567; *Barry v. Graciette* (Tex. Civ. App.), 71 S. W. 309; *Faulkner v. Simms*, 68 Neb. 295, 302, 89 N. W. 171, 94 N. W. 113.

**Divorce Actions.**—In no other litigation is the personal presence of the parties in court more important, or the weight and value of the circumstances we have mentioned more vital, than in divorce proceedings." *Berry v. Berry*, 115 Iowa 543, 88 N. W. 1075.

**Case Tried by Three Juries.** "When a case involving questions of fact has been fairly passed upon by at least three juries with like result, the court (on appeal) will not again assert its power by setting aside the verdict as contrary to the weight of the evidence, unless there is a reasonable probability of a different outcome." *Williams v. Delaware, L. & W. R. Co.*, 81 App. Div. 444, 80 N. Y. Supp. 945, *affirmed*, 177 N. Y. 564, 69 N. E. 1133. But see the report of previous trial of this case in 66 App. Div. 336, 73 N. Y. Supp. 38.

**97.** *Gorman v. Hand Brew. Co.* (R. I.), 66 Atl. 209.

"The evidence of a witness whom no one seeing and hearing testify on the stand would believe when his evidence is reduced to writing may appear as consistent and truthful as that of a witness of the most undoubted truth and integrity." *Bishop v. Busse*, 69 Ill. 403.

**98.** *Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6; *Faulkner v. Simms*, 68 Neb. 295, 89 N. W. 171, 94 N. W. 113.

**99.** *Lehman Bros. v. McQueen*, 65 Ala. 570 (evidence largely in writing); *Faulkner v. Simms*, 68 Neb. 295, 305, 89 N. W. 171, 94 N. W. 113.

**Depositions.**—The *Marcus Hook*, 135 Fed. 744, 68 C. C. A. 382; *Lake Shore Transit Co. v. Corrigan* (C. C. A.), 137 Fed. 484; *Paauhau Plantation Co. v. Palapala*, 127 Fed.

## IV. CONCLUSIVENESS ON PARTY INTRODUCING.

The rules which determine under what circumstances a party is not concluded by evidence introduced by himself, are elsewhere discussed.<sup>1</sup>

## V. CONSTRUCTION OF EVIDENCE.

**1. Construction of Writings.** — The rules of construction pertaining to written evidence together with the admissibility of parol evidence to aid therein, are fully discussed elsewhere in this work.<sup>2</sup>

**2. Construction of Testimony.** — A. PROVINCE OF COURT AND JURY. — The construction of the language used by witnesses in giving their testimony is a matter entirely for the jury.<sup>3</sup>

B. RULES OF CONSTRUCTION. — a. *Duty To Reconcile Testimony.* The first principle to be observed in construing the testimony of a

920, 62 C. C. A. 552; Williams v. Miles, 68 Neb. 463, 476, 94 N. W. 705, 96 N. W. 151, 62 L. R. A. 383; Galveston, H. & S. A. R. Co. v. Matula, 79 Tex. 577, 15 S. W. 573.

"The testimony is largely in the shape of depositions, and therefore, the advantages of observing the demeanor of the witnesses, when testifying, was denied to the lower court, so that an equal opportunity is afforded to this, as to that court, of determining what probative force to give to the testimony of the witnesses thus testifying." Allen v. Logan, 96 Mo. 591, 598, 10 S. W. 149.

**Accounting in Equity.** — "In long and complicated equity cases, especially where an accounting is involved, there is a marked difference between reaching a finding on one's recollection of what he has heard in the course of a trial lasting weeks or even months, and a finding as a result of patient investigation of a written record, with the aid of printed briefs, where comparisons may be made, computations tested, circumstances weighed and conflicting statements sifted." Faulkner v. Simms, 68 Neb. 295, 89 N. W. 171, 94 N. W. 113. See also Boylan v. Meeker, 28 N. J. L. 274, 476.

1. See articles "CONCLUSIVE EVIDENCE," Vol. III; "CONTRADICTION OF WITNESSES," Vol. III; "IMPEACHMENT OF WITNESSES," Vol. VII.

**Different Witnesses Establishing Different Causes of Action.** "Where the two witnesses of the

plaintiff testify to facts which establish two different causes of action, a variance is not necessarily made out; the question of whether the cause of action alleged has been made out is for the jury." Hopper v. Smith, 70 N. J. L. 403, 57 Atl. 389.

2. See article "PAROL EVIDENCE," Vol. IX, p. 370.

3. Carpenter v. Fisher, 175 Mass. 9, 55 N. E. 479; Faber v. St. Paul, etc. R. Co., 29 Minn. 456, 13 N. W. 902; Toulman v. Swain, 47 Mich. 82, 10 N. W. 117; Snyder v. Bougher, 214 Pa. St. 453, 459, 63 Atl. 893; Drain v. St. Louis, etc. R. Co., 86 Mo. 574, 581; Cumberland Val. R. Co. v. McLanahan, 59 Pa. St. 23, 31.

"The jury are always judges of the meaning of language employed by witnesses." Rosenbaum v. State, 33 Ala. 354, 363.

Where the testimony admits of two reasonable constructions it is error for the court to itself determine the question. Bruch v. Philadelphia, 181 Pa. St. 588, 37 Atl. 818.

**Written Testimony—Depositions.** It is better for the court to construe doubtful expressions in a deposition, though it is not obliged to do so. Powers v. Leach, 26 Vt. 270, 278.

**Memoranda.** — Where a memorandum made by a witness was read by him to the jury it was held that its construction and meaning was for the jury and not for the court.

witness,<sup>4</sup> or of several witnesses,<sup>5</sup> is that it should be so construed as to reconcile the various statements made, in so far as that is possible.<sup>6</sup>

b. *Natural Meaning To Be Considered.*—Where a witness' language passes unchallenged, no inquiry being made as to his meaning, it is to be construed according to the most natural meaning and import of the language used,<sup>7</sup> and it will be assumed that

Spalding v. Lowe, 56 Mich. 366, 23 N. W. 46.

4. "It is a well established rule that in construing evidence, it shall be so construed as to reconcile apparent inconsistencies, if the language used will admit of it, so as to give credit and effect to the whole statement of the witness." Whitfield v. Browder, 13 Ark. 143, 148.

5. "Where testimony is ambiguous as in this case, and there is a doubt as to its correct application to the facts in question, the promotion of truth, and justice to the witnesses require that construction which will render it as consistent as possible with the opposing evidence." Smith v. Smith, 1 Greene (Iowa) 307, 310. And see Fullam v. Rose, 160 Pa. St. 47, 28 Atl. 497; Johnson v. Scribner, 6 Conn. 185, 189.

"I think it is a canon, which any one who is familiar with courts of justice will recognize as a just one, that instead of assuming that people are perjuring themselves you should, if there is a view by which you can reconcile all the testimony, prefer that to the view which places people in the position of contradicting each other so that they must necessarily be swearing what is false." Steamer Gannet v. Steamer Algoa, (1900) App. Cas. (Eng.) 234, 238.

• 6. *United States.*—United States v. Brown, Deady 566, 24 Fed. Cas. No. 14,662; United States v. The Anna, 24 Fed. Cas. No. 14,457. *Connecticut.*—Johnson v. Scribner, 6 Conn. 185.

*Delaware.*—McAllister v. People's R. Co., 4 Penne. 272, 54 Atl. 743; Reed v. Continental Ins. Co., 65 Atl. 569; Jemnienski v. Lobdell Car Wheel Co., 5 Penne. 385, 63 Atl. 935; Green v. Council

of Newark, 5 Penne. 316, 62 Atl. 792.

*Indian Territory.*—Atoka Coal & M. Co. v. Miller, 7 Ind. Ter. 104, 104 S. W. 555.

*New Jersey.*—Morris Canal & Bkg. Co. v. Stearns, 23 N. J. Eq. 414.

*New York.*—Crowe v. House of the Good Shepherd, 38 App. Div. 620, 56 N. Y. Supp. 223.

7. The Rover, 23 Fed. 515, 520. See Minton v. New York, etc. R. Co., 130 N. Y. 332, 338; Goodstein v. Brooklyn Hts. R. Co., 69 App. Div. 617, 74 N. Y. Supp. 1017.

The words used by a witness are to be taken in their ordinary meaning; thus where the word "presume" was used the court held that its etymological meaning of belief without examination was not intended but that the witness merely intended to affirm modestly or hesitatingly a positive fact within his knowledge. Hammock v. McBride, 6 Ga. 178, 184.

"The court should never 'strain the meaning of terms' so as to destroy a 'sensible meaning' in construing answers to interrogatories." Bliss v. Paine, 11 Mich. 92, 99.

*Illustrations.*—Where the captain of a boat testified that he gave several short blasts of the whistle in reply to a signal, it was said that "the word 'several' is commonly understood to imply more than two, but not very many." The North Star, 108 Fed. 436.

"In the absence of any proof to the contrary, or any inquiry as to the mode, we must understand this (that letters were sent) to mean that they were mailed in the usual manner." Flint v. Kennedy, 33 Fed. 820, 822, quoting Oregon S. S. Co. v. Otis, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221.

Where a witness testified in a



that was the meaning which was intended by the witness.<sup>8</sup>

c. *Context Controlling*.—Another fundamental rule of construction is that the literal meaning of words or phrases will be controlled by the context of the entire testimony.<sup>9</sup> In many cases it clearly appears that the witness did not intend to be taken literally<sup>10</sup> or has made a slip in speaking.<sup>11</sup>

civil case that a child was born on a certain day, it was held that as in the general course of nature a large majority of births are of living children, it would be assumed that the witness intended to say that the child was born alive. *Mann v. People*, 35 Ill. 467.

A statement of a witness in answer to a question whether he had not testified to a certain fact in a former examination—"I may have," was said "not necessarily or even probably intended as a statement that his best recollection was that he had so testified, but rather that he had no recollection whatever about it." *Higgins v. Shepard*, 186 Mass. 57, 70 N. E. 1014.

A witness who alleged that she fell on a sidewalk near a corner was allowed to recover on proof that the place was sixty-five feet from the corner. *Masters v. City of Troy*, 50 Hun 485, 3 N. Y. Supp. 450.

Statement that a man was of good standing and on a par with other men for truth and veracity, was held to state the general neighborhood opinion of the man's character and not the mere opinion of the witness. *Powers v. Leach*, 26 Vt. 270.

**Liberality** in construing terms used by foreign witnesses in a deposition. *Dussert v. Roe*, 1 Wall. Jr. 39, 8 Fed. Cas. No. 4,200.

8. *Lee v. Guardian L. Ins. Co.*, 15 Fed. Cas. No. 8,190.

**Professional Witness**.—In *Rosenbaum v. State*, 33 Ala. 354, 363, the court said that the sense in which a doctor employed the word "examine" was for the jury, and called attention to the fact that being a doctor he might have meant that although he saw the wound in question he did not give it a professional examination.

9. *Wilson v. Wilson*, 66 N. J. Eq. 237, 57 Atl. 552; *Felver v. Central Elec. R. Co. (Mo.)*, 115 S. W. 980 (on appeal the court remarked that

it had interpreted the evidence in the light of its context).

"The jury very properly subordinated the literal terms used by the witness to the substance and effect of her evidence." *People v. Wallace*, 109 Cal. 611, 42 Pac. 159.

Where a witness testified that he let the anchor go "when the wind began to blow," it was held that he meant when it began to blow a hurricane, as it had been blowing some for a long time. *The Carl Konow*, 64 Fed. 815.

**That Is Certain Which May Be Made Certain**.—"Testimony by itself vague and apparently relating to matters not in issue, may be made certain in its character, and plainly relevant, by other facts in proof." *Mosely v. Gordon*, 16 Ga. 384, 394.

10. *Carpenter v. Fisher*, 175 Mass. 9, 55 N. E. 479; *New Jersey R. Co. v. Palmer*, 33 N. J. L. 90.

A statement of a witness that he had seen an occurrence twenty-five or thirty times, and a later statement that it occurred ten or fifteen times, were held not to so contradict each other as to warrant a new trial, since it was apparent that all the witness meant was that he had seen the act repeated many times. *Lewis v. Roby*, 79 Vt. 487, 493, 65 Atl. 524.

**Words Having a Technical Legal Meaning** are liable to misuse "by persons lacking appreciation of their precise meaning and effect." *Fleuty v. Orr*, 13 Ont. L. 59, 70. A "lending" held not to be a legal lending; "the witness was mistaken in the use of terms." *Fullerton v. Dalton*, 58 Barb. (N. Y.) 236, 240.

11. *Tanham v. Nicholson*, L. R. 5 H. L. (Eng.) 561, 570 (a statement that a paper was "two or three times upon the dresser" clearly intended to mean two or three hours); *Buser v. Novelty Tufting Mach. Co.*, 151 Fed. 478, 484, 81 C. C. A. 16.

d. *Construed as a Whole*.—As a corollary to the rule last stated, it is to be remarked that the testimony must be construed as a whole and not by isolated portions.<sup>12</sup>

e. *Interest of Witness*.—Although it has been said that the testimony of a witness is to be construed less favorably to the party offering him,<sup>13</sup> the rule seems to be generally applied only in those cases in which the witness is himself interested.<sup>14</sup>

f. *Presumptions*.—In actions involving moral turpitude, testimony should be so construed as to render it consistent with the

#### Answer to Complex Question.

Where questions are complex and made up of several parts, it is a common habit to ignore the earlier parts and answer only the latter parts to which the attention is last directed. *Drain v. St. Louis*, etc. R. Co., 86 Mo. 574, 581r.

12. See *The Daniel Burns*, 56 Fed. 605, 6 C. C. A. 49; *Billings v. Rust*, 1 Nova Scotia 88, 100.

"Facts imperfectly stated in answer to one question may be supplied by his answer to another; and when from one statement considered by itself an inference may be deduced that inference may be strengthened or repelled by the facts disclosed in another." *Ware v. Stephenson*, 10 Leigh (Va.) 155, 165 (dealing with a demurrer to the evidence).

"Testimony must be considered as a whole. . . . The true meaning of her answers to the isolated questions can only be ascertained by due consideration of all the questions and answers propounded to her." *State v. Meals*, 184 Mo. 244, 255, 83 S. W. 442.

**Direct and Cross-Examination** is to be construed together. *Mairs v. Freeman*, 3 Redf. (N. Y.) 181, 193.

13. "There can be no doubt of the rule that where proof as well as pleading is of a doubtful or equivocal character, it must be construed least favorably to the party offering it." *Bennett v. Rogers*, 12 Neb. 382, 11 N. W. 314.

14. *United States*.—*Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S. 481, 488.

*California*.—*Alper v. Tormey*, 7 Cal. App. 8, 93 Pac. 402 (interested party a hostile witness).

*Georgia*.—*Southern R. Co. v. Hobbs*, 121 Ga. 428, 49 S. E. 294;

*Horne v. Peacock*, 122 Ga. 45, 49 S. E. 722; *Steele v. Central of Georgia R. Co.*, 123 Ga. 237, 51 S. E. 438; *Tuten v. Atlantic, etc. R. Co.*, 4 Ga. App. 353, 61 S. E. 511; *Farmer v. Davenport*, 118 Ga. 289, 45 S. E. 244; *Ray v. Green*, 113 Ga. 920, 39 S. E. 470; *Baggett v. Trulock*, 77 Ga. 369, 3 S. E. 162; *Burkhalter v. Oliver*, 88 Ga. 473, 487, 14 S. E. 704.

"It surely can never be unfair to a party laboring under no mental infirmity to deal with his case from the standpoint of his own testimony as a witness. Where a party calls witnesses who conflict with each other in their sworn statements he is not to be held responsible for the contradictions among them, for it is not within his power to prevent their occurrence; and a reviewing court will generally give to a party the benefit of the most favorable version of such testimony as a whole which the jury would be authorized to accept. But a party testifying in his own favor has no right to be intentionally or deliberately self-contradictory; and if he is so the courts are fully justified in taking against him that version of his testimony which is most unfavorable to him." *Western & A. R. Co. v. Evans*, 96 Ga. 481, 486, 23 S. E. 494. And see *Freyermuth v. South Bound R. Co.*, 107 Ga. 31, 32 S. E. 668.

"From the general rule that plaintiff's admissions in evidence are binding upon him . . . it is a necessary deduction that the strongest admission he so makes must be accepted as the extent of his concession, unless, before he closes his evidence, he shows there was some mistake or misapprehension in what he stated." *Cogan v. Cass Ave. &*

presumption of innocence.<sup>15</sup> Positive testimony is presumed to be given from personal knowledge.<sup>16</sup>

g. *Manner of Witness*. — The manner of the witness while testifying is often important as bearing upon the exact meaning with which certain words are used.<sup>17</sup>

h. *Vulgar Language*. — Witnesses in describing disgraceful conduct, sometimes have recourse to words which are not to be found in standard dictionaries because of their vulgarity, but this does not prevent the court or jury from accepting the words and attaching to them their current meaning.<sup>18</sup> On the other hand, the testimony of modest witnesses who refuse to use such words will be given full effect if they designate their meaning in a general way.<sup>19</sup>

F. G. R. Co., 101 Mo. App. 179, 73 S. W. 738.

15. *Morris v. Talcott*, 96 N. Y. 100 (fraud); *Crook v. Rindskopf*, 105 N. Y. 476, 12 N. E. 174 (fraud); *Pollock v. Pollock*, 71 N. Y. 137 (adultery).

In an action involving moral turpitude, "the rule is well settled that when the evidence is as capable of an interpretation which makes it consistent with the innocence of the accused party as with one consistent with his guilt, the meaning must be ascribed to it which accords with his innocence rather than that which imputes to him a criminal intent. *Ramsay v. Ryerson*, 40 Fed. 739 (action for criminal conversation)."

16. *Carpenter v. Carpenter*, 56 Hun 643, 9 N. Y. Supp. 583.

"Where a witness testifies positively to facts which may be within his personal knowledge, and the opposite party makes no inquiry to ascertain whether so or not, the court must assume that the witness speaks from personal knowledge," whether the testimony is given orally at the trial or by deposition. *Fassin v. Hubbard*, 55 N. Y. 465, 571.

17. "No precedent can control a jury or referee in determining what a witness means when he uses language warranting distinct and opposite inferences. They must determine his meaning not only from his words, but from his manner and all the surrounding circumstances." *Bruch v. Philadelphia*, 181 Pa. St. 588, 37 Atl. 818. And see *Mexican*

*Cent. R. Co. v. Henderson*, 114 Fed. 892, 896, 52 C. C. A. 512.

18. "Because the modesty of our lexicographers restrains them from publishing obscene words or from giving the obscene signification to words that may be used without conveying any obscenity, it does not follow that they are not English words, and not understood by those that hear them; or that chaste words may not be applied so as to be understood in an obscene sense by every one who hears them." *Edgar v. McCutchen*, 9 Mo. 768.

"A number of common English words are not to be found in the standard lexicons of the language on account of their vulgarity." *Linck v. Kelley*, 25 Ind. 278.

"The words used by the witnesses were not drawing room terms and are neither found in the statutes or dictionaries, but judging from the familiarity with which the witnesses used them they must have imparted quite a definite notion of what transpired." *State v. Fowler*, 13 Idaho 317, 89 Pac. 757.

But in an *Inditment* for slander it is held in Texas that the proof of words of exactly similar import to those alleged because of the obscenity of the latter is insufficient. *Barnett v. State*, 35 Tex. Crim. 280, 33 S. W. 340.

19. *Words Indicative of Sexual Intercourse*. — Denial that the parties ever slept in the same bed has been construed as a denial of intercourse. *Pollock v. Pollock*, 71 N. Y. 137, 152. And a statement of a wit-

C. ON APPEAL. — On appeal, the construction put upon the testimony by the jury will not be disturbed if from any point of view such construction could fairly be made.<sup>20</sup>

ness that she staid with her companion in a room at a hotel and knew what that phrase meant, was held sufficient to characterize what occurred. *Herzinger v. State*, 70 Md. 278, 17 Atl. 81.

20. Since the evidence "may

fairly be interpreted as showing that he did do all that is claimed he ought to have done in this respect, we may not reverse the conclusions of the jury and of the trial court." *Faber v. St. Paul, etc. R. Co.*, 29 Minn. 465, 13 N. W. 902.

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## WHISKY.—See Intoxicating Liquors.

Vol. XIV

# WILLS.

By JOHN R. BERRYMAN and JOHN A. POWELL.

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### CROSS-REFERENCES:

Admissions; Age; Alterations;  
 Best and Secondary Evidence; Burden of Proof;  
 Capacity; Competency;  
 Death and Survivorship; Declarations; Descent and Distribution;  
 Domicil;  
 Executors and Administrators; Expert and Opinion Evidence;  
 Fraud; Forgery;  
 Handwriting;  
 Identity; Insanity;  
 Lost Instruments;  
 Mental and Physical States;  
 Parol Evidence; Parties and Persons Interested as Witnesses; Presumptions; Privileged Communications;  
 Records;  
 Transactions With Deceased Persons;  
 Undue Influence;  
 Weight and Effect.

## I. JURISDICTIONAL FACTS.

**1. Burden of Proof.** — The burden of proving the jurisdictional facts in a proceeding to probate a will,<sup>1</sup> including the death of the testator<sup>2</sup> and his testamentary age and residence,<sup>3</sup> is upon the proponent.

There is a **Presumption** in an action to set aside the probate of a will that the jurisdictional facts were established to the satisfaction of the surrogate's court.<sup>4</sup>

**2. Proof of Death.** — The death of the testator may be proved as in other cases,<sup>5</sup> either by direct, circumstantial,<sup>6</sup> or presumptive evidence.<sup>7</sup>

**3. Proof of Testamentary Age and Domicil.** — The general rules of evidence apply to proof of these facts in probate proceedings and will be found treated elsewhere in this work.<sup>8</sup>

## II. INTEREST OF CONTESTANT.

**1. Nature of the Question.** — The interest of the contestant is a

**1. Application for Letters of Administration. — Burden of Proof.** See article "EXECUTORS AND ADMINISTRATORS," Vol. V. pp. 389, 390.

**2.** *Prout v. M'Nab*, 6 Dem. (N. Y.) 152; *Barnewall v. Murrell*, 108 Ala. 366, 389, 18 So. 831.

**3.** *Barnewall v. Murrell*, 108 Ala. 366, 389, 18 So. 831; *Sehr v. Lindemann*, 153 Mo. 276, 54 S. W. 537.

**4.** Under a statute which requires that a complaint in an action to contest the validity of a will must be filed in the circuit court of the county where the testator died, or where some part of his estate is situated, where the circuit court proceeds to hear and determine the cause it will be presumed on appeal, in the absence of any showing to the contrary, that the court found the existence of the necessary jurisdictional facts. *Whittenberger v. Bower*, 158 Ind. 673, 63 N. E. 307.

In an action to set aside the probate of a will after the lapse of eight years, where the petition of probate is absent from the files and cannot be found, it will be presumed in behalf of the regularity of the proceedings that the petition contained a statement of all the necessary jurisdictional facts. *In re Warfield's Will*, 22 Cal. 51, citing *Posten v. Rasette*, 5 Cal. 467; *Collier v. Corbett*, 15 Cal. 183.

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Where a will is admitted to probate on the ground that the original will has been destroyed, the omission of the record to state that the destruction of the original will was subsequent to the death of the testator does not render the order admitting such will to probate void. *Converse v. Starr*, 23 Ohio St. 491.

**5.** See article "DEATH AND SURVIVORSHIP," Vol. IV, p. 38.

**6.** Proof of the death of the testatrix, necessary before her will can be probated, may be made by circumstantial evidence. *In re Morgan*, 30 Misc. 578, 63 N. Y. Supp. 1098 (disappearance after a fire in a hotel).

**Repute Inadmissible.** — Death cannot be proven by repute, in an action for probate of a will. *Prout v. M'Nab*, 6 Dem. (N. Y.) 152, but where the reputation is that of the family it is sometimes held admissible under the pedigree exception to the hearsay rule. See article "PEDIGREE," Vol. IX, p. 739.

**7.** See article "DEATH AND SURVIVORSHIP," Vol. IV, pp. 41-49.

In *Goods of Matthews*, L. R. (1898) P. D. 17, where the testator had disappeared and been absent for three years, upon proof of sufficient inquiry having been made the court allowed the death of the testator to be sworn to.

**8.** See articles "AGE," Vol. I, p.

preliminary matter which must first appear before his contest will be heard by the court.<sup>9</sup>

**2. Burden of Proof.** — The contestant has the burden of showing his legal interest in the case and how it arises.<sup>10</sup>

**3. Prima Facie Case.** — Ordinarily, and if no question is raised the right of the heirs to contest the probate of the will, will be presumed.<sup>11</sup>

**4. Unprobated Will as Evidence.** — It has been held proper to allow the proponent to show that by an earlier and unprobated will the contestants were cut off without any devise or bequest and therefore had no right to contest the will propounded,<sup>12</sup> although the contrary has also been held.<sup>13</sup>

**5. Parol Evidence.** — Parol evidence is admissible to prove or disprove the interest of the contestant.<sup>14</sup>

731; "DOMICIL," Vol. IV, p. 844.

**Conclusiveness of Decree of Foreign Court Admitting Will to Probate,** on question of domicile, see *infra*, under XVIII, 2, E, a, (2).

9. "It is well settled in this state that the right of a proposed contestant to impeach a will, if disputed, presents a controversy separate from and preliminary to the contest itself, in which it is competent for the contestant and contestee to offer evidence as to the issue joined, and that an appeal lies from a decision thereof, before the contest is heard." *Cowan v. Walker*, 117 Tenn. 135, 96 S. W. 967.

10. *Murry v. Hennessey*, 48 Neb. 608, 67 N. W. 470; *In re Darling's Will*, 10 N. Y. St. 221, *affirmed*, 53 Hun 636, 6 N. Y. Supp. 191 (case in which contestant failed to prove that the person to whom she was related was the decedent, though there was identity of names and other circumstances, and she was not allowed to appear in the case); *In re Turnbull's Will*, 51 Hun 642, 4 N. Y. Supp. 607 (relationship not made out and petition dismissed).

**Order of Proof.** — Where a proceeding for probate of a will is contested, the court in controlling the order of proof correctly held that the contestant must first establish his interest. *In re Edelman's Estate*, 148 Cal. 233, 82 Pac. 962.

11. *Murry v. Hennessey*, 48 Neb. 608, 67 N. W. 470 (contestants nieces and nearest relatives of decedent).

The fact that the propounder had

joined issue with the caveators on the merits, was *prima facie* admission that they were heirs and entitled to litigate. *Lamb v. Girtman*, 26 Ga. 625.

On a bill in chancery to contest the validity of a will admitted to probate, the plaintiffs need not, in the first instance, prove that they are heirs of the testator. In the presence of any objection on the part of the defendants the court will not make any inquiry as to the *bona fides* of the claim of the plaintiffs, unless such want of interest appears from the record itself. *Ward v. Brown*, 53 W. Va. 227, 253, 44 S. E. 488.

12. *Cowan v. Walker*, 117 Tenn. 135, 96 S. W. 967.

In *McCutchen v. Loggins*, 109 Ala. 457, 19 So. 810, the court held that a contestee may rely upon an unprobated will for the purpose of showing that the contestant had no real interest in the estate, and this although it appeared that a former will in favor of the contestee had already been admitted to probate.

13. An heir may contest a testator's will which had been admitted to probate, although by the terms of the previous will which had not been probated he was also excluded from a large interest in the property, as the previous will might never be offered for probate, or, if offered, might be rejected. *Murphy's Exr. v. Murphy*, 23 Ky. L. Rep. 1460, 65 S. W. 165.

14. Where a niece of decedent attacked a will, oral evidence was ad-

### III. FACT AND EXISTENCE OF WILL.

**1. Testacy or Intestacy.**— Properly speaking, there is no presumption that a decedent did or did not leave a valid will.<sup>15</sup> Though the courts sometimes use language which seems to recognize the existence of presumptions,<sup>16</sup> it is a matter for proof in all cases.<sup>17</sup>

**2. Last Will.**— The burden of proving that a will is the last will of a testator rests upon the party propounding it,<sup>18</sup> but ordinarily a *prima facie* case is sufficiently made out where it is shown that the will came directly from the custody of the decedent.<sup>19</sup>

mitted to show that she had no capacity to institute the action on account of the fact that her father who had disappeared was still presumed to be alive. *Boe v. Filleul*, 26 La. Ann. 126.

**15. Execution Proved.—Validity Presumed.**— The law presumes that a will properly executed and attested is valid until the presumption is overcome by clear and satisfactory proof. *Brownfield v. Brownfield*, 43 Ill. 147; *Smith v. Henline*, 174 Ill. 184, 51 N. E. 227.

**16.** We are not aware that there is any presumption of law, either that a person died testate or intestate. To prove that he left a will, an examination should be made of the records of the court of probate, that being by statute the place of deposit for wills. If no evidence can be found there, then the presumption will be, *prima facie*, that he died intestate." *Morrill v. Otis*, 12 N. H. 466.

The law never presumes the existence of a will in the absence of proof, nor after its existence has been proved will it presume that it embraced the real as well as the personal property of the testator. *Duke of Cumberland v. Graves*, 9 Barb. (N. Y.) 595.

"Upon the issue as to Mrs. Cameron's intestacy, the test was whether she left a valid will. The question being open for determination, manifestly the presumption in favor of intestacy continued until overcome by the evidence, since, under our statutes, the existence of a valid will cannot be presumed, but it must be shown to have been executed and

published as prescribed by our statutes, by a person having testamentary capacity." *In re Cameron's Estate*, 47 App. Div. 120, 62 N. Y. Supp. 187.

**17.** "Testimony of an abstracter of titles in business before the destruction of the county records by fire, that he was acquainted with a certain person and remembered his last sickness and death, that he left a will which was recorded in the recorder's office, and that his estate was pending in court when the fire occurred, proves the fact of testacy." *Kotz v. Belz*, 178 Ill. 434, 53 N. E. 367.

**Declarations of Decedent, Insufficient.**— The fact of a will cannot be proved merely by evidence of statements or declarations on the part of the decedent to the effect that he had made a will. *In re Dunahugh's Will*, 130 Iowa 692, 107 N. W. 925.

**Proof of Intestacy.**— See article "EXECUTORS AND ADMINISTRATORS," Vol. V, p. 389.

**18.** *Jamison v. Jamison's Will*, 3 Houst. (Del.) 108; *Green v. Green*, 5 Ohio 279; *Brown v. Griffiths*, 11 Ohio St. 329; *Banning v. Banning*, 12 Ohio St. 437.

**19.** "The possession of this instrument in due form on its face at his death is *prima facie* proof that it is in fact what it purports to be, his last will and testament, subject, of course, to rebuttal, as in other cases of a disputed fact." *Collins v. Collins*, 125 N. C. 98, 34 S. E. 195.

Where a will is admitted to exist and its validity is admitted subject to the claim of its revocation, presumptively it is the last will of the

**3. Identity of Testator.**—The identity of the decedent with the person executing the will ordinarily appears from the mere proof of execution,<sup>20</sup> but where the person who executed the will was a stranger to all the witnesses, the question of identity sometimes becomes important and is to be settled by extrinsic<sup>21</sup> evidence of all the circumstances in the case.<sup>22</sup>

testator; and before probate can be denied it must be shown that a subsequent will was made. *In re Estate of Lambie*, 97 Mich. 49, 56 N. W. 223.

The rule that a testamentary writing is of no legal effect as a will until the testator's death applies to the whole instrument including the revocation clause, and hence the testamentary paper which the testator permits to survive him is *prima facie* his will. *Stetson v. Stetson*, 200 Ill. 601, 66 N. E. 262, 61 L. R. A. 258.

**Testimony of Scrivener Admissible.**—Where the same scrivener drew each of two wills known to have been executed by the testator, only one of which wills was produced or could be found after his death, the positive testimony of the scrivener that the will produced was the first one which had been executed by him will overcome the presumption that the will which was unaccounted for was the first to have been executed. *Starkweather v. Bell*, 13 S. D. 475, 83 N. W. 566.

**Will Left in Custody of Scrivener.** Where a will was left in the custody of the scrivener and was never called for by the testatrix, but the scrivener was unable to find the will on searching for it after the death of the testatrix and was of the opinion that it had been secretly removed by interested parties, the presumption is that this will was the last will and testament of the testatrix. *Hildreth v. Schillenger*, 10 N. J. Eq. 196.

**Destroyed Will Presumed To Have Antedated Will Produced.**—Where it appears that a testator had left two wills, each containing a formal revocatory clause and only one could be found after his decease, "ordinary experience would justify the inference that the will destroyed or unaccounted for was executed prior to the one that was retained by the testatrix and after her death regularly presented for probate." *Stark-*

*weather v. Bell*, 13 S. D. 475, 83 N. W. 566.

**Subsequent Will Revoking Earlier One.** see *infra*, under VIII, I, B.

20. See *infra*, "EXECUTION," XIV, 3.

3. In offering proof to establish the validity of execution of a will, "all that transpired on the occasion may properly be shown as part of the *res gestae*. This will, of course, include the act and declaration of every person who participated in what was there done, and inevitably the true relation of every such person will be made known. It will thus be ascertained who was the testator whose act and deed is the paper produced." *Chaney v. Missionary Soc.*, 28 Ill. App. 621.

**Handwriting May Be Proved.** Where the question is whether the deceased was the party who executed the will submitted for probate and the will was attested by strangers, evidence of the signature and handwriting of the testator may be resorted to. *Mowry v. Silber*, 2 Bradf. Sur. (N. Y.) 133.

21. **Identity of Witness.**—Where a witness signs by a name slightly different from that given to him in the testament, parol evidence is admissible to show that the two are the same person. *Davenport v. Davenport*, 116 La. 1009, 41 So. 240.

22. See article "IDENTITY," Vol. VI, p. 970.

"Proof that a woman making her will announced herself as a certain person to the attorney who drafted the will and to a witness thereto, neither of whom had met her before, not only by accepting an introduction to them as that person, but by signing herself as such in the will, constituted *prima facie* evidence of her identity as that person." *Harris v. Martin* (N. C.), 64 S. E. 126.

"Where, in a will contest, the caveators claimed that the evidence

**4. Identity of Instrument.** — A. PAROL EVIDENCE. — Parol evidence is admissible to identify the instrument propounded as the will of the decedent<sup>23</sup> and the evidence for the proponent on this

failed to identify the person who executed by mark the paper offered for probate, with the testator; and it appeared, among other things, that the draftsman of the paper prepared it at the direction of one whose name was the same as that of the testator, and who duly executed it; that after the testator's death the paper was found in his bureau drawer, where he had said before his death it would be found; and that the paper correctly gave the names of the testator's son and grandchildren, and described real estate he owned, — it was *held* that the identity had been shown and the paper should be admitted to probate." *Storey v. Storey*, 30 App. Cas. (D. C.) 41.

Where in a will contest a question arises as to the identity of the testatrix, testimony showing that before and after its execution the woman whose will it is claimed to be stated what she intended to do with her property and what she had done with it, which disclosures exactly coincided with the will; and the fact that the will was drawn at an office to which she had been sent for the purpose, with the further fact that the will was signed by a woman who introduced herself by the name signed to the will, although she was not personally known to the person drawing the will, sufficiently established the identity of the testatrix. *Riddle v. Gibson*, 29 App. Cas. (D. C.) 237.

**Identity Not Established.** — "A paper signed with a mark and dated three years prior to the death of testatrix will not be admitted to probate where the evidence showed that the paper was prepared by a justice of the peace and executed before him by a woman whom he did not know; that one of the witnesses did not know the woman; that the other who apparently did know her was dead when the paper was offered for probate; that another woman present at the time of the execution, and to whom the paper was given, was also dead; that the paper was discovered

in the effects of this woman three years afterwards; that the testatrix although attending the latter's funeral had never made any request or search for the paper; and that the paper offered made as the principal beneficiary of the estate, a person stranger in blood to testatrix, and with whom she had little to do." *In re McAndrew's Estate*, 206 Pa. St. 366, 55 Atl. 1040.

**Order of Proof.** — Whether in a will contest at the time of the admission of the will in evidence there was sufficient evidence to establish the identity of the testatrix is immaterial on appeal, where at a later stage ample evidence was introduced to establish identity. *Riddle v. Gibson*, 29 App. Cas. (D. C.) 237.

**23.** *Burge v. Hamilton*, 72 Ga. 568.

**Res Gestae of Execution Admissible.** — "Counsel's final and principal contention is that oral evidence is not admissible to show that the clauses under contest were parts of the instrument at the time the testator signed and published it as his will, and that in no event was it proper to permit any but the attesting witnesses to testify. . . . It is always proper to show the state and condition of the instrument and all that transpired at the time of its execution as of the *res gestae*, and this may be shown by any competent witness, whether he be a subscribing witness or not." *Kolowski v. Fausz*, 103 Ill. App. 528.

**Testimony to Some Peculiarity Not Required.** — "The testimony of a witness who swears to the execution and identity of a will is not to be rejected as incompetent and insufficient in law, because he is unable to designate any peculiarity in the testator's mark or signature, or in the paper upon which the will is written. There may be nothing peculiar in the mark or paper, and yet the witness, from the general appearance of the instrument and its likeness, in all respects, to the one he saw executed, may have no doubt



point is not restricted to that given by the subscribing witnesses.<sup>24</sup>

**B. PAPERS COMPRISING THE WILL.** — a. *General Rule.* — Although a will need not be written upon a single piece of paper,<sup>25</sup> where several sheets of paper or written instruments are propounded together constituting the will of a decedent, their connection with each other must appear upon their face or be shown to the court<sup>26</sup> by extrinsic evidence.<sup>27</sup>

b. *Presumptions.* — Where a will is propounded as consisting of

as to its identity, and be able to swear that it is the same paper." Carson's Appeal, 59 Pa. St. 493.

**24. Sufficiency of Evidence.** Where the subscribing witnesses signed only by mark and neither of them can identify the instrument as the one they attested, the proof is not sufficient to authorize its probate. *Crowley v. Crowley*, 80 Ill. 469.

"A subscribing witness is not required to know that he is attesting a will, or what its provisions are, so as to identify it. A subscribing witness attesting a signature to a will is no more competent on the question whether anything has occurred to the will subsequent to the attestation than anybody else, and the proponent is not limited to the testimony of such a witness. On the question in this case it was error to tell the jury that the proponent must explain the cutting off and re-attaching of a part of the will by at least one of the subscribing witnesses. That she could not do. They knew nothing about it, and the law did not require that they should." *Webster v. Yorty*, 194 Ill. 408, 62 N. E. 907.

"The statutes of this state do not require that the witnesses to a will shall know the contents thereof and be able to testify on the probate of the will that the provisions thereof as then appearing in the instrument are the same as in the instrument at the time when executed. *In re Sheldon's Will*, 16 N. Y. Supp. 454.

"It would be wholly impracticable to require witnesses to know and remember the contents of wills signed by them." *Roche v. Nason*, 105 App. Div. 256, 93 N. Y. Supp. 565.

Where two subscribing witnesses signed by mark but failed to identify

the paper propounded as the instrument which they signed, the person who drew the will and subscribed their names for them may testify as to the identity of the instrument, and his testimony will control upon the issue. *Montgomery v. Perkins*, 2 Met. (Ky.) 448.

**25.** Where a will is composed of several sheets of paper loosely fastened together, the fact that there is a possibility that some might have been removed and others substituted is not sufficient to justify a refusal to probate the will. In the absence of proof of fraud or other improper conduct such a will is entitled to probate where the proof shows that it was properly executed. *Palmer v. Owen*, 229 Ill. 115, 82 N. E. 275.

**26.** The question of whether a trust deed previously executed was a part of a will is a question of law for the court. *Glass v. Glass*, 127 Iowa 646, 103 N. W. 1013.

**27.** "There is no difficulty in executing a will in such physical form and shape as will leave no doubt where it begins and ends and what constitutes it. The court should not be required to select from a medley of paper sheets which may or may not be related to each other, transpose and rearrange them, and finally construct for the testator a valid instrument. If a testator chooses to execute his will upon loose, detached sheets, before probate is allowed either the sheets themselves, by their contents or other manifest relationship, or some other competent proof, should adequately establish that they were executed as and constitute a single, entire will." *In re Dake's will*, 75 App. Div. 403, 78 N. Y. Supp. 29.

several sheets of paper bound together, there is a presumption that the papers were so bound together when the will was executed.<sup>28</sup>

c. *Declarations.* — Declarations of the decedent as to what constitutes his will are admissible<sup>29</sup> as well as his statements as to how he intended to or had left his property.<sup>30</sup>

5. *Completion of Will.* — A. *EARLY RULE.* — While the law was that a will of personal property need not be formally executed, and a will was propounded purporting to dispose of both real and personal property, but admittedly incomplete as a devise of the real estate from a failure to have the accompanying attestation clause executed, or from any other reason, there was held to be a slight presumption that the will was incomplete and unfinished in respect to the personal property also.<sup>31</sup>

B. *MODERN RULE.* — a. *Presumption of Completion.* — It will be

28. *Rees v. Rees*, L. R. 3 P. D. (Eng.) 84; *Barnewall v. Murrell*, 108 Ala. 366, 379, 18 So. 831.

"The will in this case consisted of four pages of typewritten matter fastened together, and although the fastening was not sufficiently secure to prevent the possibility of fraud by changing the sheets of which it consists, the presumption where sheets of paper are bound together constituting a will, at the testator's death is that the same sheets were so bound together at the time of its execution." *Roche v. Nason*, 105 App. Div. 256, 93 N. Y. Supp. 565.

"If any theory consistent with the validity of the will can be suggested, which appears to the court to be as probable as the theory on which the argument for invalidity is based, the will as found must be maintained." *Rees v. Rees*, L. R. 3 P. D. (Eng.) 84 (*quoted in Barnewall v. Murrell*, 108 Ala. 366, 379, 18 So. 831, on point that will consisting of several sheets of paper fastened together will be presumed to have been so fastened at the time of execution).

29. *Gould v. Lakes*, L. R. 6 P. D. (Eng.) 1.

30. *Gould v. Lakes*, L. R. 6 P. D. (Eng.) 1.

31. *Boling v. Boling*, 22 Ala. 826. See *Ex parte Henry*, 24 Ala. 638; *Mealing v. Pace*, 14 Ga. 596; *Barnes v. Sylvester*, 14 Md. 507; *Plater v. Groome*, 3 Md. 134; *Robeson v. Kea*, 15 N. C. (4 Dev.

L.) 301; *Barnet's Appeal*, 3 Rawle (Pa.) 15.

For a complete discussion of the early and now obsolete law in relation to unexecuted wills of personal property, and an examination of the early English cases, the reader is referred to the case of *Public Admr. v. Watts*, 1 Paige (N. Y.) 347, *reversed in* 4 Wend. 168.

"The natural inference to be drawn from an attestation clause at the foot of a testamentary paper is, that the writer meant to execute it in the presence of witnesses, and that it was incomplete, in his apprehension of it, till that operation was performed — the presumption of law is *against* a testamentary paper, with an attestation clause not subscribed by witnesses; where the testator is not proved, as he is not suggested even in the present case, to have been prevented by any 'act of God' from going on to complete it, had he so intended. The presumption against an instrument, so circumstanced, I admit to be a slight one, where the instrument, like that before the court, is perfect in all other respects. Slight as it is, however, it must be rebutted by *some* extrinsic evidence of the testator intending the instrument to operate, in its subsisting state, before it can be entitled to probate, consistently with those established principles to which it is the duty of the court to adhere." *Beatty v.*

conclusively presumed that a property executed will represents the completed intention of a testator.<sup>32</sup>

b. *Declarations.* — Declarations of the testator will not be allowed to overcome this presumption.<sup>33</sup>

c. *Recitals and Blanks.* — The fact that the will as propounded contains a recital of facts which do not appear to exist,<sup>34</sup> or that it contains large blank spaces,<sup>35</sup> or is not kept by the testator with his other valuable papers<sup>36</sup> does not show that the instrument was incomplete.

d. *Holographic Will.* — An exception to the general rule seems to be made in the case of holographic wills, and where such a will, although properly executed, appears upon its face to be incomplete, a presumption arises that it was not intended by the decedent to operate as a completed instrument.<sup>37</sup>

Beaty, 1 Addams 154, 5 Eng. Ecc. Rep. 60.

32. *Barnewall v. Murrell*, 108 Ala. 366, 384, 18 So. 831; *Waller v. Waller*, 1 Gratt. (Va.) 454.

Where it was alleged that a will was never completed to the satisfaction of the testator, the court said: "It is conclusively shown that the will was signed and executed by her, and attested by witnesses, in the mode prescribed by law, and this is in law, conclusive evidence of the fact that it was completed to her satisfaction." *Taylor v. Cox*, 153 Ill. 220, 38 N. E. 656.

"A will having been duly executed, evidence to show that the testator entertained thoughts of, or contemplated changes, alterations, or revocations thereof, cannot affect the validity of such will, in its integrity, or in any of its parts. Until there is a change, alteration, or revocation in the mode appointed by law, the legal presumption is that the result of all thought and contemplation was a determination to adhere to the will as executed." *Barnewall v. Murrell*, 108 Ala. 366, 18 So. 831, *quoted in La Rue v. Lee* 63 W. Va. 388, 60 S. E. 388.

33. Declarations of the testator to the effect that he had blocked out a will, and later, that his business was unfinished cannot prevail against the plain testamentary form and intent shown by the writing itself. *LaRue v. Lee*, 63 W. Va. 388, 60 S. E. 388.

Declarations of a testatrix which

show an intention to change her will have no tendency to show that the will as executed was in any legal sense incomplete. *Taylor v. Cox*, 153 Ill. 220, 38 N. E. 656.

34. Where a will is drawn up on a printed blank and recited the presence of a seal which was not actually attached, and contained a blank space of a page and a half; it was held that since the instrument was not drawn up by a lawyer the absence of the seal and the presence of the blank was not proof that the instrument was incomplete where there was no doubt of its execution. *In re McCarthy's Will*, 59 Misc. 128, 112 N. Y. Supp. 219.

35. *Barnewall v. Murrell*, 108 Ala. 366, 385, 18 So. 831.

36. The fact that a will is found in a drawer and not in a tin box where the testator kept his other valuable papers is of very slight weight as evidence tending to show that the testator did not regard the instrument as complete and final. *LaRue v. Lee*, 63 W. Va. 388, 60 S. E. 388.

37. If a holographic will contained an unexecuted attestation clause it will be presumed that it was not meant to operate as a completed instrument. *Crutcher v. Crutcher*, 11 Humph. (Tenn.) 377.

"The presumption is always against a paper which bears self evident marks of its being unfinished, and it behooves those who assert its testamentary character to show by the most unequivocal testimony that the deceased subse-

#### IV. EXTENT OF TESTAMENTARY POWER.

**1. Burden of Proof.** — The burden of proof rests upon the party who claims that a bequest or devise is inoperative as being beyond the legal power of the decedent to make.<sup>38</sup>

**2. Declarations.** — Declarations of the testator are admissible to aid in determining whether a prohibition of statute has been violated.<sup>39</sup>

**3. Extrinsic Evidence.** — Extrinsic evidence is always admitted to show the invalidity<sup>40</sup> or illegality<sup>41</sup> of a provision in a will.

quently adopted it as his will in its unfinished state." *Jones v. Jones*, 60 Ky. (3 Met.) 266.

**38.** The burden of proof is upon the person attacking the validity of a will of a testator who died leaving a wife and child, upon the ground that he gave more than half of his estate to an educational institution. *In re Durand* (N. Y.), 87 N. E. 677.

"Whilst the right to will property may be conceded to be a privilege, rather than a right, and not a natural right, still the general rule of this state is that one may will his property to whom he chooses, and if there be any limitation upon this power it devolves upon him who would take advantage of the limitation to show that it applies. In other words, the burden is upon the contestant to show that his case comes within the terms of the limitation or exception." *Rine v. Wagner*, 135 Iowa 626, 113 N. W. 471 (construing § 1101, Code 1873, which provides that no person leaving a wife, child or parent shall devise or bequeath to any corporation more than one-fourth of his estate).

Under Louisiana Rev. Civ. Code, art. 1849, which provides that doctors who have attended a testator during his last illness, or ministers of religious worship who have called upon a testator, shall not be competent to receive property under the will of such testator except in various cases, one of which is where the party is related by consanguinity to the testator, the contestant must allege and prove that the person receiving such a bequest does not come within the exception although this involves the proving

of a negative. Succession of *Herber*, 117 La. 239, 41 So. 559.

**Contrary Rule in Pennsylvania.** Burden of proof is upon charitable legatees to show that execution was at least one month before decease of testator. *In re Amberson's Estates*, 204 Pa. St. 397, 54 Atl. 484.

**Power Limited by Antenuptial Contract.** — See *Wells v. Bradford*, 28 Ala. 200; *Lowe v. Bryant*, 30 Ga. 528.

**39.** *Cobb v. Battle*, 34 Ga. 458 (statute forbidding the manumission of slaves).

**40.** But see *Ellis v. Birkhead*, 30 Tex. Civ. App. 529, 71 S. W. 31, where it is claimed that a provision in a will was void as in citing the legatee to obtain a divorce from her husband, this must appear from the face of the will itself; and extrinsic evidence to show that the testator had objected to the marriage and had made trouble soon after it had occurred is admissible.

Where the constitution prohibited a bequest to a church and in the will in question the bequest was left to an individual who was an officer in the church, parol evidence was admitted to show that the real intention of the testatrix was to leave the bequest to the church, since it is competent to attack every written instrument for fraud, and this fraud may be shown by parol testimony. A fraud upon the policy of the law like all other frauds may be so shown and will be then set aside. *Kenrick v. Cole*, 61 Mo. 572.

Parol evidence is admissible to show that a will is void because of the existence of a valid antenuptial marriage settlement. *Lowe v. Bryant*, 30 Ga. 528.

**41.** *Robinson v. King*, 6 Ga. 539

**4. Sufficiency of Evidence.**—Clear proof must be made that a provision in a will is void as being in excess of the testamentary power of the decedent.<sup>42</sup>

## V. ANIMUS TESTANDI.

**1. Burden of Proof.**—The party offering an instrument for probate must show that it was executed with the testamentary intent, but this sufficiently appears, *prima facie*, where the instrument purports on its face to be testamentary, and the burden then shifts to the party denying the fact.<sup>43</sup>

**2. Intrinsic Evidence.**—A. FORM OF INSTRUMENT.—The very form of the instrument itself is often of great importance in determining the intent with which it was executed,<sup>44</sup> although it is

(will indirectly providing for the manumission of slaves).

Parol evidence is admissible to show that the actual effect of a will is to create a secret and illegal trust. *In re O'Hara*, 95 N. Y. 403. And see *Matter of Keleman*, 126 N. Y. 73, 26 N. E. 968.

<sup>42</sup>. Where it is claimed that a bequest in a will is illegal it must be clearly proved that such bequest comes within the prohibitions of the law, and any doubt existing must be resolved in favor of its validity. *Succession of Meunier*, 52 La. Ann. 79, 26 So. 776, 48 L. R. A. 77.

Where it is claimed that a provision in a will is void as tending to incite the testator's daughter to obtain a divorce from her husband, this fact must clearly appear. *Ellis v. Birkhead*, 30 Tex. Civ. App. 529, 71 S. W. 31.

<sup>43</sup>. *Whyte v. Pollok*, 7 App. Cas. (Eng.) 400.

"When a sane testator, not subject to coercion or restraint, intentionally executes with the formalities required by the statute a writing which in form and substance is testamentary, the writing of itself imports, and conclusively imports, the animus testandi." *Sewell v. Singluff*, 57 Md. 537.

**Clear Evidence Required.**—On the issue of the testamentary character of the paper if the instrument appears on its face to be of a testamentary nature, it will only be set aside on very clear evidence. *Boehm v. Kress*, 179 Pa. St. 386, 36 Atl. 226.

<sup>44</sup>. *Moye v. Kittrell*, 29 Ga. 677; *Sharp v. Hall*, 86 Ala. 110, 5 So. 497, 11 Am. St. Rep. 23.

**Holographic Will.**—Where a holographic will is presented for probate the paper itself proves that the testator knew when he signed it that it was his will. *In re Stillman*, 9 N. Y. Supp. 446, 29 N. Y. St. 213. And where such a will is attested by a witness there can generally be no question as to the presence of the testamentary intent. *Douglass & Co. v. Harkrender*, 3 Baxt. (Tenn.) 114.

**Character of Words Used.**—"In ascertaining whether an instrument was intended by the maker to operate as a *bond* or as a *will*, words which may not change the legal effect of the instrument, and may, therefore, be immaterial in construing it, supposing its character to have been established, may be quite material in ascertaining its character, and though their alteration or erasure may be of no importance in the former point of view, yet they are quite material in the latter." *Smith v. Eason*, 49 N. C. (4 Jones' L.) 34.

**Certificate of Registration.**—"The instrument was sufficiently executed to operate as a deed or will, and has appended a certificate of proof of execution and of registration. It has been said that these facts raise the presumption of delivery, and are persuasive to show that the maker regarded the instrument as a deed; but they bear little, if any significance, in the absence of

clearly settled that no particular form of instrument is required.<sup>45</sup>

**B. RECITALS IN INSTRUMENT.**—The fact that the maker himself gives a certain name or characterization to the instrument, while worthy of due consideration, is not conclusive evidence of its real nature.<sup>46</sup>

proof that the instrument was delivered or recorded in the lifetime of the donor." *Crocker v. Smith*, 94 Ala. 295, 10 So. 258, 16 L. R. A. 576.

45. *Clarke v. Ransom*, 50 Cal. 595.

When the question was whether a paper was testamentary in character and it appeared that the paper was found in the bureau drawer of the testatrix after her death, in which drawer she kept gas receipts, on the back of one of which was the writing, the fact that the writing was signed, together with the language used, was sufficient to sustain a finding that the paper was a will. *In re Gaston's Estate*, 188 Pa. St. 374, 41 Atl. 529, 68 Am. St. Rep. 874.

**Examples.**—An instrument which read, "Dear old Nance: I wish to give you my watch, two shawls and also \$5000. Your old friend, E. A. Gordon," was held to be a will, parol evidence being admitted to determine its testamentary character. *Clarke v. Ransom*, 50 Cal. 595. "Want Sarah relatives have all property. S. A. M. Sadler," held not to be a will. *Young v. Wark*, 76 Miss. 829, 25 So. 660.

**Letter as Will.**—In several cases a will in the form of a letter has been established where the letter complies with the requisites necessary for a holographic will; and in such cases the great difficulty is in ascertaining the existence of the testamentary intent. *Estate of Richardson*, 94 Cal. 63, 29 Pac. 484, 15 L. R. A. 635. See *Byers v. Hoppe*, 61 Md. 206; *Maxwell v. Maxwell*, 3 Metc. (Ky.) 101; *Cowley v. Knapp*, 42 N. J. L. 297; *Todd's Will*, 2 Watts & S. (Pa.) 145; *McBride v. McBride*, 26 Gratt. (Va.) 476; *In re Skerrett*, 67 Cal. 585, 8 Pac. 181; *Gibson v. Van Syckle*, 47 Mich. 439, 11 N. W. 261.

**Judgment Notes.**—In *In re Sun-*

day's Estate, 167 Pa. St. 30, 31 Atl. 353, judgment notes executed many years after the testator's will were held not to be testamentary in character; the court stating that while no particular form was necessary for a testamentary act, an act will not be held to be testamentary where it follows an earlier will and is couched in strict technical contract terms, without clear proof of fraud, accident or mistake.

**Failure To Appoint Executor.** Where a will is complete on its face, failure to appoint an executor, or the fact that it does not dispose of all of the testator's estate, does not afford any evidence of the absence of the *animus testandi*. *Byers v. Hoppe*, 61 Md. 206.

46. *Wheeler v. Durant*, 3 Rich. Eq. (S. C.) 452 (instrument denominated a deed); *Ferguson v. Ferguson*, 27 Tex. 339.

"The fact that it is designated on its face as a *deed of gift*, is ordinarily regarded of little moment, though it may become of more or less importance when, upon a comparison of the terms of the instrument, and consideration of the bearing of each on the others, the meaning is ambiguous, and the mind is left in doubt as to the intention of the maker." *Crocker v. Smith*, 94 Ala. 295, 10 So. 258, 16 L. R. A. 576.

Where the instrument contains the clause "and this is done, in part, to do away with all need or necessity of taking out letters of administration after my death," this clause is a circumstance to be considered in determining the nature of the paper, but it is not conclusive and must be weighed with the other evidence and would be more weighty if the instrument disposed of the entire estate. *Sharp v. Hall*, 86 Ala. 110, 5 So. 497, 11 Am. St. Rep. 23.

**Parol Evidence Admissible To Contradict Recitals.**—*Fleming v. Mor-*

**C. TIME OF TAKING EFFECT.** — One of the commonest tests applied to determine whether an instrument is testamentary in nature is to ascertain whether the enjoyment of the estate is given presently or is postponed to the future,<sup>47</sup> but this is not conclusive upon the question.<sup>48</sup>

**D. INSTRUMENT IN HANDWRITING OF STRANGER.** — Where the instrument propounded is in the handwriting of some person other than the decedent, this fact is considered as tending to show that it was never executed by the decedent, with a testamentary intent.<sup>49</sup>

**3. Extrinsic Evidence.** — **A. DECLARATIONS.** — The declarations of the decedent, subsequent to the execution of the instrument, are admissible to prove his knowledge of the testamentary character

ri-son, 187 Mass. 120, 72 N. E. 499, 105 Am. St. Rep. 386.

**Illustrations.** — In *Matter of Beebe*, 6 Dem. (N. Y.) 43, a paper was held to be a will although it stated on its face that it was not a formal will but was made instead of a formal will which the party intended to make subsequently, the court drawing the conclusion that it was intended by the testator to operate as a will until the subsequent will was executed.

In *Ferguson-Davis v. Ferguson-Davis*, L. R. 15 P. D. (Eng.) 109, a paper which declared on its face that it was not meant as a legal will but as a guide was held not to be testamentary in character.

47. *Sharp v. Hall*, 86 Ala. 110, 5 So. 497, 11 Am. St. Rep. 23; *Lincoln v. Felt*, 132 Mich. 49, 92 N. W. 780.

48. *Wheeler v. Durant*, 3 Rich. Eq. (S. C.) 452.

"It may be conceded that where the character of an instrument of gift, testamentary or otherwise, is in doubt, a specification of time, within the possible limit of the life of the maker, at which his gifts are to pass to the donee, may be regarded as evidence of an intention that they shall pass *inter vivos*; but to make such specification of time conclusive of the question, or even of controlling weight in its determination, would be without precedent and contrary to reason. If it is to be conclusive or controlling, it proves that a will can never definitely fix the time of payment of a

legacy or other bequest, unless the date be beyond the possible range of the testator's lifetime. If such be the case, why those numerous wills bequeathing legacies payable to children or others when they become of age?" *Smith v. Holden*, 58 Kan. 535, 50 Pac. 447.

The question whether an instrument is a deed or a will is properly submitted to the jury where though in form a deed and acknowledged and recorded it yet recites that the grantor shall remain in possession until his death enjoying all the rents and profits, and that title shall not pass to the grantee until that time. *Hannig v. Hannig* (Tex. Civ. App.), 24 S. W. 695.

49. "The circumstance, too, of its being in the handwriting of another instead of that of the testatrix herself, is a circumstance against the will. It is true that this fact, of itself, is not conclusive on the point, but in all cases where the paper is in the handwriting of another, the proof must be clear that it has been adopted as his own by the testator." *Plater v. Groome*, 3 Md. 134.

Where the will is not in the handwriting of the deceased, and the witnesses are present in court, it is incumbent upon the proponent to satisfy the jury that the testator knew at the time of the execution of the instrument that it was his will; and no presumptions will be indulged in, but the fact must be proved by positive testimony, or from circumstances furnishing satisfactory proof. *Gerrish v. Nason*, 22 Me. 438.

of the instrument<sup>50</sup> and his intent that it should<sup>51</sup> or should not<sup>52</sup> be his will.

**Res Gestae Declarations** are commonly admitted.<sup>53</sup>

B. PAROL EVIDENCE. — a. *Res Gestae*. — All of the circumstances surrounding the execution of the instrument embracing the declarations,<sup>54</sup> acts and conduct<sup>55</sup> of the parties may be shown to aid in determining its nature.

b. *Surrounding Circumstances*. — Any facts<sup>56</sup> which tend to

50. *Matter of Nelson*, 141 N. Y. 152, 36 N. E. 3.

51. "A paper was offered as the will of A, the preamble being in the handwriting of a friend, and the disposing clauses in the writing of the testator, but not signed, but ending with a verse he directed to be engraved on his tomb, the court held, that parol evidence of his declarations was admissible to show whether he intended it for his last will or not." *Witherspoon v. Witherspoon*, 2 McCord (S. C.) 520.

52. *Fleming v. Morrison*, 187 Mass. 120, 72 N. E. 499, 105 Am. St. Rep. 386.

53. See the cases cited in the following note.

54. *Herrington v. Bradford's Exrx.*, 1 Walk. (Miss.) 520; *Wareham v. Sellers*, 9 Gill & J. (Md.) 98.

A statement made to one of the subscribing witnesses by the testator, that he was making his will and the request to the witness that he come and witness the will, made only a few moments before signing the paper, are part of the *res gestae* and indicate that it was the testator's intention to make this instrument his will. *Robinson v. Brewster*, 140 Ill. 649, 30 N. E. 683, 33 Am. St. Rep. 205.

"If with the other statutory requirements proven, a statement in the presence of a testator who is almost in *extremis* but is of sound mind, that a paper presented is a will, involves an implied declaration by him of the fact sufficient to admit it to probate, how much more should a paper be held valid when a testatrix in the full possession of her faculties but conscious of a dangerous malady, states that the purpose of the paper is to provide for

her child, and then signs it in the presence of the witnesses and requests them in terms to attest her signature." *In re Jones' Will*, 85 N. Y. Supp. 294.

55. *Boehm v. Kress*, 179 Pa. St. 386, 36 Atl. 226; *Sharp v. Hall*, 86 Ala. 110, 5 So. 497, 11 Am. St. Rep. 23; *Crocker v. Smith*, 94 Ala. 295, 10 So. 258, 16 L. R. A. 576.

"It is said the paper must speak for itself; any proof, *aliunde*, is incompetent. That is true, where the question is merely one of construction; but certainly, when the question is, what is the nature and character of the paper?—what was it intended for?—the *res gestae*, all that was done touching and concerning it, is competent evidence; for those acts impress upon it its character." *Outlaw v. Hurdle*, 46 N. C. (1 Jones' L.) 150.

"Somewhat more strictness is observed in the reception of parol evidence of expressions of a testator's intentions than in the case of like evidence explanatory of contracts *inter vivos* . . . but the rule that evidence of the circumstances under which an instrument is made and the facts to which it stands in relation may be shown in exposition of its character and meaning, applies as well to wills as any other class of writings. . . . Such evidence is admissible, not only to apply meaning to words used, and to ascertain the objects and subjects of a testator's bounty, but also to determine the character of the instrument, whether testamentary or otherwise." *Smith v. Holden*, 58 Kan. 535, 50 Pac. 447.

56. *Smith v. Holden*, 58 Kan. 535, 50 Pac. 447; *Whyte v. Pollok*, 7 App. Cas. (Eng.) 400; *Robertson v. Smith*, L. R. 2 P. D. (Eng.) 43.



throw light upon the intention of the maker, although not a part of the *res gestae* of the execution of the instrument, are admissible.<sup>57</sup>

c. *Unambiguous Instruments*.—The rules above stated do not apply to instruments which are unambiguous upon their face. In such cases, the court cannot resort to extrinsic evidence to alter the clear meaning and intent of the instrument.<sup>58</sup>

d. *Mistake or Jest*.—Parol evidence is admissible<sup>59</sup> to show that

57. *Ferguson v. Ferguson*, 27 Tex. 339; *Clarke v. Ransom*, 50 Cal. 595.

Extrinsic evidence is admissible to enable the court to place itself in the position of the maker of the instrument in order to enable it to determine whether the instrument is a deed or a will. *Tuttle v. Raish*, 116 Iowa 331, 90 N. W. 66.

#### Facts Which May Be Shown.

"We hold, that the paper, on its face, falls within the indeterminate class, which, according to circumstances, may be pronounced a deed or a will. We also hold that, on the trial of the issue, it was competent to prove that the maker was without lineal, or other very near relatives; that she was attached to the donee, who was a member of her household; that she sent for the draughtsman of the paper, and employed him to write her will; that in pursuance of such employment, he wrote the paper in controversy; that she signed it with a knowledge of its contents, and had it attested; that she did not deliver it, but had it placed in an envelope, and indorsed, 'not to be opened until after my death,' and that she carefully preserved it in such envelope, until her death. Now, all these facts and circumstances, if proved and believed, were competent and proper for the consideration of the jury, in determining the issue of *devisavit vel non*. And the fact, if believed, that the paper had never been delivered, and therefore could not take effect as a deed, should also be considered in arriving at the maker's intention." *Sharp v. Hall*, 86 Ala. 110, 5 So. 497, 11 Am. St. Rep. 23.

**Effect of Finding the Instrument a Deed May Be Considered.**—The

fact that to hold an instrument to be a deed and not a will would have the effect of stripping the maker of all his property is a strong circumstance tending to show that the instrument was not intended as a deed. *Sartor v. Sartor*, 39 Miss. 760.

58. *Dodson v. Dodson*, 142 Mich. 586, 105 N. W. 1110; *Ferguson v. Ferguson*, 27 Tex. 339; *Dexter v. Witte* (Wis.), 119 N. W. 891; *In re Sunday's Estate*, 167 Pa. St. 30, 31 Atl. 353; *In re Skerrett*, 67 Cal. 585, 8 Pac. 181; *Clay v. Layton*, 134 Mich. 317, 96 N. W. 458; *Noble v. Fickes*, 230 Ill. 594, 82 N. E. 950, 13 L. R. A. (N. S.) 1203.

#### Contract Claimed to Be a Will.

*Lindesmith v. Lindesmith*, 96 Minn. 147, 104 N. W. 825.

**Old Rule Stated.**—"Under the lax rules that formerly prevailed in England, especially in the ecclesiastical courts, where wills of personal property were probated, cases may be found where a resort to extrinsic parol evidence was allowed for the purpose of establishing testamentary intent, where there was no ambiguity on the face of the instrument, and the instrument afforded no evidence that it was only to take effect upon the death of the maker; and there are some decisions in this country to be found in the earlier reports where instruments in the form of a deed of gift have been admitted to probate out of regard to the giver's testamentary purpose, which was disclosed by extrinsic parol evidence." *Noble v. Fickes*, 230 Ill. 594, 82 N. E. 950, 13 L. R. A. (N. S.) 1203.

59. *Davis v. Rogers*, 1 Houst. (Del.) 44.

the paper was executed by mistake,<sup>60</sup> or in jest,<sup>61</sup> and without any intent that it should operate as a valid will.

e. *Instructions to Scrivener.*—The instructions given by the decedent to the draftsman of the paper will often be a guide to his intentions, and are admissible in evidence.<sup>62</sup>

f. *Construction Placed Upon Instrument by Decedent.*—Another means of ascertaining the intent of the maker is to consider how he himself regarded it, subsequent to its execution.<sup>63</sup>

4. **Knowledge of Contents.**—A. PRESUMPTION FROM EXECUTION.  
a. *In General.*—The general presumption is that a testator having executed his will, had knowledge of its contents,<sup>64</sup> but this pre-

60. *Couch v. Eastham*, 27 W. Va. 796; *Barker v. Comins*, 110 Mass. 477; *Goods of Hunt*, L. R. 3 P. D. (Eng.) 250.

**Declaration of the Testator** to the subscribing witness, made after the execution of the alleged will, to the effect that the will was a fake and made for the purpose of deceiving the principal beneficiary, is admissible to show a lack of *animus testandi*. *Fleming v. Morrison*, 187 Mass. 120, 72 N. E. 499, 105 Am. St. Rep. 386.

Where two sisters prepared their wills at the same time and with very similar provisions in them, but by mistake each sister executed the wrong will, it was held that the execution was invalid since the party did not know and approve of the contents of the document executed. *Goods of Hunt*, L. R. 3 P. D. (Eng.) 250.

61. *Lester v. Smith*, 3 Sw. & T. (Eng.) 282.

In *Nichols v. Nichols*, 2 Phill. Ecc. 180, 4 Eng. Ecc. 225, extrinsic evidence was admitted to show that a paper testamentary upon its face was executed in jest and without testamentary intention, but such evidence is received with caution, especially where it comes from an attesting witness, as it impeaches his own formal act.

"Although the testator knew and approved the contents, the paper may still be rejected, on proof establishing, beyond all possibility of mistake, that he did not intend the paper to operate as a will." *Guardhouse v. Blackburn*, L. R. 1 P. D. (Eng.) 109.

62. *Sharp v. Hall*, 86 Ala. 110, 5 So. 497, 11 Am. St. Rep. 23.

In *Green v. Proude*, 1 Mod. (Eng.) 117, 86 Eng. Reprint 776, the question being whether an instrument was a deed or a will, the court said: "Here being directions given to make a will, and a person sent for to that end and purpose, this is a good will."

63. *Robertson v. Dunn*, 6 N. C. (2 Murph. L.) 133.

The testator being old and nearly blind executed a paper in form of a power of attorney to his son. The question being whether the paper was executed *animo testandi* it was held that the fact that he expressly showed that he contemplated the settlement of his estate by his son, in conversations made before and after executing the instrument, his conduct in regard to it immediately after its execution and continuing up to the time of his death, the nature of his estate and the fact that the specific things authorized to be done after his death included a large part of that which would be required of an executor, are all admissible as tending to show the intent with which the paper was executed. *Stewart v. Stewart*, 177 Mass. 493, 59 N. E. 116.

64. *England.*—*Beamish v. Beamish*, (1894) 1 Ir. 7; *Guardhouse v. Blackburn*, L. R. 1 P. D. 109; *Browning v. Budd*, 6 Moore P. C. 429, 13 Eng. Reprint 749.

*Alabama.*—*Daniel v. Hill*, 52 Ala. 430.

*Colorado.*—*Snodgrass v. Smith*, 42 Colo. 60, 94 Pac. 312.

*Georgia.*—*Beall v. Mann*, 5 Ga.

sumption is never conclusive,<sup>65</sup> and the surrounding circumstances may be so suspicious as to require affirmative evidence of this fact.<sup>66</sup>

b. *Will Drawn by Principal Beneficiary.* — It is not true that the mere fact that a will was drawn under the supervision of a person who takes a large interest under it, repels the presumption that the

456; *Gaither v. Gaither*, 20 Ga. 709.

*Illinois.* — *Purdy v. Hall*, 134 Ill. 298, 25 N. E. 645; *Waters v. Waters*, 222 Ill. 26, 78 N. E. 1; *Keithley v. Stafford*, 126 Ill. 507, 18 N. E. 740; *Jones v. Abbott*, 235 Ill. 220, 85 N. E. 279; *Sheer v. Sheer*, 159 Ill. 591, 43 N. E. 334; *Yoe v. McCord*, 74 Ill. 33, 43; *Robinson v. Brewster*, 140 Ill. 649, 30 N. E. 683, 33 Am. St. Rep. 265.

*Kansas.* — *McConnell v. Keir*, 76 Kan. 527, 92 Pac. 540.

*Kentucky.* — *Sechrest v. Edwards*, 4 Met. 163; *Shanks v. Christopher*, 3 A. K. Marsh. 144.

*Maine.* — *Barnes v. Barnes*, 66 Me. 286.

*Maryland.* — *Taylor v. Creswell*, 45 Md. 422; *Cramer v. Crumbaugh*, 3 Md. 491.

*New Hampshire.* — *Pettes v. Bingham*, 10 N. H. 514.

*New Jersey.* — *Day v. Day*, 3 N. J. Eq. 549; *In re Maxwell*, 8 N. J. Eq. 251.

*New York.* — *In re Hall's Will*, 5 Misc. 461, 24 N. Y. Supp. 864.

*North Carolina.* — *Carr v. McCamm*, 18 N. C. (1 Dev. & B.) 276; *Downey v. Murphey*, 18 N. C. (1 Dev. & B.) 82.

*Pennsylvania.* — *Ginder v. Far-num*, 10 Pa. St. 98; *Weigel v. Weigel*, 5 Watts 486; *Vernon v. Kirk*, 30 Pa. St. 218; *Hoshauer v. Hoshauer*, 26 Pa. St. 404; *Lewis v. Lewis*, 6 Serg. & R. 489, 495.

*South Carolina.* — *Black v. Ellis*, 3 Hill L. 68; *M'Ninch v. Charles*, 2 Rich. L. 229.

*Tennessee.* — *Maxwell v. Hill*, 89 Tenn. 584, 15 S. W. 253; *Cox v. Cox*, 4 Sneed 81; *Bartee v. Thompson*, 8 Baxt. 508; *Patton v. Allison*, 7 Humph. 320; *Rutland v. Gleaves*, 1 Swan 198.

*Texas.* — *Kelly v. Settegast*, 68 Tex. 13, 2 S. W. 870.

**Basis of Presumption.** — "This presumption is drawn from the ordinary conduct of mankind. Men do

not commonly sign papers without knowledge of what is embraced within them." *Vernon v. Kirk*, 30 Pa. St. 218.

#### **May Control Other Evidence.**

Where the testimony leaves it doubtful whether testator understood the contents of his will, the presumption that he did controls. *Sheer v. Sheer*, 159 Ill. 591, 43 N. E. 334.

#### **Transaction of Recent Date.**

Where a will is not in the handwriting of the testator and the witnesses are present, and the transaction recent, no presumption of knowledge of contents can arise. *Gerrish v. Nason*, 22 Me. 438.

65. *Harris v. Vanderveer's Exr.*, 21 N. J. Eq. 561. And see *Taylor v. Cresswell*, 45 Md. 422.

The presumption that a person who executes a will does so with knowledge of its contents readily yields to evidence showing that such was not the fact. *Purdy v. Hall*, 134 Ill. 298, 25 N. E. 645.

66. *Tyrrell v. Painton*, (1894) P. (Eng.) 151; *Harrison v. Rowan*, 3 Wash. C. C. 580, 11 Fed. Cas. No. 6,141; *Griffith v. Diffenderfer*, 50 Md. 466; *Lake v. Ranney*, 33 Barb. (N. Y.) 49.

**Burden of Proof.** — "That the testator did know and approve of the contents of the alleged will is therefore part of the burthen of proof assumed by every one who propounds it as a will. This burthen is satisfied, *prima facie*, in the case of a competent testator by proving that he executed it. But if those who oppose it succeed by a cross-examination of the witnesses, or otherwise, in meeting this *prima facie* case, the party propounding must satisfy the tribunal affirmatively that the testator did really know and approve of the contents of the will in question before it can be admitted to probate." *Cleare v. Cleare*, L. R. 1 P. D. (Eng.) 655.

testator had knowledge of its contents,<sup>67</sup> although the rule is sometimes stated in this broad form.<sup>68</sup> It is only in connection with other suspicious facts that this fact is of any great importance.<sup>69</sup>

c. *Secrecy in Preparing Will*. — The fact that a will was prepared with more or less secrecy is to be considered in determining whether the testator had actual knowledge of its contents.<sup>70</sup>

67. *Cramer v. Crumbaugh*, 3 Md. 491; *McConnell v. Keir*, 76 Kan. 527, 92 Pac. 540.

Where the principal beneficiary was the son of the testatrix there was held to be no presumption that the testatrix did not have knowledge of the contents of her will. *Blume v. Hartman*, 115 Pa. St. 32, 8 Atl. 219, 2 Am. St. Rep. 525.

68. *England*. — *Brown v. Fisher*, 63 L. T. N. S. 465; *Michell v. Thomas*, 12 Jur. 967; *Fulton v. Andrew*, 7 H. L. 448; *Scoular v. Plowright*, 28 L. T. 193.

*Alabama*. — *Daniel v. Hill*, 52 Ala. 430; *Hill v. Barge*, 12 Ala. 687.

*Colorado*. — *Snodgrass v. Smith*, 42 Colo. 60, 94 Pac. 312.

*Georgia*. — *Adair v. Adair*, 30 Ga. 102; *Woodson v. Holmes*, 117 Ga. 19, 43 S. E. 467; *Hughes v. Meredith*, 24 Ga. 325.

*Michigan*. — *Bush v. Delano*, 113 Mich. 321, 71 N. W. 628.

*New York*. — *In re Bedell's Will*, 107 App. Div. 284, 95 N. Y. Supp. 12.

*Pennsylvania*. — *Blume v. Hartman*, 115 Pa. St. 32, 8 Atl. 219, 2 Am. St. Rep. 525.

*Tennessee*. — *Patton v. Allison*, 7 Humph. 320.

*Texas*. — *Renn v. Samos*, 33 Tex. 760; *Vickery v. Hobbs*, 21 Tex. 570.

*Wisconsin*. — *Goerke v. Goerke*, 80 Wis. 516, 50 N. W. 345.

And see article "UNDUE INFLUENCE," Vol. XIII.

**Leading Case.** — "All that can be truly said is, that if a person, whether attorney or not, prepares a will with a legacy to himself, it is, at most, a suspicious circumstance, of more or less weight, according to the facts of each particular case; in some of no weight at all, as in the case suggested, varying according to circumstances; for instance, the *quantum* of the legacy, and the pro-

portion it bears to the property disposed of, and numerous other contingencies; but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased." *Barry v. Butlin*, 2 Moore P. C. 480, 12 Eng. Reprint 1089.

69. Where the proponent is the person who drew the will and takes a large interest under it, and the testator was weak at the time of its execution, there must be strong and satisfactory evidence that the testator knew the contents of the will. *McKnight v. Wright*, 12 Rich. L. (S. C.) 232.

**Relation of Trust or Confidence Existing.** — Where it is shown that a relation of trust and confidence existed between the testatrix and her agent who was instructed by her to draw her will, this fact in connection with the fact that under the will presented for probate he took a substantial interest in the property is sufficient to shift the burden of proof on him to show by a preponderance of the evidence that the testatrix not only had the opportunity of reading the will, but that she did read it and understood its provisions and what disposition she was making of her property. *Bradford v. Blossom*, 207 Mo. 177, 230, 105 S. W. 289. And see *Hill v. Barge*, 12 Ala. 687; *Beall v. Mann*, 5 Ga. 456.

70. *Purdy v. Hall*, 134 Ill. 298, 25 N. E. 645. And see *Hill v. Barge*, 12 Ala. 687.

The fact that opportunities existed for deceiving the testator, and that the legatees were designing, is evidence against knowledge of con-

d. *Possession of Will.*—Where the will after being prepared, was in the possession of the testator for a length of time sufficient to enable him to have examined and destroyed it, if he had so desired, this is very strong evidence that he had knowledge of its contents.<sup>71</sup> And the fact that he keeps possession of it after its execution tends as strongly to prove the same fact.<sup>72</sup>

e. *Incapacity of Testator.*—In cases in which the testator was either physically<sup>73</sup> or mentally<sup>74</sup> incapacitated to a greater or less extent at the time of executing the will, the presumption is properly

tents. *M'Ninch v. Charles*, 2 Rich. L. (S. C.) 229.

"A testatrix during her last illness made a will in favor of two persons who were strangers in blood. The will was in accordance with her previously expressed intentions, but the instructions for it were given to the persons interested under it when no one else was present, and it was not read over to her, and its contents were not distinctly explained to her before or at the time of the execution. Her next of kin were denied access to her during her illness. *Held*, that there was evidence that the testatrix knew and approved of the contents of the will, and it was pronounced for." *Goodacre v. Smith*, L. R. 1 P. D. (Eng.) 359.

71. *In re Shapter's Estate*, 35 Colo. 578, 85 Pac. 688, 6 L. R. A. (N. S.) 575; *Woodson v. Holmes*, 117 Ga. 19, 43 S. E. 467; *In re Jones' Will*, 85 N. Y. Supp. 294; *In re McLaughlin's Will*, 69 N. J. Eq. 479, 59 Atl. 892.

72. *In re Cooper's Will* (N. J. Eq.), 71 Atl. 676; *Barker v. Streuli*, 69 N. J. Eq. 771, 61 Atl. 408; *Gerbich v. Freitag*, 213 Ill. 552, 73 N. E. 338, 104 Am. St. Rep. 234; *Mason v. Williams*, 53 Hun 398, 6 N. Y. Supp. 479.

"Where a man retains a revocable instrument, with full opportunity of revoking it, and does not revoke it, there is a strong presumption, that he wishes it to stand, though at first it might have been unfairly obtained from him. But there is no such presumption, where, soon after the execution of the instrument, he is taken ill and dies; or where, from the time of execution to his death, his intellects were

too weak to judge of the propriety of revocation." *Irish v. Smith*, 8 Serg. & R. (Pa.) 573. And see *In re McLaughlin's Will*, 69 N. J. Eq. 479, 59 Atl. 829.

73. *In re Way*, 6 Misc. 484, 27 N. Y. Supp. 235; *Black v. Ellis*, 3 Hill (S. C.) 68 (testator must be *in extremis* to rebut the presumption of knowledge).

**Blind Testator.**—Proponent must adduce affirmative evidence that the testator had actual knowledge of the contents of the instrument. *In re Bull*, 111 N. Y. 624, 19 N. E. 503. And see *Harrison v. Rowan*, 3 Wash. C. C. 580, 11 Fed. Cas. No. 6,141. *Contra*, *Clifton v. Murray*, 7 Ga. 564.

**Defective Eyesight.**—Where eyesight of testator was impaired and it did not appear that the will was read over to him, probate was refused on the ground that it did not appear that he knew its contents. *Harris v. Vanderveer's Exr.*, 21 N. J. Eq. 561. *Compare* *Ross v. Ross* (Iowa), 117 N. W. 1105.

74. *M'Ninch v. Charles*, 2 Rich. L. (S. C.) 229; *Key v. Holloway*, 7 Baxt. (Tenn.) 575; *Patton v. Allison*, 7 Humph. (Tenn.) 320; *Boyd v. Boyd*, 66 Pa. St. 283; *Wilson v. Mitchell*, 101 Pa. St. 495.

Where a will is made while the testatrix is *in extremis* and she was drowsy and her mentality clouded, the legal presumption will not be in favor of the instrument, but the person propounding it must show by clear and convincing proof not only that the document was read to her, but that she fully understood its character and contents. *Hildreth v. Marshall*, 51 N. J. Eq. 241, 27 Atl. 465.

**Testatrix Addicted to Opiates.** The legal presumption that a tes-

held to be rebutted and affirmative proof of knowledge of the contents is required.<sup>75</sup>

*f. Illiteracy of Testator.*—The better rule is that the illiteracy of the testator does not repel the presumption that he had knowledge of the contents of the will executed by him,<sup>76</sup> although there is considerable authority for the opposite view.<sup>77</sup>

tatrix understood the contents of her will which had been read to her is only *prima facie* where she is of great age and addicted to the use of opiates and ardent spirits to such an extent as to enfeeble and impair her faculties. *Rutland v. Gleaves*, 1 Swan (Tenn.) 198.

75. The fact that the testator was old and very feeble is a strong circumstance to be considered upon the question whether he had knowledge of the contents of the will which he signed. *Cowan v. Shaver*, 197 Mo. 203, 95 S. W. 200. And see *Harris v. Vanderveer's Exr.*, 21 N. J. Eq. 561; *Hyatt v. Lunnin*, 1 Dem. (N. Y.) 14; *Rollwagen v. Rollwagen*, 63 N. Y. 504.

76. *Georgia.*—*Clifton v. Murray*, 7 Ga. 564.

*Illinois.*—*Doran v. Mullen*, 78 Ill. 342.

*New Jersey.*—*Patton v. Hope*, 37 N. J. Eq. 522.

*New York.*—*In re Smith's Will*, 24 N. Y. Supp. 928, 53 N. Y. St. 658.

*North Carolina.*—*King v. Kinsey*, 74 N. C. 261; *Hemphill v. Hemphill*, 13 N. C. (2 Dev.) 291, 21 Am. Dec. 331 (blind and illiterate); *Downey v. Murphey*, 18 N. C. (1 Dev. & B.) 82.

*Pennsylvania.*—*Vernon v. Kirk*, 30 Pa. St. 218.

"Illiterate persons, as well as others, may wish the contents of their wills to remain unknown to all but the confidential scrivener. Being of sound minds, and having satisfied themselves in their own way that the will has been written as directed, they may call in witnesses and execute it by affixing their marks, or having their names signed, without having the contents again made known to them. There is no good reason for excluding them from the benefit of the presumption which attaches to the same acts when performed by per-

sons able to read and write. The great weight of authority is opposed to making such an exception to the general rule." *Lipphard v. Humphrey*, 28 App. Cas. (D. C.) 355.

The fact that the testator was a German who could not understand English readily will not rebut the presumption that he had a knowledge of the contents of the will which he signed. *In re Schweigert's Will*, 17 Misc. 186, 40 N. Y. Supp. 979. And see *Hoshauer v. Hoshauer*, 26 Pa. St. 404; *Compher v. Browning*, 219 Ill. 429, 76 N. E. 678.

Although the testator could not read nor write any more than to write his name, where it appeared that he had full testamentary capacity, the presumption that he had knowledge of the contents of the instrument would arise from the mere fact of its due execution. *Baughter v. Gesell*, 103 Md. 450, 63 Atl. 1078. And see *In re Smith's Will*, 61 Hun 101, 15 N. Y. Supp. 425.

"Where the person making the will is so illiterate as to make his mark, and the draughtsman of the will is the principal beneficiary, the presumption of knowledge is overcome, and more proof is required to establish the will. Such circumstances cast a suspicion on the will, and it then becomes incumbent on the proponent to remove that suspicion by showing affirmatively that the testator fully understood the provisions of the will and freely approved them." *Maxwell v. Hill*, 89 Tenn. 584, 15 S. W. 253.

77. *Cox v. Cox*, 4 Sneed (Tenn.) 87; *Watterson v. Watterson*, 1 Head (Tenn.) 2; *Bartee v. Thompson*, 8 Baxt. (Tenn.) 508; *Rutland v. Gleaves*, 1 Swan (Tenn.) 198; *Wisener v. Maupin*, 2 Baxt. (Tenn.) 342.

*Under Georgia Code*, § 2418, which declares that usually when a testator can read and write, his signa-

g. *Complexity of Will.*—The simplicity or complexity of the terms of the will is another fact to be considered.<sup>78</sup>

h. *Reasonableness of Provisions.*—The reasonableness of the provisions made by the will has also been considered upon this issue.<sup>79</sup>

i. *Will Copied From Draft.*—Knowledge is sufficiently shown where it appears that the will was correctly copied from a draft or previous will in the possession of the testator.<sup>80</sup>

j. *Instructions to Scrivener.*—The ordinary presumption that the testator was aware of the contents of his will is greatly strengthened where it appears that the will was prepared at his express request,<sup>81</sup> even under mere general instructions;<sup>82</sup> and in

ture is sufficient evidence of his knowledge of the contents of the will, but that if the scrivener or his immediate relations are large beneficiaries under the will greater proof will be necessary to show a knowledge of the contents by the testator, conclusive proof cannot be required. *Harris v. Harris*, 53 Ga. 678.

78. *Rollwagen v. Rollwagen*, 63 N. Y. 504; *In re Smith's Will*, 61 Hun 101, 15 N. Y. Supp. 425.

79. See *M'Ninch v. Charles*, 2 Rich. L. (S. C.) 229; *In re Hall's Will*, 5 Misc. 461, 24 N. Y. Supp. 864; *In re Smith's Will*, 61 Hun 101, 15 N. Y. Supp. 425; *McCommon v. McCommon*, 151 Ill. 428, 38 N. E. 145; *Downey v. Murphey*, 21 N. C. (1 Dev. & B.) 82.

Where a will is written by the principal beneficiary and at the time the testator was incapable of ascertaining its contents by inspecting it, and it is an unnatural will, mere formal proof of the execution of the paper is not enough to show that the testator correctly understood its contents. *Kelley v. Settegast*, 68 Tex. 13, 2 S. W. 870.

"The face of the will presents the first proof, from the presumption to be derived from the reasonableness or unreasonableness of its dispositions." *M'Ninch v. Charles*, 2 Rich. L. (S. C.) 229. In *Matter of Maxwell*, 8 N. J. Eq. 251.

80. *McConnell v. Keir*, 76 Kan. 527, 92 Pac. 540; *Beyer v. Hermann*, 173 Mo. 295, 73 S. W. 164.

"It has been held, if it is clearly proved the will in controversy was correctly copied from a previous will, the contents of which were fully made known to the testator,

it is sufficient, and effect must be given to it, although it was not read to him, nor in his hearing." *Day v. Day*, 2 Green's Ch. 549; *Lyons v. Van Riper*, 26 N. J. Eq. 337.

81. *In re Shapter's Estate*, 35 Colo. 578, 85 Pac. 688, 6 L. R. A. (N. S.) 575.

Where a will has been read over to the testator, but the testator was in such a condition that he could not have had an intelligent appreciation of the words, he must be taken to have known and approved of the will if the words have been *bona fide* used by the person whom he trusts to draw it up for him. *Beamish v. Beamish*, (1894) 1 Ir. 7.

**Will Not the One Directed To Be Drawn by Testator.**—Where there was some evidence that the testator was insane at the time of making the will and it was shown that the will propounded was not the will drawn up by a person whom the testator had directed to write a will for him, and it was not shown that the testator knew the contents of a paper propounded, probate of the will was properly refused. *Fuller v. Brakefield*, 84 Ga. 459, 10 S. E. 1086.

82. *Sheer v. Sheer*, 159 Ill. 591, 43 N. E. 334; *Day v. Day*, 3 N. J. Eq. 549; *Barker v. Streuli*, 69 N. J. Eq. 771, 61 Atl. 408; *Compher v. Browning*, 219 Ill. 429, 76 N. E. 678; *Beyer v. Hermann*, 173 Mo. 295, 73 S. W. 164.

**Instructions Most Satisfactory Evidence.**—*Barry v. Butlin*, 1 Curt. 637, 6 Eng. Ecc. 417, 2 Moore P. C. 480, 12 Eng. Reprint 1089; *Crispell*

such cases the fact that it is not shown to have been read over to or by him is not important.<sup>83</sup>

k. *Reading by Testator.* — (1.) *Necessity For.* — Even in cases where there is a suspicion that the testator was not aware of the contents of the instrument he signed as his will, it need not necessarily be proved that he read it or that it was read over to him.<sup>84</sup>

(2.) *Effect of.* — But where it is shown that the will was correctly<sup>85</sup> read over to a capable testator and there was no fraud,<sup>86</sup> his knowledge of its contents will be conclusively presumed.<sup>87</sup>

*v. Dubois*, 4 Barb. (N. Y.) 393; *Lake v. Ranney*, 33 Barb. (N. Y.) 49.

83. *Day v. Day*, 3 N. J. Eq. 549; *McConnell v. Keir*, 76 Kan. 527, 92 Pac. 540.

*Testatrix Blind.* — Where the testatrix was blind and the will was drawn in conformity, with instructions given by her, but it did not appear that it was read over to her previous to execution, the court held that it sufficiently appeared that she had a knowledge of its contents. *Edwards v. Fincham*, 4 Moore P. C. 197, 13 Eng. Reprint 227.

84. *Barry v. Butlin*, 1 Curt. 637, 6 Eng. Ecc. 417, 2 Moore P. C. 480, 12 Eng. Reprint 1089; *Crispell v. Dubois*, 4 Barb. (N. Y.) 393; *Raworth v. Marriott*, 1 Myl. & K. (Eng.) 643; *Watterson v. Watterson*, 1 Head (Tenn.) 1. But see *McKnight v. Wright*, 12 Rich. L. (S. C.) 232.

"It is not necessary, in order to establish the will, that the person claiming under it, should prove that it was read over to the testator, in the presence of the attesting, or of other witnesses. It would be an unwise provision in the law, to require this to be done, inasmuch as most men are careful to confine to their own breasts the manner in which they have disposed, or mean to dispose, of their property by will. The domestic peace and harmony of the testator's family might be very unhappily jeopardized, if publicity were necessary to be given on such occasions. The law presumes, in general, that the will was read by or to the testator." *Harrison v. Rowan*, 3 Wash. C. C. 580, 11 Fed. Cas. No. 6,141.

"It is not essential to be proved in any case that the will was actually read over by or to the

testator, if there be other evidence sufficient to satisfy the jury that he was made acquainted with its contents. A blind man may make a will; a valid will may be drawn by a party taking an interest under it; but the *blindness* of the testator, or the *interest* of the party drawing and attending to the execution of the instrument, are circumstances tending to put the jury on their guard in scrutinizing the evidence which is offered to show *knowledge* of its contents." *Davis v. Rogers*, 1 Houst. (Del.) 44. And see *Kahl v. Schober*, 35 N. J. Eq. 461; *Watterson v. Watterson*, 1 Head (Tenn.) 1.

*Blind Testator.* — "Fraud or imposition is never presumed, and affirmative proof that a will was read to a testator, who was blind, is unnecessary until evidence to overcome the presumption has been offered by the contestant." *Hand's Estate*, 4 Pa. Co. Ct. 446.

85. *Correct Reading Presumed.* *In re Murphy's Will* 15 Misc. 208, 37 N. Y. Supp. 223.

86. *Guardhouse v. Blackburn*, L. R. 1 P. D. (Eng.) 109.

87. *Taylor v. Cresswell*, 45 Md. 422.

Where a will is correctly read to a testatrix of sound mind, "the law imputes knowledge and the door of inquiry is closed." *Griffith v. Diefenderffer*, 50 Md. 466.

"If it be proved or admitted that a testator is of sound mind, memory, and understanding, that a will has been read over to him, or that he had read it to himself, and that he had put his signature to it, the question whether he knew and approved of the contents of such will must be answered in the affirmative, and such knowledge and approval will be held to extend to every part



1. *Other Matters.* — From the preceding sections it will be seen that direct evidence of the knowledge of the testator of the contents of his will is not necessary.<sup>88</sup> Other matters tending to prove this fact are referred to in this note.<sup>89</sup>

B. DECLARATIONS. — Declarations of the testator made before,<sup>90</sup>

of the will." *Atter v. Atkinson*, L. R. 1 P. D. (Eng.) 665.

**Reading Most Satisfactory Evidence.** — *Barry v. Butlin*, 1 Curt. 637, 6 Eng. Ecc. 417, 2 Moore P. C. 480, 12 Eng. Reprint 1089; *Watterson v. Watterson*, 1 Head (Tenn.) 1.

88. *Raworth v. Marriott*, 1 Myl. & K. 643; *Daniel v. Hill*, 52 Ala. 430; *Lyons v. Van Riper*, 26 N. J. Eq. 337.

"It is true that the will was not read by or to Mrs. Allan when she signed it; but it does not, therefore, follow that she had not read it and was not fully aware of its contents and provisions. The jury must be satisfied that the testatrix knew the contents of the will at the time of signing and executing it, and they were, in this case, so explicitly instructed by the court; but the authorities are full and conclusive that they may be *so satisfied*, and that such knowledge may be proved by *circumstantial* evidence, and that *direct evidence* is not indispensably necessary." *Montague v. Allan's Exr.*, 78 Va. 592.

**Degree of Proof Required Varies.** *Harris v. Vanderveer's Exr.*, 21 N. J. Eq. 561.

"The proof most usually given, because the most accessible, is of instructions for the preparation of the will, and of previously declared intentions consistent with the will, together with evidence of the reasonableness of its provisions. But there is no line of evidence prescribed, and any evidence is competent, as well as sufficient, which satisfies a court or jury that the will was in truth executed by the testator with full knowledge of its contents, and voluntarily executed, without restraint, coercion or undue influence of any kind." *Lake v. Ranney*, 33 Barb. (N. Y.) 49.

89. **Particularity of Description.** The fact that before signing a will the testatrix added a few words in her own handwriting, and the

further fact that the various items devised were described with great particularity tends to show that the testatrix had complete knowledge of the contents of the instrument. *Snodgrass v. Smith*, 42 Colo. 60, 94 Pac. 312.

**Existence of a Codicil** which in express terms confirms a will tends to prove that the testatrix was acquainted with the contents of the will. *In re Cooper's Will* (N. J. Eq.), 71 Atl. 676.

Where the Attestation Clause was complete it sufficiently appears that the testatrix had knowledge of its contents. *Barker v. Streuli*, 69 N. J. Eq. 771, 61 Atl. 408.

**Uneasiness of Testator.** — Where witnesses testified that they did not hear the scrivener read over the will to the testator and it appears that they were in such a position that if he had read it over they would have heard it, and where it further appears that the testator afterwards inquired anxiously whether the scrivener had his will as he wanted it, a finding that the will was not read over to the testator and that he did not have knowledge of its contents is justified. *Keithy v. Stafford*, 126 Ill. 507, 18 N. E. 740.

**Testamentary Plans May Be Shown.** — *McNinch v. Charles*, 2 Rich. L. (S. C.) 229.

90. *Maxwell v. Hill*, 89 Tenn. 584, 15 S. W. 253.

"Evidence of declarations before or after the execution of the instrument, in conformity with its disposals of property, and the recognition of the claims of kindred and dependents, as subjects for testamentary provision, which have been satisfied, afford proof of assent of very direct and effective force." *M'Ninch v. Charles*, 2 Rich. L. (S. C.) 229.

Parol declarations of the testator as to his testamentary intentions are admissible in evidence to

after<sup>91</sup> or at<sup>92</sup> the time when he executed the will are admissible to prove that he was aware of its contents, by showing the conformity of the provisions of the will with his expressed intentions.<sup>93</sup>

Admissions of the testator that the will had been read over to him are competent.<sup>94</sup>

## VI. TESTAMENTARY CAPACITY.

**1. Presumptions and Burden of Proof.** — **A. STATUS.** — **a. Competent Age.** — The proponent of a will must establish the jurisdictional facts, including the age of the testator.<sup>95</sup>

show that he had no knowledge of the contents of an instrument signed as his will. *Davis v. Rogers*, 1 Houst. (Del.) 44.

**91.** *Robinson v. Brewster*, 140 Ill. 649, 30 N. E. 683, 33 Am. St. Rep. 265.

Declarations of the testatrix that she had made a will and had remembered certain persons, and that she thought some people would not be satisfied, tend to show that she had knowledge of its contents. *In re Cooper's Will* (N. J. Eq.), 71 Atl. 676.

Declarations, the sole object of which is to show that the testatrix had made a different disposition of her property from that recited in the will are inadmissible to show that she did not have knowledge of the contents of the will at the time of its execution. *Lippard v. Humphrey*, 28 App. Cas. (D. C.) 355.

**Declarations of a Blind Man**, made after the execution of his will may be given in evidence to show that he knew the contents of the will when he executed it. *Harleston v. Corbett*, 12 Rich. L. (S. C.) 604.

**92.** Where the testatrix not only executed the will but showed that she understood the act she was engaged in by stating to those present that the instrument before her was her last and only will and also indicated that she was in good mental condition by asking one of the subscribing witnesses as to the health of his family and expressing regret that she was keeping the other from his work by requiring him to act as a witness to her will,

the presumption that she knew the contents of the will is greatly strengthened. *Waters v. Waters*, 222 Ill. 26, 78 N. E. 1.

**93.** See *Downey v. Murphey*, 18 N. C. (1 Dev. & B.) 82.

In *In re Voorhis' Will*, 54 Hun 637, 7 N. Y. Supp. 596, affirmed, 125 N. Y. 765, 26 N. E. 935, declarations of the testatrix as to how she had left her property were admitted to show that she had knowledge of the contents of her will by proving the conformity of the provisions in her will with such declarations.

"The man who wrote the will and witnessed it and one of the other subscribing witnesses said they understood the testator to say in effect that he wanted the property to go to his wife for life and to his children equally after his death. That wish is at such variance with the terms of the alleged will that it is a strong circumstance going to show that the man did not comprehend the effect of the instrument he was signing." *Cowan v. Shaver*, 197 Mo. 203, 95 S. W. 200.

**Reason for Admission.** — *Shailer v. Bumstead*, 99 Mass. 112.

**94.** *McCommon v. McCommon*, 151 Ill. 428, 38 N. E. 145.

**95.** *Barnewall v. Murrell*, 108 Ala. 366, 389, 18 So. 831; *Steele v. Helm*, 2 Marv. (Del.) 237, 43 Atl. 153; *Crowningshield v. Crowningshield*, 2 Gray (Mass.) 524; *Southworth v. Southworth*, 173 Mo. 59, 73 S. W. 129.

**There Is a Dictum** to the effect that the age of the testator need not be shown until the question is

b. *Great Age*.—No presumption arises against testamentary capacity because of the unusual age of the testator.<sup>96</sup>

B. PHYSICAL CONDITION.—a. *Deaf and Dumb Persons*.—A person deaf and dumb from birth was formerly presumed to be incapable of making a will; the presumption was not conclusive.<sup>97</sup> The tendency of the later cases is against any such presumption whether the testator was so born or became deaf and dumb thereafter,<sup>98</sup> if he was able to express himself by intelligible signs.<sup>99</sup>

b. *Blind Persons*.—No presumption exists against the testamentary capacity of blind persons.<sup>1</sup>

C. MENTAL CONDITION.—a. *Capacity Presumed*.—In many cases the general rule that a person whose mental health has not been permanently affected is presumed to be sane,<sup>2</sup> applies in favor of adult testators. The presumption usually arises upon formal proof of the execution of the will, though that is not always required. In some states the presumption is not admitted; in others, its effect varies. The weight of authority recognizes the presumption and gives it more or less effect.<sup>3</sup>

raised by the contestants. *Higgins v. Carlton*, 28 Md. 115, 142.

96. *In re Brower's Will*, 112 App. Div. 370, 98 N. Y. Supp. 438; *Horn v. Pullman*, 72 N. Y. 269; *In re Wheeler's Will*, 5 Misc. 279, 25 N. Y. Supp. 313.

97. *Potts v. House*, 6 Ga. 324, 356; *Perrine's Case*, 41 N. J. Eq. 409, 5 Atl. 579.

98. See *Weir v. Fitzgerald*, 2 Bradf. Sur. (N. Y.) 42, 67; *Goods of Geale*, 3 Sw. & Tr. 430, 33 L. J. Prob. 125, 12 Wkly. Rep. 1027.

99. *Goods of Owston*, 2 Sw. & Tr. 461, 31 L. J. Prob. 177.

1. *England*.—*Edwards v. Fincham*, 4 Moore P. C. 198, 13 Eng. Reprint 277; *Mitchell v. Thomas*, 6 Moore P. C. 137, 13 Eng. Reprint 636.

*Georgia*.—*Clifton v. Murray*, 7 Ga. 564; *Martin v. Mitchell*, 28 Ga. 382.

*Pennsylvania*.—*Wilson v. Mitchell*, 101 Pa. St. 495.

*South Carolina*.—*Reynolds v. Reynolds*, 1 Spears 253; *Ray v. Hill*, 3 Strobb. L. 297.

*Virginia*.—*Neil v. Neil*, 1 Leigh 6.

2. See article "INSANITY," Vol. VII, p. 460.

3. *Canada*.—*Brown v. Bruce*, 19 U. C. Q. B. 35.

*United States*.—*Stevens v. Van-*

*cleve*, 4 Wash. C. C. 262, 23 Fed. Cas. No. 13,412; *Leach v. Burr*, 188 U. S. 510 (ruling on the law of District of Columbia); *Dunlop v. Peter*, 1 Cranch C. C. 403, 8 Fed. Cas. No. 4,168.

*Alabama*.—*Stubbs v. Houston*, 33 Ala. 555 (it seems that it was held otherwise in *Dunlap v. Robinson*, 28 Ala. 100); *Saxon v. Whittaker*, 30 Ala. 237; *Eastis v. Montgomery*, 95 Ala. 486, 11 So. 294; *O'Donnell v. Rodiger*, 76 Ala. 222; *McBride v. Sullivan*, 45 So. 902.

*Arkansas*.—*Bims v. Collier*, 69 Ark. 245, 62 S. W. 593; *Taylor v. McClintock*, 112 S. W. 405.

*California*.—*Panaud v. Jones*, 1 Cal. 488; *Estate of Dole*, 147 Cal. 188, 81 Pac. 534; *In re Johnson's Estate*, 152 Cal. 778, 93 Pac. 1015.

*Delaware*.—*Duffield v. Morris*, 2 Har. 375; *Steele v. Helm*, 2 Marv. 237; *Smith v. Day*, 2 Penne. 245, 45 Atl. 396; *Jamison v. Jamison's Will*, 3 Houst. 108.

*Illinois*.—*Baker v. Baker*, 202 Ill. 595, 67 N. E. 410, and Illinois cases cited *infra*, note 4; *Todd v. Todd*, 221 Ill. 410, 77 N. E. 680.

*Indiana*.—*Teegarden v. Lewis*, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9; *Herbert v. Berrier*, 81 Ind. 1 (in the absence of a contest).

*Iowa*.—*In re Coffman's Will*, 12 Iowa 491; *Stephenson v. Stephen-*

b. *Proof on Which Presumption Rests.*—The presumption of sanity becomes operative by production of the will and of formal proof of its execution. The onus upon the proponent is thereby

son, 62 Iowa 163, 17 N. W. 456; *In re Hull's Will*, 117 Iowa 738, 89 N. W. 979; *Kirsher v. Kirsher*, 120 Iowa 337, 94 N. W. 846; *In re Goldthorp's Estate*, 115 Iowa 430, 88 N. W. 944; *In re Dunahugh's Will*, 130 Iowa 692, 107 N. W. 925.

*Kentucky.*—*Singleton v. Singleton*, 8 Dana 315; *Milton v. Hunter*, 13 Bush 163 (*compare* *Rodgers v. Thomas*, 1 B. Mon. 390); *Fee v. Taylor*, 83 Ky. 259; *Woodford v. Buckner*, 23 Ky. L. Rep. 627, 63 S. W. 617; *Hawkins v. Grimes*, 13 B. Mon. 257 (sanity at the time will was executed is presumed to have continued when it was altered).

*Louisiana.*—*Kingsbury v. Whitaker*, 32 La. Ann. 1055, 1069; *Succession of Bey*, 46 La. Ann. 773, 787, 15 So. 297.

*Maryland.*—*Brown v. Ward*, 53 Md. 376; *Higgins v. Carlton*, 28 Md. 115; *Taylor v. Creswell*, 45 Md. 422; *Gesell v. Baugher*, 100 Md. 677, 60 Atl. 481; *Home of the Aged v. Bantz*, 69 Atl. 376.

*Massachusetts.*—*Brooks v. Barrett*, 7 Pick. 94, *disapproved* in *Crowningshield v. Crowningshield*, 2 Gray 524.

*Mississippi.*—*Mullins v. Cottrell*, 41 Miss. 291, 316; *Payne v. Banks*, 32 Miss. 292.

*Missouri.*—*Jackson v. Hardin*, 83 Mo. 175.

*New Hampshire.*—*Pettes v. Bingham*, 10 N. H. 514; *Perkins v. Perkins*, 39 N. H. 163.

*New Jersey.*—*Trumbull v. Gibbons*, 22 N. J. L. 117; *Sloan v. Maxwell*, 3 N. J. Eq. 563; *Whitenack v. Stryker*, 2 N. J. Eq. 8; *Goble v. Grant*, 3 N. J. Eq. 629; *Elkinton v. Brick*, 44 N. J. Eq. 154, 15 Atl. 391; *Koegel v. Egner*, 54 N. J. Eq. 623, 35 Atl. 394; *Lee's Will*, 46 N. J. Eq. 193, 18 Atl. 525; *Smith v. Smith*, 48 N. J. Eq. 566, 25 Atl. 11; *Boylan v. Meeker*, 28 N. J. L. 274.

*New York.*—*Delafield v. Parish*, 25 N. Y. 9; *Potter v. McAlpine*, 3 Dem. Sur. 108; *In re Flansburgh's Will*, 82 Hun 49, 31 N. Y. Supp. 177.

*North Carolina.*—*Mayo v. Jones*, 78 N. C. 402; *In re Burn's Will*, 121 N. C. 336, 28 S. E. 519.

*Pennsylvania.*—*McMasters v. Blair*, 29 Pa. St. 298; *Werstler v. Custer*, 46 Pa. St. 502; *Grabill v. Barr*, 5 Pa. St. 441; *Landis v. Landis*, 1 Grant Cas. 248; *Reichenbach v. Ruddach*, 127 Pa. St. 564, 18 Atl. 432; *Palmer's Estate*, 219 Pa. St. 303, 68 Atl. 710; *Grubbs v. McDonald*, 91 Pa. St. 236; *Messner v. Elliott*, 184 Pa. St. 41, 39 Atl. 46.

*Philippine Islands.*—*Hernaes v. Hernaes*, 1 Philip. Isl. 689.

*South Carolina.*—*Kinloch v. Palmer*, 1 Mills Const. 216; *Lee v. Lee*, 4 McCord L. 183, 17 Am. Dec. 722.

*Tennessee.*—*Frear v. Williams*, 7 Baxt. 550; *Key v. Holloway*, 7 Baxt. 575; *Bartee v. Thompson*, 8 Baxt. 508; *Smith v. Smith*, 4 Baxt. 293.

*Utah.*—*In re Van Alstine's Estate*, 26 Utah 193, 72 Pac. 942.

*Vermont.*—*Dean v. Dean*, 27 Vt. 746.

*Virginia.*—*Burton v. Scott*, 3 Rand. 399.

*Wisconsin.*—*In re Cole's Will*, 49 Wis. 179.

**No Reason for Limiting the Rule as to Presumption.**—“If the presumption of law is in favor of sanity we can discover no satisfactory reason why it should not be applied to wills as well as to any other instrument of writing. The argument drawn from the fact that the statute requires the testator to be ‘of sound and disposing mind,’ if a good one, would apply with equal force to the other requirements of the statute. The testator, in terms as affirmative as those in reference to capacity, is required to be of a certain age fixed by the statute. Yet no court has ever required a party propounding a will to prove the age of a testator until the question was raised upon proof by the contestants. Why the one should be permitted to rest undisturbed upon the doctrine of pre-

met and the burden of proof shifted to the contestant.<sup>4</sup> An admission of these facts makes proof of them improper.<sup>5</sup> No presumption of incompetency arises because a subscribing witness was unacquainted with testator's mental capacity.<sup>6</sup>

**c. Effect of the Will.**—The application of the presumption has, in some cases, been further conditioned upon the due execution of the paper, the rationality of its provisions, and consistency in its details, language and structure,<sup>7</sup> unless any grossly unnatural or

sumption and not the other, to say the least, does not seem to be in accord with sound reason." Higgins v. Carlton, 28 Ind. 115, 142.

**4. Alabama.**—Barnewall v. Murrell, 108 Ala. 366, 389, 18 So. 831.

**Arkansas.**—McDaniel v. Crosby, 19 Ark. 533; McCulloch v. Campbell, 49 Ark. 367.

**Connecticut.**—Barber's Appeal, 63 Conn. 393, 27 Atl. 973.

**Delaware.**—Lodge v. Lodge's Will 2 Houst. 418.

**Georgia.**—Slaughter v. Heath, 127 Ga. 747, 57 S. E. 69; Credille v. Credille, 123 Ga. 673, 51 S. E. 628; Potts v. House, 6 Ga. 324; Stancil v. Kenan, 35 Ga. 102; Thompson v. Davitte, 59 Ga. 472; Welter v. Habersham, 60 Ga. 193.

**Illinois.**—Baker v. Baker, 202 Ill. 595, 67 N. E. 410; Craig v. Southard, 162 Ill. 209, 44 N. E. 393; Waters v. Waters, 222 Ill. 26, 78 N. E. 1; Harp v. Parr, 168 Ill. 459, 48 N. E. 113; Johnson v. Johnson, 187 Ill. 86, 58 N. E. 237; Egbers v. Egbers, 177 Ill. 82, 52 N. E. 285; Hollenbeck v. Cook, 180 Ill. 65, 54 N. E. 154; Entwistle v. Meikle, 180 Ill. 9, 54 N. E. 217; Todd v. Todd, 221 Ill. 410, 77 N. E. 680 (the statute expressly requires that the subscribing witnesses shall testify affirmatively to the capacity of the testator); Wilbur v. Wilbur, 29 Ill. 392, 21 N. E. 1076; Pendlay v. Eaton, 130 Ill. 69, 22 N. E. 853; Carpenter v. Calvert, 83 Ill. 63.

**Iowa.**—In re Goldthorp's Estate, 115 Iowa 430, 88 N. W. 944.

**Kentucky.**—Woodford v. Buckner, 23 Ky. L. Rep. 627, 63 S. W. 617; Howatt v. Howatt, 19 Ky. L. Rep. 756, 41 S. W. 771; Boone v. Ritchie, 21 Ky. L. Rep. 864, 53 S. W. 518.

**Maryland.**—Higgins v. Carlton, 28 Md. 115, 144; Brown v. Ward, 53 Md. 376.

**Missouri.**—Benoist v. Murrin, 58 Mo. 307; Norton v. Paxton, 110 Mo. 456, 19 S. W. 807; Southworth v. Southworth, 173 Mo. 59, 73 S. W. 129; Holton v. Cochran, 208 Mo. 314, 410, 106 S. W. 1035; McFadin v. Catron, 138 Mo. 197, 38 S. W. 932, 39 S. W. 771. See Bradford v. Blossom, 207 Mo. 177, 228, 105 S. W. 289.

**New Jersey.**—Sloan v. Maxwell, 3 N. J. Eq. 563; Den v. Johnson, 5 N. J. L. 454; McCoon v. Allen, 45 N. J. Eq. 708, 17 Atl. 820.

**North Carolina.**—Mayo v. Jones, 78 N. C. 402.

**Pennsylvania.**—Landis v. Landis, 1 Grant Cas. 248; Grubbs v. McDonald, 91 Pa. St. 236; Werstler v. Custer, 46 Pa. St. 502.

**Tennessee.**—Frear v. Williams, 7 Baxt. 550; Key v. Holloway, 7 Baxt. 575; Ford v. Ford, 7 Humph. 92; Puryear v. Reese, 6 Coldw. 21.

**Virginia.**—Wallen v. Wallen, 107 Va. 131, 57 S. E. 596; Hopkins v. Wampler, 108 Va. 705, 62 S. E. 926.

**Wisconsin.**—Will of Silverthorn, 68 Wis. 372, 32 N. W. 287 (dictum); In re Cole's Will, 49 Wis. 179, 5 N. W. 346; Allen v. Griffin, 69 Wis. 529, 35 N. W. 21.

**Nature of Burden.**—The burden on the proponent has been said to be more in the nature of ballast than of cargo. It is just enough burden to sail with—no more. Thompson v. Davitte, 59 Ga. 472; Credille v. Credille, 123 Ga. 673, 51 S. E. 628.

**5. Townshend v. Townshend, 7 Gill (Md.) 10.**

**6. Huff v. Huff, 41 Ga. 696.**

**7. McCulloch v. Campbell, 49 Ark. 367, 5 S. W. 590; Fee v. Taylor, 83 Ky. 259; Milton v. Hunter, 13 Bush (Ky.) 163; Woodford v. Buckner, 23 Ky. L. Rep. 627, 63 S. W. 617; Henning v. Stevenson, 118 Ky. 318, 80 S. W. 1135; Boone v. Ritchie, 21 Ky. L. Rep. 864, 53 S. W. 518.**

inequitable provisions are explained by it.<sup>8</sup> There are, however, authorities to the effect that no conclusion of law affecting the burden of proof arises from the disposition made of the estate.<sup>9</sup>

d. *Incomplete Will*. — The presumption is against an unfinished will which is set up in lieu of one duly executed.<sup>10</sup>

e. *Holographic Will*. — It is presumed, *prima facie*, that a will wholly written by the testator was prepared at a time when he was mentally capable of disposing of his estate.<sup>11</sup>

f. *Will in Favor of Scrivener*. — If a will is in favor of the person who prepared it he must show, beyond a reasonable doubt, that the testator was competent.<sup>12</sup> The rule stated in the note has no application where the beneficiary would have been entitled to a large share of the estate if there had been no will.<sup>13</sup>

g. *Insane Delusion*. — If the general sanity of the testator is not challenged the burden is upon the contestants who allege an insane delusion upon a single matter,<sup>14</sup> and is said to be heavier than where general infirmity is claimed.<sup>15</sup>

h. *Weight of Presumption*. — The presumption does not always dispense with the production of *prima facie* evidence of sanity in proving a will in the probate court. It is probably the general

**Manner of Revocation.** — The manner in which a will has been mutilated may raise the presumption that the testator had capacity to revoke it. *In re Estate of Jones*, 2 Ohio Dec. 404 (probate court).

"Where the Will Is Unreasonable in Its Provisions and inconsistent with the duties of the testator with reference to his property and family, this of itself will impose upon those claiming under the instrument the necessity of giving some reasonable explanation of the unnatural character of the will, or, at least, of showing that its character is not the offspring of mental defect, obliquity or perversion." *Mullen v. McKeon*, 25 R. I. 305, 55 Atl. 747; *Lancaster v. Allen*, 26 R. I. 170, 58 Atl. 638.

8. *Harrel v. Harrel*, 1 Duv. (Ky.) 203; *Boyd v. Boyd*, 66 Pa. St. 283; *Cuthbertson's Appeal*, 97 Pa. St. 163.

The will may contain such explanations as will remove the burden it would otherwise cast upon the proponent. *Lancaster v. Alden*, 26 R. I. 170, 58 Atl. 638.

9. *Knox v. Knox*, 95 Ala. 495, 11 So. 125, 36 Am. St. Rep. 235; *Henry v. Hall*, 106 Ala. 84, 17 So. 187; *Garrison v. Executors*, 15 N. J. Eq. 266,

283; *Deas v. Wandell*, 3 Thomp. & C. (N. Y.) 128.

10. *Blewitt v. Blewitt*, 4 Hagg. Ecc. (Eng.) 410.

11. *Temple v. Temple*, 1 Hen. & M. (Va.) 476; *Wallen v. Wallen*, 107 Va. 131, 57 S. E. 596.

12. *McDaniel v. Crosby*, 19 Ark. 533; *Breed v. Pratt*, 18 Pick (Mass.) 115.

**Rule Stated.** — "Where the testator is shown to be of weak mind, without regard to the cause or causes from which that weakness has arisen, though it be not sufficient in itself to destroy testamentary capacity, and the person by whom, or under whose advice, the will has been written, being a stranger to the testator's blood, receives a legacy or bequest, large as compared to the testator's estate, the burden of proof shifts from the contestants to the proponent of the will." *Caldwell v. Anderson*, 104 Pa. St. 199.

13. *Caldwell v. Anderson*, 104 Pa. St. 199.

14. *Fothergill v. Fothergill*, 129 Iowa 93, 105 N. W. 377; *Jones v. Collins*, 94 Md. 403, 51 Atl. 398.

15. *Barber's Appeal*, 63 Conn. 393, 27 Atl. 973; *Mullins v. Cottrell*, 41 Miss. 291; *In re White's Will*, 52 Hun 613, 5 N. Y. Supp. 295, 121 N.

custom to interrogate the subscribing witnesses on that question.<sup>16</sup> But this is unnecessary in the absence of anything to overcome the presumption of sanity,<sup>17</sup> which is of sufficient effect, in connection with formal proof of the will, to cast the burden on the contestant.<sup>18</sup> It must be overcome, not by doubtful, but by positive, evidence.<sup>19</sup> It can only be overcome by a preponderance of the evidence.<sup>20</sup>

Y. 406, 26 N. E. 909 (no particular expression made concerning burden of proof by the court of appeals).

16. *Kentucky*.—Hawkins v. Grimes, 13 B. Mon. 257; Milton v. Hunter, 13 Bush 163.

*Missouri*.—Southworth v. Southworth, 173 Mo. 59, 73 S. W. 129; Benoist v. Murrin, 58 Mo. 307; Norton v. Paxton, 110 Mo. 456, 19 S. W. 807.

*New Hampshire*.—Patten v. Ciley, 67 N. H. 520, 42 Atl. 47; Boardman v. Woodman, 47 N. H. 120, 132; Hardy v. Merrill, 56 N. H. 227; Perkins v. Perkins, 39 N. H. 163; Whitman v. Morey, 63 N. H. 448, 2 Atl. 899.

**Method of Procedure.**—"The propounders may, if they see proper, rest their case on the statutory proof of due execution, and if the will be rational and the contestants introduce no proof tending to rebut the presumption of sanity on the part of the testator, the issue raised on this question by the law will usually be decided in their favor. It is usual and proper to interrogate the subscribing witnesses on this subject, and while this may be done without subjecting the propounders to the necessity of introducing all their proof in advance of an attack by the contestants, it is not absolutely essential in all cases; and when there is no proof on the question of sanity, or where the evidence leaves that question in doubt, the jury may resolve that doubt by acting on the legal presumption." Milton v. Hunter, 13 Bush (Ky.) 163.

17. *Alabama*.—O'Donnell v. Rodiger, 76 Ala. 222.

*Iowa*.—*In re Hull's Will*, 117 Iowa 738, 89 N. W. 979; *In re Dunaugh's Will*, 130 Iowa 692, 107 N. W. 925.

*Mississippi*.—Pryne v. Banks, 32 Miss. 292.

*New Hampshire*.—Perkins v. Perkins, 39 N. H. 163.

*Pennsylvania*.—Newhard v. Yundt, 132 Pa. St. 324, 19 Atl. 288; Landis v. Landis, 1 Grant Cas. 248.

*Tennessee*.—Bartee v. Thompson, 8 Baxt. 508.

18. *Delaware*.—Cordrey v. Cordrey, 1 Houst. 269.

*Illinois*.—Baker v. Baker, 202 Ill. 595, 67 N. E. 410; Waters v. Waters, 222 Ill. 26, 78 N. E. 1.

*Kentucky*.—Fee v. Taylor, 83 Ky. 259; Howat v. Howat, 19 Ky. L. Rep. 756, 41 S. W. 771.

*Maryland*.—Higgins v. Carlton, 28 Md. 115, 142.

*Missouri*.—Southworth v. Southworth, 173 Mo. 59, 73 S. W. 129; Holton v. Cochran, 208 Mo. 314, 410, 106 S. W. 1035.

*Pennsylvania*.—Werstler v. Custer, 46 Pa. St. 502.

*Tennessee*.—Bartee v. Thompson, 8 Baxt. 508.

*Wisconsin*.—*In re Silverthorn's Will*, 68 Wis. 372, 32 N. W. 287.

**Slight Evidence**, in addition to that required to admit the will to probate, will make out a *prima facie* case in the event of a contest. *In re Johnson's Estate*, 152 Cal. 778, 93 Pac. 1015.

19. Grubbs v. McDonald, 91 Pa. St. 236; Palmer's Estate, 219 Pa. St. 303, 68 Atl. 710.

20. Estate of Nelson, 132 Cal. 182, 64 Pac. 294.

**Presumption Without Special Force.**—"We do not think that the presumption of sanity in a case in which a will is contested has any greater force than any other rebuttable or disputable presumption of law has in any ordinary civil case. When such presumptions are overcome by evidence the conflicting evidence on the question of fact is to be weighed and a verdict rendered in favor of the party whose proofs have most weight; and the presumption is of value only as it has probative force, except it be that on the entire case the evidence is equally

i. *Continuance of Presumption*. — The presumption of testator's sanity continues during the whole case, and may resolve the doubt arising from the testimony.<sup>21</sup>

j. *Conditional Presumption*. — A qualified presumption in favor of testator's sanity has been recognized, as where the will was executed long prior to death and while in good health. But this rule cannot be applied in aid of a pleading where the facts are not alleged; though the presumption may exist it is not strong enough to dispense with an allegation that testator was of sound mind.<sup>22</sup>

k. *Habitual Inebriety*. — The accustomed inebriety of a testator does not repel the presumption that he executed the will when he was competent.<sup>23</sup> If a general derangement has resulted from the use of intoxicants the burden of showing a disposing state of mind may be upon the proponent though testator was not continually deranged.<sup>24</sup>

l. *Mental State Affected by Physical*. — The burden is not shifted to the proponent in states where it usually rests on the contestant by proof that testator had occasional fits or aberrations of mind in consequence of physical suffering. There is no pre-

balanced, in which event the arbitrary power of the presumption of law will settle the issue in favor of the proponent." *Bims v. Collier*, 69 Ark. 245, 62 S. W. 593.

*Nature of Presumption*. — "The presumption of sanity is not in itself evidence, but it may serve the purpose and supply the place of evidence in setting up something which must be overcome by proof to the contrary." Hence the presumption of sanity must be considered in connection with the evidence. *Sturdevant's Appeal*, 71 Conn. 392, 42 Atl. 70. See *Encyc. of Ev.* Vol. IX, p. 888.

21. *Egbers v. Egbers*, 177 Ill. 82, 52 N. E. 285; *Hawkins v. Grimes*, 13 B. Mon. (Ky.) 257; *Milton v. Hunter*, 13 Bush (Ky.) 163; *Hopkins v. Wampler*, 108 Va. 705, 62 S. E. 926.

22. *Beaubien v. Cicotte*, 8 Mich. 9.

23. *Delaware*. — *Duffield v. Roberson*, 2 Har. 375.

*Kentucky*. — *Harper's Will*, 4 Bibb 244.

*New Jersey*. — *Lee's Will*, 46 N. J. Eq. 193, 18 Atl. 525; *Koegel v. Egner*, 54 N. J. Eq. 623, 35 Atl. 394; *Elkinson v. Brick*, 44 N. J. Eq. 154, 15 Atl. 391, 1 L. R. A. 161.

*New York*. — *Lewis v. Jones*, 50 Barb. 645, 669; *In re Sutherland's*

*Will*, 28 Misc. 424, 59 N. Y. Supp. 989; *Gardner v. Gardner*, 22 Wend. 526, 34 Am. Dec. 340.

*Pennsylvania*. — *Starrett v. Douglass*, 2 Yeates 46.

*South Carolina*. — *Black v. Ellis*, 3 Hill L. 68.

*No Presumption*. — If it is not shown that fixed mental disease resulted to the testator from his habitual and excessive use of intoxicants, no presumption to that effect arises either from the proof of his habits or from such proof coupled with proof that he attempted to commit suicide and eventually did so. "It is established, by abundant authority, that inebriety, though long continued and resulting occasionally in temporary insanity, does not require proof of lucid intervals to give validity to the acts of the drunkard, as is required where general insanity is proved; consequently where habitual intoxication is shown there will be no presumption that incapacitating drunkenness existed at the time of making the will. Such a condition at that time must affirmatively appear or the presumption of capacity will prevail." *Koegel v. Egner*, 54 N. J. Eq. 623, 35 Atl. 394; *Lee's Will*, 46 N. J. Eq. 193, 18 Atl. 525.

24. *Cochran's Will*, 1 T. B. Mon. (Ky.) 264, 15 Am. Dec. 116.



sumption of the continuance of such a condition, whatever may be its cause.<sup>25</sup> Hence the contestant must show that the will was executed while deceased was afflicted with a temporary derangement of his mind.<sup>26</sup> There is not entire unanimity on this point if the mind has in fact been affected by a disease of the body.<sup>27</sup> Impaired vision does not shift the burden of proof.<sup>28</sup>

m. *Apprehensions as to Result of Operation.*—A nervous condition growing out of apprehensions concerning the result of a surgical operation about to be performed does not overcome the presumption of mental capacity.<sup>29</sup>

n. *Effect of Suicide.*—Neither an affirmative nor negative inference is to be drawn from the mere fact of testator's death by suicide. It is not to be inferred that because a man has acted contrary to reason that he was without reason.<sup>30</sup> Though suicide is the result of insanity the presumption does not follow that the testator was insane a short time prior to the commission of the suicidal act.<sup>31</sup>

o. *Rule Affected by Testator's Condition.*—From the proponent's showing it may appear that the testator's condition was such as to put the burden of proof of sanity on proponent,<sup>32</sup> or the circumstances surrounding him and the beneficiaries under the will may require clear proof of sanity.<sup>33</sup>

p. *Proof of Will in Common Form.*—A distinction is made in some cases where the proof of the will is in common form. In such a proceeding the probate judge acts for all the parties, and the proceeding is *in rem*, and he should require proof of the testator's

25. O'Donnell v. Rodiger, 76 Ala. 222; Brown v. Riggin, 94 Ill. 560; Taylor v. Pegram, 151 Ill. 106, 37 N. E. 837; Trish v. Newell, 62 Ill. 196, 14 Am. Rep. 79; Kirsher v. Kirsher, 120 Iowa 337, 94 N. W. 846.

26. Blake v. Rourke, 74 Iowa 519, 38 N. W. 392; *In re Lyddy's Will*, 53 Hun 629, 5 N. Y. Supp. 636, 4 N. Y. Supp. 468; Clark's Heirs v. Ellis, 9 Or. 128; McMasters v. Blair, 29 Pa. St. 298.

27. *In re Coughlin's Will*, 68 N. J. Eq. 582, 59 Atl. 879.

28. Ross v. Ross (Iowa), 117 N. W. 1105.

29. Linton's Appeal, 104 Pa. St. 228.

30. Duffield v. Morris, 2 Har. (Del.) 375; Brashears v. Orme, 93 Md. 442, 49 Atl. 620; Holton v. Cochran, 208 Mo. 314, 425, 106 S. W. 1035; Koegel v. Egner, 54 N. J. Eq.

623, 35 Atl. 394; Roche v. Nason, 185 N. Y. 128, 77 N. E. 1007, 105 App. Div. 256, 93 N. Y. Supp. 565.

31. Succession of Bey, 46 La. Ann. 773, 15 So. 297.

32. *Illustration.*—Mere Compliance with statutory requirements is not sufficient in the case of an aged, ignorant testator wholly swayed by passion and prejudice and exposed to influence. In such a case the burden is shifted, and proponent must show that the testator's mind accompanied the will. Van Pelt v. Van Pelt, 30 Barb. (N. Y.) 134. Other cases in New York put the burden upon the proponent regardless of special circumstances. See Kingsley v. Blanchard, 60 Barb. (N. Y.) 317; Roche v. Nason, 185 N. Y. 128, 77 N. E. 1007, 105 App. Div. 256, 93 N. Y. Supp. 565.

33. Morrison v. Smith, 3 Bradf. Sur. (N. Y.) 209.

capacity.<sup>34</sup> Proof in such form casts upon the caveators the burden of showing incapacity.<sup>35</sup>

q. *Presumption Does Not Affect Burden of Proof.*—In some states the presumption does not affect the burden of proof. The proponent occupies the position of plaintiff and must sustain his contention.<sup>36</sup>

34. *Mayo v. Jones*, 78 N. C. 402.

35. *In re Burns' Will*, 121 N. C. 336, 28 S. E. 519.

36. *California*.—Estate of Motz, 136 Cal. 558, 69 Pac. 294; Estate of Latour, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441; *In re Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695.

*Georgia*.—Credille v. Credille, 123 Ga. 673, 51 S. E. 628.

*Massachusetts*.—Phelps v. Hartwell, 1 Mass. 71; *Crowninshield v. Crowninshield*, 2 Gray 524. But compare *Brooks v. Barrett*, 7 Pick. 94, distinguished and disapproved in the first case.

*Missouri*.—Norton v. Paxton, 110 Mo. 456, 19 S. W. 807; *Elliott v. Welby*, 13 Mo. App. 19.

*Nebraska*.—Murry v. Hennessey, 48 Neb. 608, 67 N. W. 470.

*New York*.—Delafeld v. Parish, 25 N. Y. 9; *Roche v. Nason*, 185 N. Y. 128, 77 N. E. 1007, 105 App. Div. 256, 93 N. Y. Supp. 565.

*Oregon*.—Chrisman v. Chrisman, 16 Or. 127, 18 Pac. 6. See generally, article "BURDEN OF PROOF," Vol. II, p. 773.

**Reason of the Rule.**—"The party offering the will for probate says, in effect, this instrument was executed with the requisite formalities by one of full age and of sound mind, and he must prove it; and this is to be done, not by showing merely that the instrument was in writing, that it bears the signature of the deceased, and that it was attested in his presence by three witnesses; but also that it was signed by one capable of being a testator, one to whom the law had given the power of making disposition of his property by will. This is the doctrine of the earliest cases upon the subject in our reports. *Phelps v. Hartwell*, 1 Mass. 71. It was there argued by the appellees that the burden of proof was with the appellants, opposing the

will, and that it was incumbent on them to show that the testator was not of sound mind at the time of the making of the will. 'But the whole court held that the rule was the same in this case as in all others. The burden of proof is always with those who take the affirmative in pleading. Here the appellees have the affirmative, and must therefore produce reasonable and satisfactory evidence to the jury that the testator was sane at the time of making the will.' *Blaney v. Sargent*, 1 Mass. 335, is to the same effect. "These cases but recognize and confirm a familiar and well settled rule of pleading, as of logic, that he who affirms the existence of a given state of facts must prove it." *Crowninshield v. Crowninshield*, 2 Gray (Mass.) 524. *Brooks v. Barnett*, 7 Pick. (Mass.) 94, is disapproved in so far as it is out of harmony with this and the earlier cases referred to.

**The English Rule** is based on like reasoning. "If the party upon whom the burden of proof of any fact lies, either upon his own case, where there is no conflicting testimony, or upon the balance of the evidence, fails to satisfy the tribunal of the truth of the proposition which he has to maintain, he must fail in his suit; and in a court of probate, where the *onus probandi* most undoubtedly lies upon the party propounding the will, if the conscience of the judge, upon a careful and accurate consideration of all the evidence on both sides, is not judicially satisfied that the paper in question does contain the last will and testament of the deceased, the court is bound to pronounce its opinion that the instrument is not entitled to probate." *Baker v. Batt*, 2 Moore P. C. 317, 12 Eng. Reprint 1026; *Smee v. Smee*, L. R. 5 Prob. Div. 84; *Sutton v.*

*r. Presumption Denied.*—In many cases the presumption of sanity is held not to be applicable in favor of wills, and the burden of establishing competency is on the proponent.<sup>37</sup> In others, though

Sadler, 3 C. B. N. S. 87, 26 L. J. C. P. 284; Wallis *v.* Hodgeson, 2 Atk. 56 (will of real estate in which infants were interested); Harwood *v.* Baker, 3 Moore P. C. 282, 13 Eng. Reprint 117.

In New York the same view is held. Delafield *v.* Parish, 25 N. Y. 9.

In Virginia it is said: "The *onus probandi* is upon the party who seeks to set up the instrument in question, and this from the fact that the propounder alleges that the paper offered for probate is the true will of a free and capable testator, and hence it devolves upon him to make good his allegation (that is, to prove by competent testimony that the instrument is what it purports to be), for in every such case the conscience of the court is to be satisfied, and nothing short of clear and convincing evidence will suffice." Tucker *v.* Sandidge, 85 Va. 546, 8 S. E. 650; Gray *v.* Rumrill, 101 Va. 507, 44 S. E. 697.

#### **Presumption and Burden of Proof.**

"Nor does the existence of a general presumption that men are sane change the burden of proof. It may stand in the stead of proof; it may make a *prima facie* case; where the question of sanity is made it may make necessary greater weight of evidence in him who seeks to impeach it; but it does not change the burden of proof. But when the evidence is in, on the one side and the other, the issue still continues as before, and he to whose case the proof of such sanity is necessary has the burden." Crowninshield *v.* Crowninshield, 2 Gray (Mass.) 524.

37. *England.*—Harwood *v.* Baker, 3 Moore P. C. 282, 13 English Reprint 117; Boughton *v.* Knight, L. R. 3 P. & D. 64; Smee *v.* Smee, L. R. 5 P. D. 84; Sutton *v.* Sadler, 3 C. B. (N. S.) 87, 26 L. J. C. P. 284; Harris *v.* Ingledew, 3 P. Wms. 91; Barry *v.* Butlin, 1 Curt. Ecc. 637, 2 Moore P. C. 480, 12 Eng. Reprint 1089; Browning *v.* Budd, 6 Moore P. C. 430, 13 Eng. Reprint 749.

*Canada.*—Currie *v.* Currie, 24 Can. Sup. 712; *In re* Harrison's Will, 30 N. Bruns. 164.

*Connecticut.*—Knox's Appeal, 26 Conn. 20; Comstock *v.* Hadlyme Ecc. Soc., 8 Conn. 254, 20 Am. Dec. 100.

*Georgia.*—Wetter *v.* Habersham, 60 Ga. 193; Evans *v.* Arnold, 52 Ga. 169; Credille *v.* Credille, 123 Ga. 673, 51 S. E. 628.

*Indiana.*—Steinkuehler *v.* Wempner, 169 Ind. 154, 81 N. E. 482, 15 L. R. A. (N. S.) 673; McReynolds *v.* Smith, 86 N. E. 1009 (if proponents are met with a challenge before jurisdiction taken).

*Kentucky.*—Johnson *v.* Stivers, 95 Ky. 128, 23 S. W. 957.

*Maine.*—Gerrish *v.* Nason, 22 Me. 438; Barnes *v.* Barnes, 66 Me. 286; Cilley *v.* Cilley, 34 Me. 162; *In re* Chandler's Will, 102 Me. 72, 87, 66 Atl. 215; *In re* Thomson, 92 Me. 563, 43 Atl. 511.

*Massachusetts.*—Phelps *v.* Hartwell, 1 Mass. 71; Crowninshield *v.* Crowninshield, 2 Gray 524 (the testator was under guardianship as an insane person); Fulton *v.* Umbehend, 182 Mass. 487, 65 N. E. 829.

*Michigan.*—Beaubien *v.* Cicotte, 8 Mich. 9; Taff *v.* Hosmer, 14 Mich. 309; Aikin *v.* Weckerly, 19 Mich. 482; McKinnis *v.* Kempsey, 27 Mich. 363; Prentis *v.* Bates, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494, *modifying* a former opinion in the same case, 88 Mich. 567, 50 N. W. 637; *In re* Mansbach's Estate, 150 Mich. 348, 114 N. W. 65; Buxton *v.* Emery, 139 Mich. 341, 102 N. W. 948; Moriarty *v.* Moriarty, 108 Mich. 249, 65 N. W. 964.

*Minnesota.*—Layman's Will, 40 Minn. 371, 42 N. W. 286 (the statute explicitly requires proof of sanity whether there be a contest or not).

*Mississippi.*—Tucker *v.* Whitehead, 59 Miss. 594; Sheehan *v.* Kearney, 21 So. 41, 35 L. R. A. 102 (by virtue of statute).

*Missouri.*—Elliott *v.* Welby, 13 Mo. App. 19; Jones *v.* Roberts, 37 Mo. App. 163; Benoist *v.* Murrin, 58

the presumption be not denied, the effect given it is insufficient to change the burden of proof on the whole case.<sup>38</sup> In New York

Mo. 307, 322; *Norton v. Paxton*, 110 Mo. 456, 19 S. W. 807.

*Nebraska*.—*Murry v. Hennessey*, 48 Neb. 608, 67 N. W. 470; *Seebrock v. Fedawa*, 30 Neb. 424, 46 N. W. 650.

*New York*.—*Kingsley v. Blanchard*, 60 Barb. 317; *Delafield v. Parish*, 25 N. Y. 9; *Ramsdell v. Viele*, 6 Dem. 244.

*Ohio*.—*In re Estate of Ludlow*, 6 Ohio Dec. 106.

*Texas*.—*Prather v. McClelland* (Tex. Civ. App.), 26 S. W. 657; *Renn v. Samos*, 33 Tex. 760; *Beazley v. Denson*, 40 Tex. 416.

*Vermont*.—*Williams v. Robinson*, 42 Vt. 658, 1 Am. Rep. 359; *Denny v. Pinney's Heirs*, 60 Vt. 524, 12 Atl. 108.

*Virginia*.—*Gray v. Rumrill*, 101 Va. 507, 44 S. E. 697; *Riddell v. Johnson*, 26 Gratt. 152.

*Washington*.—*In re Baldwin's Estate*, 13 Wash. 666, 43 Pac. 934.

*West Virginia*.—*McMechen v. McMechen*, 17 W. Va. 683.

*Wisconsin*.—*Will of Silverthorn*, 68 Wis. 372, 32 N. W. 287 (obiter).

**Reasons for the Distinction Between Presumptions as to Deeds and Wills.**—"There are strong reasons why the same presumption as to sanity should not attach to wills as to deeds and ordinary contracts. Wills are supposed to be made *in extremis*. In point of fact, a large proportion of them are made when the mind is to some extent enfeebled by sickness or old age. It is for this reason that the execution of the will and the proof of its execution are invested with more solemnity, the statute requiring it to be attested by three or more competent witnesses, making void all beneficial devises, legacies or gifts to such interested witnesses, and requiring the presence of the three in probate court for its proof." *Crowninshield v. Crowninshield*, 2 Gray (Mass.) 524; *Delafield v. Parish*, 25 N. Y. 9.

**"The General Rule of Law** undoubtedly is that one is presumed sane until the contrary is shown, and

this may also be said of the rule that he who holds the affirmative of a proposition must prove his assertion. But when one comes into a court of justice to give the property of a deceased person a different direction from that given by the law, he takes upon himself to prove all the conditions on which his right depends." *Evans v. Arnold*, 52 Ga. 169.

**The General Presumption in Favor of Competency** is weakened by the nature of the instrument and the fact that it may divest persons of rights which, but for it, would accrue to them under statutes. *Evans v. Arnold*, 52 Ga. 169; *Gerrish v. Nason*, 22 Me. 438; *Crowninshield v. Crowninshield*, 2 Gray (Mass.) 524; *Delafield v. Parish*, 25 N. Y. 9.

38. *Massachusetts*.—*Baxter v. Abbott*, 7 Gray 71, *overruling* a dictum to the contrary in *Crowninshield v. Crowninshield*, 2 Gray 524; *Richardson v. Bly*, 181 Mass. 97, 63 N. E. 3; *Brooks v. Barrett*, 7 Pick. 94.

*Michigan*.—*McGinnis v. Kempsey*, 27 Mich. 363.

*Missouri*.—*Elliott v. Melby*, 13 Mo. App. 19; *Jones v. Roberts*, 37 Mo. App. 163; *Benoist v. Murrin*, 58 Mo. 307, 322.

*New York*.—*Delafield v. Parish*, 25 N. Y. 9; *In re Schreiber's Will*, 112 App. Div. 495, 98 N. Y. Supp. 483.

*Oregon*.—*Chrisman v. Chrisman*, 16 Or. 127, 18 Pac. 6.

**Weight To Be Given.**—"Considering the existence of the presumption as a principle to operate subject to circumstances, it is very clear that it cannot have the force of an independent fact to serve as a substantial make-weight against counter-proof. Because if it could the rule of law which casts upon proponents the necessity of showing the testator's soundness of mind by other evidence might be subverted. The force and efficacy of the presumption will vary with cases, yet it can never have much influence

the cases are not agreed as to the weight to be given the presumption.<sup>39</sup> The denial of the presumption is sometimes put on the ground that the statute requires proof in the court of original jurisdiction, though there be no contest,<sup>40</sup> or because of the conditions on which a will may be made.<sup>41</sup> In Montana the contestant must file his grounds and sustain them; hence he occupies the position of plaintiff.<sup>42</sup> The statute must be given effect notwithstanding the presumption of capacity; hence in the first instance the proponent must show testator's capacity.<sup>43</sup> There is not, however, entire agreement on this point, possibly because of varying statutes.<sup>44</sup>

when the issue upon the testator's sanity is contested in the usual way, by an appeal to those facts which bear upon it. And whatever force may be due to it in given instances will be owing, not to its intrinsic weight as a distinct item of proof, but to its operation in some degree, more or less, in rendering the circumstances adduced to prove sanity more persuasive." *McGinnis v. Kempsey*, 27 Mich. 363, 374.

39. *In re Preston's Will*, 113 App. Div. 732, 99 N. Y. Supp. 312. But it has been held under the code, which provides that "if it appears to the surrogate that the will was duly executed and that the testator at the time of executing it was, in all respects, competent to make a will," it must be admitted, that the presumption arising from the presentation of a will in due form is not sufficient to sustain a finding of testator's competency. The provision of the code is equivalent to a positive requirement that the fact of competency must be established, in the first instance, by the proponents of a will. This is usually done by the subscribing witnesses (*Miller v. White*, 5 Redf. Sur. 320), inasmuch as the proponent has the affirmative of the issue (*Will of Cottrell*, 95 N. Y. 329; *Matter of Freeman*, 46 Hun 458); and unless it be done probate should be refused (*Goodwin's Will*, 95 App. Div. 183, 88 N. Y. Supp. 734). Indeed, if there could have been any doubt upon the subject it was removed by *Matter of Ramsdell*, 16 N. Y. St. 281, where probate was denied upon this express ground, and the decree of the sur-

rogate was affirmed by the late General Term (3 Supp. 499) which in turn was affirmed by the court of appeals in 117 N. Y. 636, 22 N. E. 1130. And to the same effect is *Goodwin's Will*, *supra*, and *Kingsley v. Blanchard*, 66 Barb. (N. Y.) 317.

40. *Layman's Will*, 40 Minn. 371, 42 N. W. 286; *Seebrook v. Fedawa*, 30 Neb. 424, 46 N. W. 650; *Ramsdell v. Viele*, 6 Dem. (N. Y.) 244; *Beazley v. Denson*, 40 Tex. 416; *Williams v. Robinson*, 42 Vt. 658, 1 Am. Rep. 359.

**Statute Inconsistent With Presumption.**—The requirement that testators shall be of sound mind changes the rule in favor of the presumption of sanity. *Prather v. McClelland* (Tex. Civ. App.), 26 S. W. 657; *McMechen v. McMechen*, 17 W. Va. 683.

41. *Knox's Appeal*, 26 Conn. 20 (all persons of sound minds).

42. *Farleigh v. Kelley*, 28 Mont. 421, 72 Pac. 756.

43. *Harper v. Harper*, 1 Thomp. & C. (N. Y.) 351; *Ramsdell v. Viele*, 6 Dem. (N. Y.) 244.

44. In Indiana it was provided: Before a will shall be probated it shall be proven by one or more of the subscribing witnesses, etc. The court observed: "This contemplates no more than due proof of the formal execution of the will, and clearly means that when such proof is made the will shall be admitted to probate. It certainly does not mean that in advance of any imputation of want of capacity, or of a showing of the presence of duress or undue influence, the proponent shall give evidence of sanity and

(1.) **Rule Not Affected by Pleadings.** — It is immaterial to the application of the rule that the petition is silent concerning the testator's competency. The general statement that the instrument is the last will of deceased is all that is necessary for petitioner to allege.<sup>45</sup>

(2.) **Waiver of Proof.** — If there are minor heirs the duty upon proponent of establishing the validity of the will cannot be waived.<sup>46</sup>

s. **Rule on Appeal.** — On an appeal from the order of the court of first instance the proponent has the laboring oar,<sup>47</sup> though he has the advantage of the *prima facie* case made by the probate proceeding.<sup>48</sup> It is otherwise where the appeal places the case on the docket to be tried as an original proceeding.<sup>49</sup> In some cases the burden is upon the contestant by virtue of the rule that he occupies the position of plaintiff.<sup>50</sup> In others the contestant has the burden because of the presumption of sanity.<sup>51</sup>

t. **In Actions To Set Will Aside.** — The party seeking to set aside a will on the ground of the testator's incapacity has the burden of proof.<sup>52</sup>

liberty of action." *Herbert v. Berrier*, 81 Ind. 1. This seems contrary to *Steinkuehler v. Wemper*, 169 Ind. 154, 81 N. E. 482, 15 L. R. A. (N. S.) 673, where it is held that the proponent must show capacity because he seeks to bring himself within the exception to the statute. It is immaterial that there are no formal pleadings.

In *Tennessee* it is not necessary, in the examination of the witnesses as to the due execution and attestation of the will that they should be examined as to the sanity of the testator. The party contesting the validity of the will may examine them on this point. The general burden of the issue of *devisavit vel non* is upon the party claiming under the will; but upon any allegation of want of capacity in a testator, it is upon the contestant. The proponent has the right to open and close. *Puryear v. Reese*, 6 Coldw. (Tenn.) 21.

45. *Seebrook v. Fedawa*, 30 Neb. 424, 46 N. W. 650.

46. *Seebrook v. Fedawa*, 30 Neb. 424, 46 N. W. 650; *Williams v. Robinson*, 42 Vt. 658, 1 Am. Rep. 359.

47. *Comstock v. Hadlyne*, 8 Conn. 254 (the right to go forward is subject to the discretion of the court); *Brooks v. Barrett*, 7 Pick. (Mass.)

94; *Carl v. Gabel*, 120 Mo. 283, 25 S. W. 214; *Murry v. Hennessey*, 48 Neb. 608, 67 N. W. 470; *Seebrook v. Fedawa*, 30 Neb. 424, 46 N. W. 650.

48. *Rathjens v. Merrill*, 38 Wash. 442, 80 Pac. 754.

49. *Milton v. Hunter*, 13 Bush (Ky.) 163.

50. *Estate of Latour*, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441; *Estate of Dole*, 147 Cal. 188, 81 Pac. 534; *Patten v. Cilley*, 67 N. H. 520, 42 Atl. 47; *Prather v. McClelland* (Tex. Civ. App.), 26 S. W. 657; *Beazley v. Denson*, 40 Tex. 416; *Renn v. Samos*, 33 Tex. 760.

51. *Copeland v. Copeland*, 32 Ala. 512; *Barlow v. Waters*, 16 Ky. L. Rep. 426, 28 S. W. 785; *Brown v. Ward*, 53 Md. 376. See *Williams v. Robinson*, 42 Vt. 658, 1 Am. St. Rep. 359.

52. *Arkansas*. — *McDaniel v. Crosby*, 19 Ark. 533; *Jenkins v. Tobin*, 31 Ark. 306.

*Indiana*. — *Young v. Miller*, 145 Ind. 652, 44 N. E. 757; *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948; *Blough v. Parry*, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560; *Turner v. Cook*, 36 Ind. 129.

*Kansas*. — *Rich v. Bowker*, 25 Kan. 6.

*New York*. — *McGown v. Underhill*, 115 App. Div. 638, 101 N. Y.

u. *In Collateral Proceedings*. — It will be presumed in favor of a will regularly admitted to probate and offered in evidence to sustain title to land that it was executed when testator was sane.<sup>53</sup> In England the competency of the testator must be proved where the title to land is involved.<sup>54</sup>

v. *Where Insanity Shown To Have Existed*. — It is presumed that a person shown to have been insane continued in that condition, unless it was the effect of a temporary or transitory cause. The burden of proof is upon the party who alleges a lucid interval or a full recovery.<sup>55</sup> The rule is the same where the adjudication of lunacy finds that the lunatic had lucid intervals.<sup>56</sup>

Supp. 313 (the record of the probate is made by statute *prima facie* evidence of the validity of the will).

*Oregon*. — *Greenwood v. Cline*, 7 Or. 17.

*Texas*. — *Renn v. Samos*, 33 Tex. 760.

53. *Den v. Gibbons*, 22 N. J. L. 117, 51 Am. Dec. 253; *Boylan v. Meeker*, 28 N. J. L. 274; *Howard v. Moot*, 64 N. Y. 262; *Jackson v. VanDusen*, 5 Johns. (N. Y.) 144; *Jones v. Jones*, 17 N. Y. Supp. 905, 43 N. Y. St. 434; *Thompson v. Kyner*, 65 Pa. St. 368.

54. *Sutton v. Sadler*, 3 C. B. N. S. (Eng.) 87, 26 L. J. C. P. 284.

55. *England*. — *Cartwright v. Cartwright*, 1 Phill. 90; *Smith v. Tebbitt*, L. R. 1 P. & D. 398, 434.

*United States*. — *Keely v. Moore*, 196 U. S. 38, *affirming* 22 App. Cas. (D. C.) 9.

*Alabama*. — *Saxon v. Whitaker*, 30 Ala. 237; *O'Donnell v. Rodiger*, 76 Ala. 222; *McBride v. Sullivan*, 45 So. 902.

*Delaware*. — *Duffield v. Morris*, 2 Har. 375.

*Georgia*. — *Griffin v. Griffin*, R. M. Charl. 217; *Terry v. Buffington*, 11 Ga. 337; *Lucas v. Parsons*, 27 Ga. 593.

*Illinois*. — *James White Memorial Home v. Haeg*, 204 Ill. 422, 68 N. E. 568.

*Indiana*. — *Kenworthy v. Williams*, 5 Ind. 375; *Rush v. Megee*, 36 Ind. 69; *Stevens v. Stevens*, 127 Ind. 560, 26 N. E. 1078; *Harrison v. Bishop*, 131 Ind. 161, 30 N. E. 1069; *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948.

*Iowa*. — *Bever v. Spangler*, 93

*Iowa* 576, 601, 61 N. W. 1072; *In re Jones' Estate*, 130 Iowa 177, 106 N. W. 610.

*Louisiana*. — *Succession of Morere*, 114 La. 506, 38 So. 435.

*Maine*. — *Halley v. Webster*, 21 Me. 461.

*Massachusetts*. — *Breed v. Pratt*, 18 Pick. 115.

*Missouri*. — *King v. Gilson*, 191 Mo. 307, 90 S. W. 367.

*New Jersey*. — *Whitenack v. Stryker*, 2 N. J. Eq. 8; *Elkinton v. Brick*, 44 N. J. Eq. 154, 15 Atl. 391, 1 L. R. A. 161.

*New York*. — *Clark v. Fisher*, 1 Paige 171; *In re Lapham's Will*, 19 Misc. 71, 44 N. Y. Supp. 90; *In re Widmayer*, 74 App. Div. 336, 77 N. Y. Supp. 663, 34 Misc. 439, 69 N. Y. Supp. 1014.

*Pennsylvania*. — *Landis v. Landis*, 1 Grant Cas. 248; *Grabill v. Barr*, 5 Pa. St. 441; *Harden v. Hays*, 9 Pa. St. 151; *Titlow v. Titlow*, 54 Pa. St. 216; *Hoopes' Estate*, 174 Pa. St. 373, 34 Atl. 603.

*Rhode Island*. — *Hamilton v. Hamilton*, 10 R. I. 538.

*Tennessee*. — *Puryear v. Reese*, 6 Coldw. 21; *Smith v. Smith*, 4 Baxt. 293. See article "INSANITY." Vol. VII, p. 462.

56. *Titlow v. Titlow*, 54 Pa. St. 216.

**Circumstances Giving Rise to the Presumption**. — If the testator has been subject to a commission or any legal restraint, even a domestic restraint clearly and plainly imposed upon him in consequence of undisputed insanity, the burden of showing sanity is cast upon those who claim it existed. *White v. Wilson*,

(1.) **Presumption Not Conclusive.** — The presumption of continued insanity may be overthrown.<sup>57</sup>

(2.) **May Be Overcome by the Will.** — In Louisiana if the will is shown to have been made by the testator, without aid, and its provisions are sage and judicious it establishes a presumption, even in the case of a person habitually insane, that it was made during a lucid interval, and imposes upon those asserting the invalidity of the will the burden of proving insanity when it was made.<sup>58</sup> But the rule stated applies only when it is affirmatively shown that the will was made by the testator unaided and uncontrolled.<sup>59</sup>

(3.) **Continuance of Lucid Interval.** — It cannot be presumed that a lucid interval continued for any length of time.<sup>60</sup>

(A.) **LUCID INTERVAL AND BURDEN OF PROOF.** — If incapacity has been shown, proof of the existence of a lucid interval does not effect the burden of proof.<sup>61</sup>

(B.) **NATURE OF INSANITY.** — The burden of proof will not be shifted to the proponent to show that the will was made during a lucid interval, unless the contestant established habitual and fixed insanity.<sup>62</sup> It is not enough to show the apparent permanency of the aberration.<sup>63</sup> The burden of proof may be shifted to the

13 Ves. (Eng.) 87; Attorney-General v. Paruther, 3 Bro. C. C. (Eng.) 441.

57. Snow v. Benton, 28 Ill. 306.

58. Kingsbury v. Whitaker, 32 La. Ann. 1055; Succession of Bey, 46 La. Ann. 773, 788, 15 So. 297; Wood v. Salter, 118 La. 695, 43 So. 281.

59. Succession of Morere, 114 La. 506, 38 So. 435.

60. Saxon v. Whitaker, 30 Ala. 237; Harden v. Hays, 9 Pa. St. 151.

61. **Reason.** — If the establishment of a lucid interval shifted the burden the consequence would be that it might be shifted twenty times in the course of the trial by proof of twenty lucid intervals, all of which may have occurred before the will was made. Saxon v. Whitaker, 30 Ala. 237.

62. *Alabama.* — O'Donnell v. Rodiger, 76 Ala. 222; Johnson v. Armstrong, 97 Ala. 731, 12 So. 72; Murphree v. Senn, 107 Ala. 424, 18 So. 264; Mullen v. Johnson, 47 So. 584; McBride v. Sullivan, 45 So. 902.

*Illinois.* — Snow v. Benton, 28 Ill. 306.

*Iowa.* — Kirsher v. Kirsher, 120 Iowa 337, 94 N. W. 846; Fothergill

v. Fothergill, 129 Iowa 93, 105 N. W. 377; Glass v. Glass, 127 Iowa 646, 103 N. W. 1013; Gates v. Cole, 137 Iowa 613, 115 N. W. 236.

*Maryland.* — Townshend v. Townshend, 7 Gill 10; Taylor v. Creswell, 45 Md. 422.

*Missouri.* — Von de Veld v. Judy, 143 Mo. 348, 364, 44 S. W. 1117.

*Pennsylvania.* — McMasters v. Blair, 29 Pa. St. 298.

"**There Is No Presumption** in favor of the continuance of anything temporary or ephemeral in its nature. The disease of the mind must be of such general and permanent character as human experience shows generally continuous. Where the insanity is produced by an attack of some acute or violent disease, it is not sufficient for the contestant merely to show its existence, under such circumstances, at a time, short or distant, preceding the making of the will. He must show its continuance at the time when the will was made." O'Donnell v. Rodiger, 76 Ala. 222. See article "PRESUMPTIONS," Vol. IX, p. 906.

63. Merriman v. Merriman, 153 Ind. 631, 55 N. E. 734. "The court charged the jury in several instructions that if the decedent prior to



proponent by proof that on and prior to the date of the will testator was suffering from a mental disease of a permanent and progressive nature.<sup>64</sup>

(C.) QUESTION FOR JURY — Whether or not it is shown that the will was executed during a lucid interval is for the jury, though a clear case of habitual delusion has been shown.<sup>65</sup> The presumption of incapacity is one of fact merely, though the delusion may have continued for several years.<sup>66</sup>

**2. As to Conduct, Character and Condition of Testator.** — A. THE ISSUE. — Testamentary capacity may exist though the mind of the testator may not be wholly unimpaired. It is sufficient if he can collect and retain the elements of the business in hand long enough to perceive and comprehend their relation to each other and be able to form a rational judgment in relation to them.<sup>67</sup>

a. *Wide Field of Inquiry Open.* — The nature of the issue and the necessity for admitting circumstantial evidence results in opening a wide field of inquiry. It may be said, indeed, that the great majority of the cases discuss the question of evidence rather from the standpoint of its weight than of its competency.<sup>68</sup>

the date of the alleged will, was of unsound mind, of apparent permanency, the burden would fall on the defendants to prove by a preponderance of the evidence that at the time the alleged will was made the decedent possessed sufficient mental capacity to make a will or had a lucid interval. These instructions were erroneous," citing *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948; *Young v. Miller*, 145 Ind. 652, 44 N. E. 757; *Teegarden v. Lewis*, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9.

<sup>64.</sup> *In re Jones' Estate*, 130 Iowa 177, 106 N. W. 610.

<sup>65.</sup> *Townshend v. Townshend*, 7 Gill (Md.) 10.

<sup>66.</sup> *Manley's Exr. v. Staple*, 65 Vt. 370, 26 Atl. 630.

<sup>67.</sup> *Bulger v. Ross*, 98 Ala. 267, 12 So. 803; *O'Donnell v. Rodiger*, 76 Ala. 222; *Leeper v. Taylor*, 47 Ala. 221; *Bates v. Bates*, 27 Iowa 110; *Van Guysling v. Van Kuren*, 35 N. Y. 70; *Dalafield v. Parish*, 25 N. Y. 9.

<sup>68.</sup> *Alabama.* — *Bulger v. Ross*, 98 Ala. 267, 12 So. 803.

*Arkansas.* — *Taylor v. McClintock*, 112 S. W. 405; *Tobin v. Jenkins*, 29 Ark. 151.

*Georgia.* — *Pergason v. Etcherson*, 91 Ga. 785, 18 S. E. 29.

*Iowa.* — *Ross v. McQuiston*, 45 Iowa 145.

*Kentucky.* — *Bradshaw v. Butler*, 30 Ky. L. Rep. 1249, 100 S. W. 837.

*Michigan.* — *Beaubien v. Cicotte*, 12 Mich. 459, 488.

*New York.* — *Matter of Woodward*, 167 N. Y. 28, 60 N. E. 233.

**Circumstantial Evidence.** — Mental unsoundness need not be established by positive testimony. *Reichenbach v. Ruddach*, 127 Pa. St. 564, 18 Atl. 432; *Steele v. Helm*, 2 Marv. (Del.) 237, 43 Atl. 153.

**Necessity for Liberal Rule.** — The essential fact of sanity can only be ascertained by considering, "not only the direct proof, but as well all collateral and relative facts and surrounding circumstances that tended to throw light upon the mental capacity of the testator at that time, and from which inferences might be drawn and presumptions raised as to whether or not he was mentally capable of making a will, and whether the disposition made of his property was consistent with his situation and in accordance with his previously expressed wishes and intentions, and such as he would naturally make under the circumstances, or adopt, or acquiesce in, if not wholly deprived of consciousness." *In re*

b. *General Statement of Rule as to Admissibility of Evidence.* It has been repeatedly said, in effect, that any fact which is more consistent with insanity than with sanity may be proved, though it does not tend of itself to show either, if it may do so in connection with other testimony.<sup>69</sup> But in determining the weight of such testimony regard must be had to the situation and temperament of the testator.<sup>70</sup> The inquiry, however, may not cover facts which have but a remote bearing on the issue.<sup>71</sup>

Shapter's Estate, 35 Colo. 578, 85 Pac. 688, 6 L. R. A. (N. S.) 575.

69. *Alabama.*—Johnson v. Armstrong, 97 Ala. 731, 12 So. 72.

*Colorado.*—In re Shapter's Estate, 35 Colo. 578, 85 Pac. 688, 6 L. R. A. (N. S.) 575.

*Connecticut.*—Dennison's Appeal, 29 Conn. 399.

*Indiana.*—Swygart v. Willard, 166 Ind. 25, 76 N. E. 755; Burkhart v. Gladish, 123 Ind. 337, 24 N. E. 118.

*Iowa.*—Manatt v. Scott, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293; In re Knox's Will, 123 Iowa 24, 98 N. W. 468; Bever v. Spangler, 93 Iowa 576, 61 N. W. 1072; Vannest v. Murphy, 135 Iowa 123, 112 N. W. 236.

*Kentucky.*—Synder's Exr. v. Cunningham, 13 Ky. L. Rep. 24, 16 S. W. 130 (causeless quarrel); McDonald v. McDonald, 27 Ky. L. Rep. 607, 85 S. W. 1084 (fixed aversion to children).

*Maine.*—Robinson v. Adams, 62 Me. 369, 413.

*Maryland.*—Brashears v. Orme, 93 Md. 442, 49 Atl. 620 (expression of wish to die).

*Michigan.*—Prentis v. Bates, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494; Roberts v. Bidwell, 136 Mich. 191, 98 N. W. 1000.

*New Jersey.*—In re Gilman's Will, 64 N. J. Eq. 715, 52 Atl. 690.

*New York.*—Clapp v. Fullerton, 34 N. Y. 190; In re Ely's Will, 16 Misc. 228, 39 N. Y. Supp. 177 (surrogate's court); In re Rounds' Will, 25 Misc. 101, 54 N. Y. Supp. 710; Christy v. Clark, 45 Barb. 529, 548.

*Pennsylvania.*—Hoopes' Estate, 174 Pa. St. 373, 34 Atl. 603; Reichenbach v. Ruddach, 127 Pa. St. 564, 591, 18 Atl. 432.

*Texas.*—Cockrill v. Cox, 65 Tex. 669.

**"The Habits, the Exterior Appearance,** the conversations of a man may furnish proofs of insanity, on account of their extravagant and unreasonable nature. But as it is an habitual state or disposition, and generally a permanent affection of the mind, its existence must be proved, not by one instance of unreasonable conduct, but by repeated acts and multiplied actions testified to by persons who have been repeated observers of them." Duffield v. Morris, 2 Har. (Del.) 375, citing Shelford on Lunacy, p. 23.

70. In re Blakely's Will, 48 Wis. 294, 4 N. W. 337.

71. *Indiana.*—Wait v. Westfall, 161 Ind. 648, 68 N. E. 271 (desire for secrecy in preparing will).

*Kentucky.*—Tudor v. Tudor, 17 B. Mon. 383.

*Maryland.*—Safe-Dep. & Tr. Co. v. Berry, 93 Md. 560, 49 Atl. 401.

*Massachusetts.*—Hall v. Hall, 17 Pick. 373.

*Michigan.*—Fraser v. Jennison, 42 Mich. 206, 222, 3 N. W. 882; Prentis v. Bates, 88 Mich. 567, 580, 50 N. W. 637, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494; In re Estate of Leffevre, 102 Mich. 568, 61 N. W. 3; Hoban v. Piquette, 52 Mich. 346, 360, 17 N. W. 797.

**Illustrations.**—In Fraser v. Jennison, 42 Mich. 206, 227, the court ruled that there was no error in excluding evidence as to the particulars of a disease which had affected testator twenty years before, the behavior and habits of his son, the relations existing between himself and collateral relatives, the disease of a brother, personal eccentricities and other like matters. Judge Cooley observed: Many of the facts suggested may be said to have a remote bearing upon the question of insanity to this extent: that they

c. *Testimony Calculated to Arouse Prejudice.* — The admission of testimony which is merely calculated to arouse prejudices by disclosing the previous relations of the parties or otherwise has been reprobated.<sup>72</sup>

B. *PERSONAL HISTORY.* — The facts connected with the personal history of the testator may be proved — his deportment, conversation, acts and appearance.<sup>73</sup>

a. *Importance of Such Evidence.* — Because the mind is dealt with and judged of according to its manifestations the words, appearance, acts, conduct and behavior of the person whose mind is in question are matters of the highest moment in determining its condition.<sup>74</sup>

would be facts more likely to attend or precede a condition of insanity than one of mental soundness. But any one of these circumstances may co-exist with a perfectly sound mind, and any one of them may be looked for as not an improbable misfortune or peculiarity in the life of a perfectly sane person. See *In re Wax's Estate*, 106 Cal. 343, 39 Pac. 624.

*In Prentiss v. Bates*, 88 Mich. 567, 580, 50 N. W. 637, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494, it was said that testimony does not rise to the dignity of evidence which merely shows that testator talked more than some others, seemed erratic, changed his mind, became angry and screamed and scolded at workmen.

72. *Arkansas.* — *Taylor v. McClintock*, 112 S. W. 405.

*Illinois.* — *Floto v. Floto*, 233 Ill. 605, 84 N. E. 712.

*Iowa.* — *Pelamourges v. Clark*, 9 Iowa 1; *Vannest v. Murphy*, 135 Iowa 123, 112 N. W. 236.

*Michigan.* — *Pierce v. Pierce*, 38 Mich. 412.

*Missouri.* — *Hughes v. Rader*, 183 Mo. 630, 82 S. W. 32, 56.

*Tennessee.* — *Key v. Holloway*, 7 Baxt. 575.

*Texas.* — *Chaddick v. Haley*, 81 Tex. 617, 17 S. W. 233.

*Virginia.* — *Wallen v. Wallen*, 107 Va. 131, 57 S. E. 596.

*Great Divergence in the Ages of Testator and His Wife* when they married is not proof *per se* of insanity. *Thomas v. Stump*, 62 Mo. 275; *In re Dwyer's Will*, 29 Misc. 382, 61 N. Y. Supp. 903 (third marriage to a person about half of tes-

atrix' age while she was ill); *Perkins v. Perkins*, 116 Iowa 253, 90 N. W. 55 (nor the age of testator when he remarried); *Hamon v. Hamon*, 180 Mo. 685, 699, 79 S. W. 422.

*Rumors Concerning Wife's Chastity* previous to her marriage cannot be proved. *Thomas v. Stump*, 62 Mo. 275.

*Refusal of the Public To Accept a Bequest* should not be shown, nor should evidence be received to show that an association made a beneficiary was unworthy of being such. *Billings' Appeal*, 49 Conn. 456.

73. *Johnson v. Armstrong*, 97 Ala. 731, 12 So. 72; *Ross v. McQuiston*, 45 Iowa 145.

74. *England.* — *Smith v. Tebbitt*, L. R. 1 P. & D. 398; *Waring v. Waring*, 6 Moore P. C. 341, 361, 13 Eng. Reprint 715.

*Alabama.* — *Watson v. Anderson*, 11 Ala. 43.

*California.* — *Estate of McKenna*, 143 Cal. 580, 77 Pac. 461; *In re Wax's Estate*, 106 Cal. 343, 39 Pac. 624.

*Delaware.* — *Jamison v. Jamison*, 3 Houst. 108; *Steele v. Helm*, 2 Marv. 237, 43 Atl. 153.

*District of Columbia.* — *Barbour v. Moore*, 4 App. Cas. 535, 548.

*Indiana.* — *Wait v. Westfall*, 161 Ind. 648, 68 N. E. 271; *McReynolds v. Smith*, 86 N. E. 1009.

*Iowa.* — *Bever v. Spangler*, 93 Iowa 576, 61 N. W. 1072; *Ross v. McQuiston*, 45 Iowa 145; *In re Evans' Estate*, 114 Iowa 240, 86 N. W. 283.

*Maine.* — *In re Chandler's Will*, 102 Me. 72, 99, 66 Atl. 215; *In re Wells*, 96 Me. 161, 51 Atl. 868.

b. *Inquiry May Go Into Details.*—Full inquiry may be made into acts, conduct and sayings of the testator within such scope of time as is relevant to the making of the will.<sup>75</sup> Proof of acts and conduct when testator was angry and violent is competent.<sup>76</sup> A witness may characterize acts and conduct observed by him though not qualified to express an opinion as to the mental condition of the testator.<sup>77</sup> The only danger connected with the admission of such testimony is that undue emphasis may be given isolated incidents.<sup>78</sup>

**Eccentricity.**—Proof of eccentric behavior does not weigh heavily against evidence of good business ability, and may be accounted for consistently with testamentary capacity,<sup>79</sup> though the eccen-

*Maryland.*—Berry v. Safe Dep. Co., 96 Md. 45, 53 Atl. 720 ("the mental condition of an individual, whatever the cause of that condition may be, is manifested by external acts and appearances and in no other way").

*Massachusetts.*—Jenkins v. Weston, 200 Mass. 488, 86 N. E. 955.

*Missouri.*—Wood v. Carpenter, 166 Mo. 465, 486, 66 S. W. 172.

*New Jersey.*—Eddy's Case, 32 N. J. Eq. 701.

*New York.*—LaBau v. Vanderbilt, 3 Redf. Sur. 384, 426; Cheney v. Price, 90 Hun 238, 37 N. Y. Supp. 117; Shaw's Will, 2 Redf. Sur. 107, 132; *In re Ely's Will*, 16 Misc. 228, 39 N. Y. Supp. 177.

*North Carolina.*—*In re Burn's Will*, 121 N. C. 336, 28 S. E. 519.

*Pennsylvania.*—Hoopes' Estate, 174 Pa. St. 373, 34 Atl. 603; Irish v. Smith, 8 Serg. & R. 573.

*West Virginia.*—Ward v. Brown, 53 W. Va. 227, 263, 44 S. E. 488.

*Wisconsin.*—*In re Blakely's Will*, 48 Wis. 294, 4 N. W. 337.

75. *Alabama.*—Hodge v. Ram-bow, 45 So. 678.

*California.*—Huyck v. Rennie, 151 Cal. 411, 90 Pac. 929; Estate of Dole, 147 Cal. 188, 81 Pac. 534.

*Indiana.*—Burkhart v. Gladish, 123 Ind. 337, 24 N. E. 118; Swygart v. Willard, 166 Ind. 25, 76 N. E. 755.

*Iowa.*—Smith v. Ryan, 136 Iowa 335, 112 N. W. 8; Bever v. Spangler, 93 Iowa 576, 61 N. W. 1072; Denning v. Butcher, 91 Iowa 425, 59 N. W. 69.

*Michigan.*—Prentis v. Bates, 93

Mich. 234, 53 N. W. 153, 17 L. R. A. 494; Hoban v. Piquette, 52 Mich. 346, 17 N. W. 797.

*New Hampshire.*—Pattee v. Whitcomb, 72 N. H. 249, 56 Atl. 459.

*Pennsylvania.*—Reichenbach v. Ruddach, 127 Pa. St. 564, 591, 18 Atl. 432.

*Washington.*—Rathjens v. Merrill, 38 Wash. 442, 80 Pac. 754.

76. *In re Stufflebeam's Will*, 135 Iowa 338, 112 N. W. 815; *In re Brown*, 38 Minn. 112, 35 N. W. 726; Coit v. Patchen, 77 N. Y. 533.

77. Estate of Keithley, 134 Cal. 9, 66 Pac. 5; Parsons v. Parsons, 66 Iowa 754, 21 N. W. 570, 24 N. W. 564.

**Characterization of testator's countenance** is proper. Irish v. Smith, 8 Serg. & R. (Pa.) 573. An ambiguous and indefinite characterization is valueless. Safe-Dep. & Tr. Co. v. Berry, 93 Md. 560, 49 Atl. 401. But compare Vannest v. Murphy, 135 Iowa 123, 112 N. W. 236.

78. **Isolated Incidents** in the lives of intelligent, educated and cultured people may be so grouped together as to make the most sane of men appear to have been mentally unsound. Dickie v. VanVleck, 5 Redf. Sur. (N. Y.) 284; Berry v. Safe-Dep. Co., 96 Md. 45, 53 Atl. 720; Gesell v. Baugher, 100 Md. 677, 60 Atl. 481.

79. *England.*—Pilkington v. Gray, L. R. (1899) App. Cas. 401, 68 L. J. P. C. 63.

*United States.*—Newton v. Carbery, 5 Cranch C. C. 626, 18 Fed. Cas. No. 10,189; Turner v. Hand,

tricity was remarkable.<sup>80</sup> In England it has been said that proof of eccentricities must not be allowed to weigh heavily in favor of incapacity.<sup>81</sup> Such conduct may be accounted for by evidence of the person's physical condition or the discord in his family,<sup>82</sup> or by

3 Wall Jr. 88, 24 Fed. Cas. No. 14,257.

*Arkansas*.—Ouachita Baptist College v. Scott, 64 Ark. 349, 42 S. W. 536.

*Connecticut*.—Kinne v. Kinne, 9 Conn. 102.

*Georgia*.—Potts v. House, 6 Ga. 324, 350 ("One thing is certain—that eccentricity, however great, is not sufficient, of itself, to invalidate a will"). To the same effect is Lee v. Lee, 4 McCord (S. C.) 183.

*Illinois*.—Schneider v. Manning, 121 Ill. 376, 12 N. E. 267.

*Iowa*.—Holmberg v. Phillips, 78 N. W. 66.

*Maine*.—In re Randall, 99 Me. 396, 59 Atl. 552.

*Michigan*.—Hoban v. Piquette, 52 Mich. 346, 360, 17 N. W. 797.

*Mississippi*.—Mullins v. Cottrell, 41 Miss. 291, 322.

*Missouri*.—Sayre v. Trustees, 192 Mo. 95, 90 S. W. 787; Archambault v. Blanchard, 198 Mo. 384, 426, 95 S. W. 834; Fulbright v. Perry County, 145 Mo. 432, 46 S. W. 955; Hamon v. Hamon, 180 Mo. 685, 79 S. W. 422; Story v. Story, 188 Mo. 110, 86 S. W. 225; Winn v. Grier, 117 S. W. 48.

*Nebraska*.—In re Owens' Estate, 73 Neb. (Unof.) 840, 103 N. W. 675.

*New Jersey*.—Gilman v. Ayer, 47 Atl. 1049.

*New York*.—In re Mabie's Will, 5 Misc. 179, 24 N. Y. Supp. 855 (surrogate's court); In re Skaat's Will, 26 N. Y. Supp. 494; In re Journey's Will, 15 App. Div. 567, 44 N. Y. Supp. 548; In re Woolsey's Will, 17 Misc. 547, 41 N. Y. Supp. 263; In re Atchley's Will, 108 N. Y. Supp. 877; In re Armstrong's Will, 55 Misc. 487, 106 N. Y. Supp. 671; In re Ross' Will, 20 N. Y. Supp. 520.

*Ohio*.—General Convention v. Crocker, 7 Ohio C. C. 327.

*Pennsylvania*.—McMasters v. Blair, 29 Pa. St. 298; Wright's Estate, 202 Pa. St. 395, 51 Atl. 1031;

Buchanan v. Pierie, 203 Pa. St. 123, 54 Atl. 583.

*South Carolina*.—Kinloch v. Palmer, 1 Mills 216; Lee v. Lee, 4 McCord 183.

*West Virginia*.—Stewart v. Lyons, 54 W. Va. 665, 47 S. E. 442; Ward v. Brown, 53 W. Va. 227, 263, 44 S. E. 488.

*Wisconsin*.—In re Blakeley's Will, 48 Wis. 294, 4 N. W. 337; In re Chafin's Will, 32 Wis. 557; In re Butler's Will, 110 Wis. 70, 85 N. W. 678; Field v. Pickard, 126 Wis. 229, 105 N. W. 796.

**Isolated Instances of Queer and Whimstreal Conduct** during a long period are greatly heightened in effect when massed together; and are not convincing as against a life sane and normal in its main aspects. Buchanan v. Pierie, 205 Pa. St. 123, 54 Atl. 583.

**80.** *Indiana*.—Wait v. Westfall, 161 Ind. 648, 68 N. E. 271.

*Iowa*.—Bennett v. Hibbert, 88 Iowa 154, 55 N. W. 93.

*Missouri*.—Cash v. Lust, 142 Mo. 630, 641, 44 S. W. 724; Archambault v. Blanchard, 198 Mo. 384, 424, 95 S. W. 834.

*New York*.—In re Merriam's Will, 16 N. Y. Supp. 738; Ivison v. Ivison, 80 App. Div. 599, 80 N. Y. Supp. 1011; Dobie v. Armstrong, 160 N. Y. 584, 55 N. E. 302; Coit v. Patchen, 77 N. Y. 533.

*South Carolina*.—Scarborough v. Baskin, 65 S. C. 558, 44 S. E. 878.

**Because Testator Talked to a Picture** and expressed the belief that the departed person thus represented possessed "the keys of the kingdom," and could understand what was said to him, does not necessarily imply lunacy. Ames v. Ames, 40 Or. 495, 67 Pac. 737.

**81.** Broughton v. Knight, L. R. 3 P. & D. 64, 75.

**82.** Coit v. Patchen, 77 N. Y. 533; In re Butler's Will, 110 Wis. 70, 85 N. W. 678.

proof of the testator's habitual conduct in the respect in question.<sup>83</sup> Seeming eccentricity may be evidence of sanity,<sup>84</sup> or, in connection with other circumstances, may be persuasive as to incompetency.<sup>85</sup> All the cases permit proof of really eccentric conduct and usually without discussion respecting its competency.<sup>86</sup> It is not subject to the objection that conclusions may not be testified to.<sup>87</sup> If peculiarities of manner are testified to, particulars may be required.<sup>88</sup>

**Negative Testimony.**—A witness may testify that he did not observe anything unusual about testator's condition at a time other than that when the will was executed.<sup>89</sup>

c. *Admission by Silence.*—Testator's silence while the state of his mind was under a discussion which would naturally call out a response from him may be proved, in the absence of anything to show that his hearing was defective.<sup>90</sup>

d. *Photograph of Testator.*—A photograph of the testator is not competent on the question of his capacity.<sup>91</sup> Photographs appear to have been received in one case, but were not considered of value.<sup>92</sup>

83. *Wood v Sawyer*, 61 N. C. (Phill L.) 251, 275.

84. *Howard's Will*, 5 T. B. Mon. (Ky.) 199, 17 Am. Dec. 60 (consciousness of deformity and avoidance of strangers). See *In re Stufflebeam's Will*, 135 Iowa 338, 112 N. W. 815.

85. *Osborne v. Osborne*, 125 Iowa 296, 101 N. W. 83; *McDonald v. McDonald*, 27 Ky. L. Rep. 607, 85 S. W. 1084.

86. *Pelamourges v. Clark*, 9 Iowa 1; *In re Rounds' Will*, 25 Misc. 101, 54 N. Y. Supp. 710.

**Eccentricity of Conduct**, absurd opinions or belief in things apparently extravagant may be evidences of incapacity, though they do not necessarily constitute it. *Leech v. Leech*, 1 Phila. (Pa.) 154.

87. *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 882.

88. *In re Estate of Goldthrop*, 94 Iowa 336, 62 N. W. 845.

A witness may explain his language characterizing testator's habits. *Swygart v. Willard*, 166 Ind. 25, 76 N. E. 755.

89. *Robinson v. Adams*, 62 Me. 369; *Jones v. Collins*, 94 Md. 403, 411, 51 Atl. 398; *Nash v. Hunt*, 116 Mass. 237; *Hogan v. Roche's Heirs*, 179 Mass. 510, 61 N. E. 57; *Clark v. Clark*, 168 Mass. 523, 47 N. E. 510.

90. *Meeker v. Meeker*, 74 Iowa

352, 37 N. W. 773; *In re Will of Fenton*, 97 Iowa 192, 66 N. W. 99; *Irish v. Smith*, 8 Serg. & R. (Pa.) 573. See article "ADMISSIONS," Vol. I, p. 367, and 1908 Supplement, 367-27.

91. *Wisener v. Maupin*, 2 Baxt. (Tenn.) 342, 369.

**Reasons.**—A photograph is a picture of some material, substantial thing—place, scene, some physical object; but we know of no claim of science or the art of photography that a picture or likeness can be taken of the intangible, immaterial mind. This photograph was passed to the jury for inspection, and they were asked, for the time being, to become psychologists and mind readers—to determine from the looks and features portrayed the degree of mental capacity and the power of the disposing memory of the subject of the picture; a class of evidence impossible of cross-examination, and making impressions on jurors beyond the touch or reach of argument. There is no case we can find which approves of the use of a photograph as made in this case, and there is no sound reason to sustain it. *Varner v. Varner*, 16 Ohio C. C. 386.

92. *In re Skaats' Will*, 74 Hun 462, 26 N. Y. Supp. 494.

e. *Age*.—The testator's age may be shown, though it is not a controlling fact in ordinary cases,<sup>93</sup> even if connected with poor health<sup>94</sup> or a weak mind.<sup>95</sup> A contrary view has been expressed, though the conclusion drawn from age and surrounding circum-

**93. Alabama.**—Henry *v.* Hall, 106 Ala. 84, 99, 17 So. 187; Leeper *v.* Taylor, 47 Ala. 221; Bulger *v.* Ross, 98 Ala. 267, 12 So. 803.

**Arkansas.**—McCulloch *v.* Campbell, 49 Ark. 367, 5 S. W. 590.

**Georgia.**—Potts *v.* House, 6 Ga. 324, 355.

**Illinois.**—Taylor *v.* Pegram, 151 Ill. 106, 37 N. E. 837; Pooler *v.* Cristman, 145 Ill. 405, 34 N. E. 57; Kelley *v.* Kelley, 168 Ill. 501, 48 N. E. 158; Johnson *v.* Farrell, 215 Ill. 542, 74 N. E. 760; Schmidt *v.* Schmidt, 201 Ill. 191, 66 N. E. 371; Woodman *v.* Illinois Tr. & Sav. Bank, 211 Ill. 578, 71 N. E. 1099; Dillman *v.* McDanel, 222 Ill. 276, 288, 78 N. E. 591; Waters *v.* Waters, 222 Ill. 26, 78 N. E. 1; Rutherford *v.* Morris, 77 Ill. 397, 408.

**Iowa.**—Perkins *v.* Perkins, 116 Iowa 253, 90 N. W. 55; Lingle *v.* Lingle, 121 Iowa 133, 96 N. W. 708; Gates *v.* Cole, 137 Iowa 613, 115 N. W. 236; Ross *v.* Ross, 117 N. W. 1105.

**Kentucky.**—Hudson *v.* Adams' Adm., 20 Ky. L. Rep. 1269, 49 S. W. 192 (it may be material as corroborating opinions); Watson *v.* Watson, 2 B. Mon. 74.

**Maine.**—Hall *v.* Perry, 87 Me. 569, 33 Atl. 160.

**Missouri.**—Hamon *v.* Hamon, 180 Mo. 685, 701, 79 S. W. 422.

**Nebraska.**—Stull *v.* Stull, 1 Neb. (Unof.) 380, 96 N. W. 196; Elliott *v.* Elliott (Neb. Unof.), 92 N. W. 1006.

**New Jersey.**—Clifton *v.* Clifton, 47 N. J. Eq. 227, 241, 22 Atl. 333.

**New York.**—*In re* Folts' Will, 71 Hun 402, 24 N. Y. Supp. 1052; Van Alst *v.* Hunter, 5 Johns. Ch. 148, 160; *In re* Otis' Will, 1 Misc. 258, 22 N. Y. Supp. 1060; *In re* Mabie's Will, 5 Misc. 179, 24 N. Y. Supp. 855 (surrogate's court); Cornwell *v.* Riker, 2 Dem. 354, 366; *In re* Halbert's Will, 15 Misc. 308, 37 N. Y. Supp. 757; Matter of Vedder, 6 Dem. 92; *In re* Metcalf's Will, 16 Misc.

180, 38 N. Y. Supp. 1131; *In re* Iredale's Will, 53 App. Div. 45, 65 N. Y. Supp. 533; *In re* Harris' Will, 19 Misc. 388, 44 N. Y. Supp. 341; Dobie *v.* Armstrong, 160 N. Y. 584, 55 N. E. 302; Dunham *v.* Dunham, 63 App. Div. 264, 71 N. Y. Supp. 330; *In re* Armstrong's Will, 55 Misc. 487, 106 N. Y. Supp. 671.

**Oregon.**—*In re* Ames' Will, 40 Or. 495, 67 Pac. 737; *In re* Pickett's Will, 49 Or. 127, 89 Pac. 377; *In re* Buren's Will, 47 Or. 307, 83 Pac. 530.

**Pennsylvania.**—Leech *v.* Leech, 1 Phila. 154; Browne *v.* Molliston, 3 Whart. 129; Wilson *v.* Mitchell, 101 Pa. St. 495; Estate of Napfle, 134 Pa. St. 492, 19 Atl. 679; Stevenson *v.* Kingsley, 8 Pa. Dist. 245.

**Philippine Islands.**—Hernaes *v.* Hernaesz, 1 Philipp. Isl. 689.

**South Carolina.**—Kirkwood *v.* Gordon, 7 Rich. L. 474 ("it may raise some doubt of capacity, but no farther than to excite vigilance").

**Tennessee.**—Van Huss *v.* Rainbolt, 2 Coldw. 139 ("the law justly regards with peculiar tenderness the wills of the aged"); Wisener *v.* Maupin, 2 Baxt. 342, 362.

**Texas.**—McIntosh *v.* Moore, 22 Tex. Civ. App. 22, 53 S. W. 611.

**West Virginia.**—Kerr *v.* Lunsford, 31 W. Va. 659, 679, 8 S. E. 493.

**94. Woodman *v.* Illinois Tr. & Sav. Bank**, 211 Ill. 578, 71 N. E. 1099; *In re* Duffy's Will, 127 App. Div. 174, 111 N. Y. Supp. 491; *In re* Cline's Will, 24 Or. 175, 33 Pac. 542; s. c. sub nom. Bain *v.* Cline, 33 Pac. 542.

**95. Bulger *v.* Ross**, 98 Ala. 267, 12 So. 803; Horn *v.* Pullman, 72 N. Y. 269; *In re* Gray's Will, 52 Hun 614, 5 N. Y. Supp. 464; *In re* Otis' Will, 1 Misc. 258, 22 N. Y. Supp. 1060 (surrogate's court); *In re* Carver's Will, 3 Misc. 567, 23 N. Y. Supp. 753 (surrogate's court), 75 Hun 612, 28 N. Y. Supp. 1126 (no opinion); *In re* Iredale's Will, 53 App. Div. 45, 65 N. Y. Supp. 533.

stances was rebutted.<sup>96</sup> Unusual age may be important in connection with proof that the testator was afflicted with senile dementia.<sup>97</sup>

In connection with proof of age it may be shown that there was increased tendency to mental derangement.<sup>98</sup>

*f. Inquiry as to Particular Faculties.* — (1.) **Generally.** — Every faculty of the mind may be made the subject of testimony, as impairment of memory, and the extent thereof. But evidence on that point is not decisive because the issue depends upon the general mental strength of the testator.<sup>99</sup>

(2.) **Intelligence.** — It may be shown what degree of intelligence testator possessed,<sup>1</sup> though it exceeded that required for the execution of the will.<sup>2</sup> But possession of less than average mental capacity does not establish incompetency.<sup>3</sup>

(3.) **Feebleness of Mind.** — Incapacity is not to be inferred from an enfeebled mental condition if the testator retains a reasonable comprehension of the act of making his will, of the extent of his estate and the claims upon him in favor of others,<sup>4</sup> at least if it

96. *Jennings v. Pendergast*, 10 Md. 346. The court observed: "The testatrix was ninety-six years of age when the will was executed. This circumstance standing alone is of great weight, and although not, *per se*, conclusive, yet it goes far, when the common history of humanity is considered, to induce the belief that the party must be much weakened in mind, if not reduced to that state which the books designate as fatuity." See *Edge v. Edge*, 38 N. J. Eq. 211.

97. *Mason v. Rodriguez* (Tex. Civ. App.), 115 S. W. 868.

98. *Titus v. Gage*, 70 Vt. 13, 39 Atl. 246.

99. *Daly v. Daly*, 183 Ill. 269, 55 N. E. 671.

1. *In re Merriman's Appeal*, 108 Mich. 454, 66 N. W. 372; *Dobie v. Armstrong*, 160 N. Y. 584, 55 N. E. 302; See *in re Ely's Estate*, 16 Misc. 228, 39 N. Y. Supp. 177; *Townsend v. Bogart*, 5 Redf. Sur. (N. Y.) 93.

2. *In re Mason's Will* (Vt.), 72 Atl. 329.

**Letters Addressed to a Testator** by persons of his acquaintance who have died are not admissible to show that he was possessed of ordinary understanding in the absence of proof that he acted upon them. *Wright v. Tatham*, 7 Ad. & El. 289, 34 E. C. L. 95.

**Reliance on Others.** — Lack of

education may account for the reliance placed by testator on the judgment of members of his family. *In re Stufflebeam's Will*, 135 Iowa 338, 112 N. W. 815.

3. *St. Joseph's Convent v. Garner*, 66 Ark. 623, 53 S. W. 298; *McCulloch v. Campbell*, 49 Ark. 367, 5 S. W. 590; *Nichols v. Wentz*, 78 Conn. 429, 62 Atl. 610; *Hoban v. Piquette*, 52 Mich. 346, 361, 17 N. W. 797.

4. *England.* — *Ex parte Barnsley*, 3 Atk. 168.

*Alabama.* — *Leeper v. Taylor*, 47 Ala. 221.

*California.* — *Estate of Nelson*, 132 Cal. 182, 64 Pac. 294.

*Illinois.* — *Dillman v. McDanel*, 222 Ill. 276, 288, 78 N. E. 591.

*Iowa.* — *Perkins v. Perkins*, 116 Iowa 253, 90 N. W. 55; *Hanrahan v. O'Toole*, 117 N. W. 675.

*Kentucky.* — *McDaniel's Will*, 2 J. J. Marsh 331.

*Maine.* — *In re Randall*, 99 Me. 396, 59 Atl. 55.

*New York.* — *Horn v. Pullman*, 72 N. Y. 269; *Matter of Vedder*, 6 Dem. 92; *In re Patterson's Will*, 26 Abb. N. C. 395, 13 N. Y. Supp. 463; *In re Metcalf's Will*, 16 Misc. 180, 38 N. Y. Supp. 1131; *In re Donohue's Will*, 97 App. Div. 205, 89 N. Y. Supp. 871; *In re Ross' Will*, 20 N. Y. Supp. 520; *Blanchard v. Nestle*,



is the result of age,<sup>5</sup> or even though it has been continuous and has extended to inability to understand business matters in which the testator was interested.<sup>6</sup> Bodily disease or extreme age may result in disqualifying weakness though there be no insanity or unsoundness of mind.<sup>7</sup>

(4.) **Instructions to Scrivener.** — If instructions given for the preparation of the will have been followed less vigor of intellect may sustain it than would otherwise be required.<sup>8</sup>

(5.) **Progress of Disease Not Assumed To Be Constant.** — It will not be inferred that a decaying mind, though gradually becoming worse, is always less competent on every succeeding day than on the previous day, and that such process goes on regularly and constantly.<sup>9</sup>

(6.) **Memory.** — (A.) **POSSESSION OF MEMORY.** — It is competent to show facts indicating the possession of memory and the exercise of good judgment.<sup>10</sup>

3 Denio 37; *Stewart v. Lispenard*, 26 Wend. 255.

*Ohio.* — *Moore v. Caldwell*, 6 Ohio C. C. (N. S.) 484.

**A Stupid and Inactive Mind** which gives indication of uncertainty in its operations is not inconsistent with testamentary capacity. *Palmer's Estate*, 219 Pa. St. 303, 68 Atl. 710.

5. *Baker v. Baker*, 202 Ill. 595, 67 N. E. 410.

6. *Nichols v. Wentz*, 78 Conn. 429, 62 Atl. 610.

7. *Manatt v. Scott*, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293. See *Mendenhall v. Tungate*, 95 Ky. 208, 24 S. W. 431.

8. *Parker v. Fellgate*, 8 P. D. (Eng.) 171.

9. *Swinfen v. Swinfen*, 27 Beav. (Eng.) 148, 160.

10. *Illinois.* — *Brownfield v. Brownfield*, 43 Ill. 147.

*Maine.* — *In re Chandler's Will*, 102 Me. 72, 92, 66 Atl. 215.

*Missouri.* — *King v. Gilson*, 206 Mo. 264, 275, 104 S. W. 52.

*New Jersey.* — *Merrill v. Rush*, 33 N. J. Eq. 537.

*New York.* — *Reynolds v. Root*, 62 Barb. 250.

*Pennsylvania.* — *Draper's Estate*, 215 Pa. St. 314, 64 Atl. 520.

*South Carolina.* — *Tomkins v. Tomkins*, 1 Bailey L. 92 ("minute recollection of instructions given for preparing will twenty-four hours before, is wholly inconsistent with that

imbecility and alienation of mind which incapacitates for making a will").

*Wisconsin.* — *In re Butler's Will*, 110 Wis. 70, 85 N. W. 678.

**The Absence of Testimony Showing Defects in Memory** has been remarked upon as significant. *Stull v. Stull*, 1 Neb. Unof. 380, 96 N. W. 196.

**Sufficiency of Memory.** — If the will was dictated when there was sufficient vigor of mind and executed when the testator was able to recollect the particulars dictated it was valid though he died two hours later. *Hathorn v. King*, 8 Mass 371.

**The Ability To Answer Familiar and Usual Questions** is not proof of the possession of a disposing memory. *Marsh v. Tyrrell*, 2 Hagg. Ecc. (Eng.) 84; *Marquis of Winchester's Case*, 6 Coke (Eng.) 23; *Tucker v. Sandidge*, 85 Va. 546, 8 S. E. 650; *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314.

**Failure of a Sick Person To Recognize Those Who Are Related to Him** may be a matter of volition. *Turner v. Cheesman*, 15 N. J. Eq. 243, 254. It may be explained by his suffering. *In re Kearney's Will*, 69 App. Div. 481, 74 N. Y. Supp. 1045.

**Failure To Name Relatives in Will** is not evidence that testator forgot them. *Mairs v. Freeman*, 3 Redf. Sur. (N. Y.) 181, 206. But

(B.) FAILING MEMORY. — In the case of aged persons loss of memory does not *per se* indicate incapacity unless it is total or extends to the testator's immediate family and property.<sup>11</sup> Instances of forgetfulness alone are not evidence of incompetency, nor are they

failure to refer to them in conversation while near death's door has been regarded as significant. *Christy v. Clarke*, 45 Barb. (N. Y.) 529, 548.

11. *Arkansas*. — *McCulloch v. Campbell*, 49 Ark. 367, 5 S. W. 590. *Connecticut*. — *Kinne v. Kinne*, 9 Conn. 102.

*District of Columbia*. — *Barbour v. Moore*, 4 App. Cas. 535, 547.

*Illinois*. — *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837; *Johnson v. Farrell*, 215 Ill. 542, 74 N. E. 760.

*Indiana*. — *Wait v. Westfall*, 161 Ind. 648, 659, 68 N. E. 271.

*Iowa*. — *Holmberg v. Phillips*, 78 N. W. 66; *Perkins v. Perkins*, 116 Iowa 253, 90 N. W. 55; *Gates v. Cole*, 137 Iowa 613, 115 N. W. 236.

*Maine*. — *Hall v. Perry*, 87 Me. 569, 33 Atl. 160 ("weakness of memory, vacillation of purpose, credulity and vagueness of thought may all consist with adequate testamentary capacity under favorable circumstances"); *Randall v. Randall*, 99 Me. 396, 59 Atl. 552.

*Maryland*. — *Gessell v. Baugher*, 100 Md. 677, 60 Atl. 481.

*Missouri*. — *Southworth v. Southworth*, 173 Mo. 59, 72, 73 S. W. 129; *Hamon v. Hamon*, 180 Mo. 685, 698, 79 S. W. 422; *Couch v. Gentry*, 113 Mo. 248, 20 S. W. 890.

*New Jersey*. — *Turner v. Cheesman*, 15 N. J. Eq. 243, 255; *Eddy's Case*, 32 N. J. Eq. 701.

*New York*. — *VanAlst v. Hunter*, 5 Johns. Ch. 148, 161; *Dumond v. Kiff*, 7 Lans. 465; *Reynolds v. Root*, 62 Barb. 250; *Clarke v. Davis*, 1 Redf. Sur. 249; *In re Jones' Will*, 5 Misc. 199, 25 N. Y. Supp. 109; *In re Clearwater's Will*, 2 N. Y. Supp. 99, 17 N. Y. St. 794 (Surrogate's court); *In re Stewart's Will*, 59 Hun 618, 13 N. Y. Supp. 219; *Dalfield v. Parish*, 25 N. Y. 9; *In re Mabie's Will*, 5 Misc. 179, 24 N. Y. Supp. 855 (surrogate's court); *Cheney v. Price*, 90 Hun 238, 37 N. Y. Supp. 117; *Mairs v. Freeman*, 3 Redf. Sur. 181, 206; *Bleecker v.*

*Lynch*, 1 Bradf. Sur. 458; *Lavin v. Thomas*, 123 App. Div. 113, 108 N. Y. Supp. 112.

*Oregon*. — *In re Cline's Will*, 24 Or. 175, 33 Pac. 542; *s. c.*, *sub nom.* *Bain v. Cline*, 33 Pac. 542; *Ames v. Ames*, 40 Or. 495, 67 Pac. 737; *Clark's Heirs v. Ellis*, 9 Or. 128.

*Pennsylvania*. — *Shreiner v. Shreiner*, 178 Pa. St. 57, 35 Atl. 974 (the will itself may establish that forgetfulness was but temporary, as where it names the person who is alleged to have gone unrecognized by the testator); *Estate of Woods*, 13 Phila. 236; *Wilson v. Mitchell*, 101 Pa. St. 495; *Fow's Estate*, 147 Pa. St. 264, 23 Atl. 447; *Stevenson v. Kingsley*, 8 Pa. Dist. 245; *Lenhart's Estate*, 199 Pa. St. 618, 49 Atl. 305. *Tennessee*. — *Wisener v. Maupin*, 2 Baxt. 342, 362.

*West Virginia*. — *Martin v. Thayer*, 37 W. Va. 38, 54, 16 S. E. 489 (name of grandchild; remembering the person more important).

**Rule Stated.** — "It has been reiterated in our courts that a man's memory may be imperfect and greatly impaired by age or disease; that he may not be able, at all times, to recollect the names, the persons or the families of those with whom he has been intimately acquainted; that he may at times ask idle questions and repeat those which he has before asked, which may have been answered, and yet, at the time of executing his will, may be capable of recollecting the property he is about to dispose of and the natural objects of his bounty, and of understanding the manner in which he determines to distribute his property. *Stevens v. Vancleve*, 4 Wash. C. C. 262, 23 Fed. Cas. No. 13,412; *Lowe v. Williamson*, 2 N. J. Eq. 82; *Andrew v. Weller*, 3 N. J. Eq. 604; *Stackhouse v. Horton*, 15 N. J. Eq. 202; *Turner v. Cheesman*, 15 N. J. Eq. 243; *Boylan v. Meeker*, 28 N. J. L. 274; *Eddy's Case*, 32 N. J. Eq. 701; *Rusling v. Rusling*, 36 N. J. Eq. 603." *White v. Starr*, 47 N. J.

a good basis for expert testimony,<sup>12</sup> unless they are numerous or remarkable.<sup>13</sup> But a total loss of memory condemns a will.<sup>14</sup> A misstatement to the scrivener who drew the will, as to the amount of testator's property is a relevant, but not controlling, circumstance.<sup>15</sup>

(C.) **STRENGTH OF MEMORY.** — The testimony must be directed to the question of the testator's capacity to comprehend the act in which he is engaged, the nature and extent of his property, and the objects of his bounty and their claims upon him. Actual recollection of all these is not necessary if the capacity to recollect them exists.<sup>16</sup> The rule applies in case of mental unsoundness produced by mental diseases as well as where the impaired capacity has been continuous.<sup>17</sup>

(7.) **Conversation.** — (A.) **ABILITY TO CONVERSE.** — The ability to converse intelligently is significant.<sup>18</sup>

(B.) **BROKEN CONVERSATION.** — Failure to exhaust the subject of a conversation is not important,<sup>19</sup> especially if the testator has a

Eq. 244, 258, 20 Atl. 875. *Clifton v. Clifton*, 47 N. J. Eq. 227, 241, 22 Atl. 333, is to the same effect.

12. *Prentiss v. Bates*, 88 Mich. 567, 588, 50 N. W. 637 (but in *Bush v. Delano*, 113 Mich. 321, 71 N. W. 628, it is said that evidence of forgetfulness has a tendency to show incapacity); *Matter of Wintermute's Will*, 27 N. J. Eq. 447; *Matter of Gross*, 14 N. Y. St. 429.

13. *Davis v. Denny*, 94 Md. 390, 50 Atl. 1037; *Leffingwell v. Bettinghouse*, 151 Mich. 513, 115 N. W. 731; *Shaw's Will*, 2 Redf. Sur. (N. Y.) 107, 133; *Potter v. M'Alpine*, 3 Dem. (N. Y.) 108; *Townsend v. Bogart*, 5 Redf. Sur. (N. Y.) 93; *Cockrill v. Cox*, 65 Tex. 669.

14. *In re Harrison's Will*, 30 N. Bruns. 164 (inability to name the persons desired to serve as executors); *Lamb v. Lamb*, 105 Ind. 456, 5 N. E. 171.

Inability to recollect how to write the first letter of his name is strong evidence of incapacity. *Griffin v. Griffin*, R. M. Charl. (Ga.) 217.

15. *Waugh v. Moan*, 200 Ill. 298, 65 N. E. 713.

16. *England*. — *Harwood v. Baker*, 3 Moore P. C. 282, 13 Eng. Reprint 117.

*Arkansas*. — *Taylor v. McClintock*, 112 S. W. 405.

*Indiana*. — *McReynolds v. Smith*, 86 N. E. 1009, qualifying a remark

in *Barricklow v. Stewart*, 163 Ind. 438, 72 N. E. 128.

*Missouri*. — *Holton v. Cochran*, 208 Mo. 314, 422, 106 S. W. 1035.

*New Jersey*. — *Smith v. Smith*, 48 N. J. Eq. 566, 25 Atl. 11 ("it is not required that he shall in fact correctly ascertain the legal status of each person who apparently stands in natural relation to him. In the exercise of reason, he may move upon false or insufficient evidence, or by mistake of law, and thus exclude from his bounty those whom, but for his error, he would have recognized. Stupid error, either in his reasoning or conclusion, is not lack of testamentary capacity").

*New York*. — *Townsend v. Bogart*, 5 Redf. Sur. 93.

*Pennsylvania*. — *Wilson v. Mitchell*, 101 Pa. St. 495; *Reichenbach v. Ruddach*, 127 Pa. St. 564, 590, 18 Atl. 432.

*West Virginia*. — *Kerr v. Lunsford*, 31 W. Va. 659, 682, 8 S. E. 493.

17. *Banks v. Goodfellow*, L. R. 5 Q. B. 549, 569.

18. *Cox's Estate*, 167 Pa. St. 501, 31 Atl. 747.

**A Concession of Competency** when an interview took place does not render an account of it incompetent. *In re Mason's Will* (Vt.), 72 Atl. 329.

19. *Leffingwell v. Bettinghouse*, 151 Mich. 513, 115 N. W. 731; *Clif-*

physical ailment.<sup>20</sup> But inability to continue a conversation has been regarded as significant in connection with other circumstances.<sup>21</sup>

(C.) **REPETITION.** — The repetition of early events in the life of an aged testator is not valuable as evidence of incapacity.<sup>22</sup> And so of the repetition of other subjects of conversation.<sup>23</sup>

(8.) **Character.** — (A.) **MORAL CHARACTER.** — The moral character of a testator is not a relevant question.<sup>24</sup>

(B.) **POSITIVENESS.** — Firmness and decisiveness of character or the reverse of these may be shown.<sup>25</sup>

(C.) **PRESSING UNJUST CLAIM.** — The continued assertion of a financial claim destitute of merit is an important matter.<sup>26</sup>

(9.) **Passions and Prejudices.** — The manifestation of passions and prejudices is not, of itself, evidence of insanity.<sup>27</sup>

ton v. Clifton, 47 N. J. Eq. 277, 241, 22 Atl. 333; Carroll v. Norton, 3 Bradf. Sur. (N. Y.) 291.

20. Cheney v. Price, 90 Hun 238, 37 N. Y. Supp. 117.

21. Williamson v. Nabers, 14 Ga. 285, 311; Prentiss v. Bates, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494; Townsend v. Bogart, 5 Redf. Sur. (N. Y.) 93.

**The Manner of Testator's Conversation** may be shown if it is alleged to have been disconnected. *In re Estate of Goldthorp*, 94 Iowa 336, 62 N. W. 845.

**An Attorney May Testify to the inability of his client to converse.** Daniel v. Daniel, 39 Pa. St. 191, 210.

**Evidence That Rational Answers Were Made to Simple Questions**, requests for nourishment, or brief remarks made on being suddenly aroused does not show a disposing mind. Christy v. Clarke, 45 Barb. (N. Y.) 529, 546; Daniel v. Daniel, 39 Pa. St. 191.

**Cause of Broken Conversation.** A witness whose opinion of testator's capacity was based on his breaking off in conversation and who has testified on cross-examination that a brother of the testator did the same thing, may be asked on redirect examination his opinion as to the brother's sanity. Nichols v. Wentz, 78 Conn. 429, 62 Atl. 610.

22. Holmberg v. Phillips (Iowa), 78 N. W. 66; Riley v. Sherwood, 144, Mo. 354, 365, 45 S. W. 1077.

23. Kinne v. Kinne, 9 Conn. 102; Succession of Jones, 120 La. 986, 45 So. 965.

24. Graham v. Deuterman, 217 Ill. 238, 75 N. E. 480; Wallace v. Whitman, 201 Ill. 59, 66 N. E. 311.

**Mere Moral Insanity**, that is disorder of the moral affections and propensities, will not, unless accompanied by insane delusion, invalidate a will. Frere v. Peacocke, 3 Curt. (Eng.) 664; Boardman v. Woodman, 47 N. H. 120, 136; *In re Jones' Will*, 5 Misc. 199, 25 N. Y. Supp. 109 (surrogate's court); *In re Fow's Estate*, 147 Pa. St. 264, 23 Atl. 447; Wickes v. Walden, 228 Ill. 56, 73, 81 N. E. 798.

**Miserly Disposition and Habits**, unclean modes of life, even to theft, profanity and violence of temper, of themselves do not affect testamentary capacity. Lewis' Case, 33 N. J. Eq. 219; *In re Halbert's Will*, 15 Misc. 308, 37 N. Y. Supp. 757; *In re Gorkow's Estate*, 20 Wash. 563, 56 Pac. 385.

**Dissoluteness or Profligacy** of the testator are irrelevant matters. Snell v. Weldon (Ill.), 87 N. E. 1022; Graham v. Deuterman, 217 Ill. 235, 75 N. E. 480.

25. Patten v. Cilley, 67 N. H. 520, 42 Atl. 47; *In re Metcalf's Will*, 16 Misc. 180, 38 N. Y. Supp. 1131; *In re Cline's Will*, 24 Or. 175, 33 Pac. 542; s. c., *sub nom.*, Bain v. Cline, 33 Pac. 542; Foster's Exrs. v. Dickerson, 64 Vt. 233, 249, 24 Atl. 253.

26. Holton v. Cochran, 208 Mo. 314, 421, 106 S. W. 1035.

27. Newton v. Carbery, 5 Cranch C. C. 626, 18 Fed. Cas. No. 10,189; Cash v. Lust, 142 Mo. 630, 44 S. W. 724; Coit v. Patchen, 77 N. Y. 533;

(10.) **Avariciousness.**—Unsoundness of mind is not shown by proof of avariciousness.<sup>28</sup>

(11.) **Handwriting.**—Peculiarities in handwriting may indicate old age rather than loss of mental power; and while proof of handwriting may be received, so may evidence accounting for its peculiarities.<sup>29</sup>

(12.) **Mistake.**—A misapprehension of facts does not show incapacity though the will is changed because of it.<sup>30</sup>

(13.) **Ignorance of Facts.**—Failure of a testator to fully inform himself respecting all the facts and circumstances by which he is surrounded is not a fatal matter.<sup>31</sup>

(14.) **Change of Testamentary Intention.**—Testator's change of intention as to the course his estate should take is not significant of itself,<sup>32</sup> especially in the absence of proof of a change of attitude toward collateral relatives affected thereby,<sup>33</sup> though numerous changes tend to show lack of business intelligence.<sup>34</sup> It is not conclusive as to the lack of capacity,<sup>35</sup> and if there has been a general consistency in intentions the fact is in favor of capability.<sup>36</sup> A revolutionary change may, in connection with proof of a progressive disease or other facts, be important.<sup>37</sup> But generally a motive for change may be shown, and it is immaterial that it rested on prejudice.<sup>38</sup>

(15.) **Change in Desire.**—Proof that regrets were expressed because a gift had been made does not bear on the question of the giver's capacity.<sup>39</sup>

(16.) **Failure To Perfect Gift.**—It is not relevant to show that tes-

*In re Morgan's Estate*, 219 Pa. St. 355, 68 Atl. 953 ("a man's prejudices are part of his liberty"); *Field v. Pickard*, 126 Wis. 229, 105 N. W. 796.

28. *Iverson v. Iverson*, 80 App. Div. 599, 80 N. Y. Supp. 1011; *Field v. Pickard*, 126 Wis. 229, 105 N. W. 796.

29. *In re Chandler's Will*, 102 Me. 72, 113, 66 Atl. 215.

30. *Martin v. Thayer*, 37 W. Va. 38, 48, 16 S. E. 489; *Couch v. Eastman*, 27 W. Va. 796, 805.

31. *Matter of Bethune*, 15 N. Y. St. 294.

32. *Turner v. Cheesman*, 15 N. J. Eq. 243, 255; *McLaughlin v. McDevitt*, 63 N. Y. 213; *Potter v. M'Alpine*, 3 Dem. (N. Y.) 108, 120; *In re Jones' Will*, 5 Misc. 199, 25 N. Y. Supp. 109; *Titlow v. Titlow*, 54 Pa. St. 216.

33. *Safe Dep. & Tr. Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

34. *In re Snelling*, 136 N. Y. 515, 32 N. E. 1006; *Cheney v. Price*, 90 Hun 238, 37 N. Y. Supp. 117.

35. *Cheney v. Price*, 90 Hun 238, 37 N. Y. Supp. 117.

36. *Newton v. Carbery*, 5 Cranch C. C. 626, 18 Fed. Cas. No. 10,189.

37. *In re Ellwanger's Will*, 114 N. Y. Supp. 727; *Yardley v. Cuthbertson*, 108 Pa. St. 395, 463.

**In Connection With Proof of Age**, habits of dissipation and personal injuries, an unexplained change of intention made within a short time may be cogent evidence of incapacity. *Edge v. Edge*, 38 N. J. Eq. 211.

38. *Morgan's Estate*, 219 Pa. St. 355, 68 Atl. 953.

39. *Fraser v. Jennison*, 42 Mich. 206, 223, 3 N. W. 882.

tator, many years previous to the will, made a gift of land to one of his children and failed to convey it.<sup>40</sup>

(17.) **Changed Condition.**—Marked changes in social and business habits, mind, and love and devotion for children or other near relatives are strong evidence of incompetency in the absence of proof of cause therefor.<sup>41</sup> But if cause exists for the change such evidence is not important.<sup>42</sup> It must be weighed in connection with proof of the age of the testator,<sup>43</sup> and of his physical condition.<sup>44</sup>

40. *James v. Sutton*, 36 Neb. 393, 54 N. W. 670.

41. *England*.—*Smith v. Teb-bitt*, L. R. 1 P. & D. 398, 430 (as much weight may be given the assigned reason for a severance of pleasant family relations as to the fact).

*Alabama*.—*Johnson v. Arm-strong*, 97 Ala. 731, 12 So. 72.

*California*.—*In re Carpenter*, 79 Cal. 382, 21 Pac. 835.

*Iowa*.—*Pelamourges v. Clark*, 9 Iowa 1; *Osborne v. Osborne*, 125 Iowa 296, 101 N. W. 83.

*Kentucky*.—*Sherley v. Sherley*, 81 Ky. 240; *Tudor v. Tudor*, 17 B. Mon. 395.

*Missouri*.—*Holton v. Cochran*, 208 Mo. 314, 418, 106 S. W. 1035; *Knapp v. St. Louis Tr. Co.*, 199 Mo. 640, 665, 98 S. W. 70.

*New York*.—*In re Loewenstine's Estate*, 2 Misc. 323, 21 N. Y. Supp. 931; *Miller v. White*, 5 Redf. Sur. 320.

*Texas*.—*Cockrill v. Cox*, 65 Tex. 669.

**Change of Habits.**—If testator has been insane at times previous to the making of his will, and though competent to do business, his habits indicate a complete revolution in his character, all those things tending to show the extent and nature of the change in him should be disclosed. *Bitner v. Bitner*, 65 Pa. St. 347, 361. See *In re Ely's Estate*, 16 Misc. 228, 39 N. Y. Supp. 177.

**Extent of Change.**—If the change of manner from cheerfulness and affability to moroseness and discourtesy was shown alike to intimate friends and ordinary acquaintances; if penuriousness and avarice had recently supplanted open-handed generosity; if great physical strength and courage had given way to excessive timidity and feebleness, and business

capacity and sagacity to folly and blundering in the management of business affairs, there would then be ample warrant for holding that the testator was incompetent. *Potter v. M'Alpine*, 3 Dem. Sur. (N. Y.) 108.

**Change in a Single Particular** is not significant. *Conner v. Skaggs*, 213 Mo. 334, 111 S. W. 1132; *Lef-fingwell v. Bettinghouse*, 151 Mich. 513, 115 N. W. 731 (increasing untidiness of aged person); *Wright's Estate*, 10 Pa. Dist. 133. Neglect to care for property as previously may be shown. *Hamilton v. Hamilton*, 10 R. I. 538.

**Relevant Facts.**—Sudden irritability, moroseness and unprovoked profanity, indicating a complete and radical change of disposition, may be shown in connection with other facts. *Conely v. McDonald*, 40 Mich. 150; *Sherley v. Sherley*, 81 Ky. 240. It may be shown that decedent abandoned his family and lived with an illegitimate daughter as his wife. *Johnson v. Armstrong*, 97 Ala. 731, 12 So. 72. Proof of a change of manner of living and associating with immoral women may be persuasive. *Bryant v. Pierce*, 95 Wis. 331, 70 N. W. 297. Compare *Weston v. Hanson*, 212 Mo. 248, 111 S. W. 44.

**Indecent Conduct.**—Indecency of language and gestures in a person well brought up and of a chaste life is a plain indication of mental disease. *Waring v. Waring*, 6 Moore P. C. 341, 362, 13 Eng. Reprint 715. 42. *Riley v. Sherwood*, 144 Mo. 354, 365, 45 S. W. 1077.

43. *In re Flansburgh's Will*, 82 Hun 49, 31 N. Y. Supp. 177; *In re Halbert's Will*, 15 Misc. 308, 37 N. Y. Supp. 757; *Wilson v. Mitchell*, 101 Pa. St. 495.

44. *In re Flansburgh's Will*, 82 Hun 49, 31 N. Y. Supp. 177.

A general statement by a witness as to testator's action or manner is competent.<sup>45</sup>

**Basis of Comparison.** — The testator's manner, talk and actions at the time in issue must be compared with his conduct at a time when he was concededly sane.<sup>46</sup>

(18.) **Vanity.** — Extraordinary vanity is a material circumstance.<sup>47</sup>

(19.) **Brutality.** — Brutal treatment by a testator of his wife, without cause, is not a test of capacity.<sup>48</sup>

(20.) **Suicide.** — The fact that testator committed suicide is relevant and in some cases raises a doubt of his sanity,<sup>49</sup> or, it has been said, removes all doubt as to the testator's previous condi-

45. *Parsons v. Parsons*, 66 Iowa 754, 21 N. W. 570, 24 N. W. 564.

46. *Dillman v. McDanel*, 222 Ill. 276, 290, 78 N. E. 591.

**A Broader Scope** is allowed in England. "No man knows aught of the condition of another's mind except by comparison with his own. And in instituting this comparison we recognize the general fact that all mankind are endowed with the same senses, moved by the like emotions, governed by the same restraints, and guided by the same faculties. All these vary in their force and action in different individuals, or the same individuals at different times. But they vary within certain limits, and certain limits only. It is when the words or deeds of others, referred to our own standard and that which by experience is found to be the common standard of the human race, appear to transgress those limits, that we suspect these common senses, emotions and faculties, which we know to exist to be the subjects of disorder or disease. If the divergence be very marked, and exhibit itself either on many subjects or with uniform constancy in the behavior of the individual we pronounce disease without hesitation. In proportion as the disease is either casual or trifling, or open to some other possible solution, the inquiry is difficult and the judgment hesitates. Here, then, I think, is the simple rule by which mankind in general pronounce upon mental disease." In addition to this basis is that employed by medical men—the comparison of the acts and sayings of the testator with those of the admittedly insane.

*Smith v. Tebbitt*, L. R. 1 P. & D. (Eng.) 398.

In *Boughton v. Knight*, L. R. 3 P. & D. (Eng.) 64, Sir J. Hannen instructed the jury thus: "You must not arbitrarily take your own mind as the measure of capacity in this sense, that you should say I do not believe such and such a thing, and therefore the man who does believe it is insane. Nay, more, you must not say, I should not have believed such and such a thing, therefore the man who did believe it is insane. But you must of necessity put to yourself this question and answer it. Can I understand how any man in possession of his senses could have believed such and such a thing? And if the answer you give is, I cannot understand it, then it is of the necessity of the case that you should say the man is not sane."

47. *Waring v. Waring*, 6 Moore P. C. 341, 363, 13 Eng. Reprint 715.

48. *Weston v. Hanson*, 212 Mo. 248, 266, 111 S. W. 44.

The purpose of inflicting cruel and inhuman punishment on others may be shown by proof of the state of the public mind in usual times. *Mullins v. Cottrell*, 41 Miss. 291, 323.

49. *Pyle v. Pyle*, 158 Ill. 289, 300, 41 N. E. 109; *Godden v. Burke*, 35 La. Ann. 160, 171 ("Suicide, it is true, is not as an inflexible rule, considered in itself as evidence of insanity, but it cannot be denied that in most cases it is committed in moments of mental aberration, and is an act which nothing can otherwise justify"); *Pettit v. Pettit*, 4 Humph. (Tenn.) 191; *Frary v. Gusha*, 59 Vt. 257, 9 Atl. 549; *Rath-*

tion.<sup>50</sup> But generally it is for the jury to find the effect of so doing.<sup>51</sup> Circumstances may tend to lessen the weight which evidence of suicide might otherwise carry.<sup>52</sup> They may also add to the weight afforded by that fact.<sup>53</sup> Attempts to commit suicide may be shown.<sup>54</sup>

**Love of Life.**—To meet the theory that the testator was afflicted with melancholia and in consequence committed suicide, his love of life may be shown and the efforts made to obtain restored health.<sup>55</sup>

**(21.) Business Transactions.**—(A.) **IMPORTANCE OF.**—Because the making of a will is essentially a business transaction the capacity of the testator to do business successfully is a relevant fact which has often been regarded as of the utmost significance where no question of delusion was raised.<sup>56</sup>

(B.) **BUSINESS CAPACITY NOT THE TEST.**—The capacity to transact ordinary business is not the test of testamentary capacity; it exceeds the standard. But proof of general business capacity is received because it gives rise to the presumption that capacity to

jens v. Merrill, 38 Wash. 442, 80 Pac. 754.

50. *In re Kahn's Will*, 5 N. Y. Supp. 556, 24 N. Y. St. 409 (in this case the suicide was preceded by the murder of testator's wife as to whom he is alleged to have entertained a delusion).

51. *England.*—Burrows v. Burrows, 1 Hagg. Ecc. 109; Chambers v. Queen's Proctor, 2 Curt. Ecc. 415. *Delaware.*—Duffield v. Morris, 2 Har. 375.

*Maryland.*—McElwee v. Ferguson, 43 Md. 479.

*Massachusetts.*—Brooks v. Barrett, 7 Pick. 94.

*Missouri.*—Holton v. Cochran, 208 Mo. 314, 425, 106 S. W. 1035.

*New Jersey.*—Koegel v. Egner, 54 N. J. Eq. 623, 35 Atl. 394.

*New York.*—*In re Card's Will*, 55 Hun 607, 8 N. Y. Supp. 297.

**Suicide Resulting From a Temporary Surrender of Reason** is not inconsistent with the exercise of usual discretion in business affairs (Brooks v. Barrett, 7 Pick. [Mass.] 94), and such surrender is in "its very nature transitory, and the proof of its existence by mere proof of an attempt at suicide or if the act of suicide itself by no means establishes its existence at an antecedent or subsequent period of time." Koegel v. Egner, 54 N. J. Eq. 623, 35 Atl. 394.

52. *In re Card's Will*, 55 Hun

607, 8 N. Y. Supp. 297 (old age, absence of resources for enjoyment, vexations, and no fear for the future).

53. *Burkhart v. Gladish*, 123 Ind. 337, 24 N. E. 118 (murder of wife because of a delusion as to her fidelity, followed by suicide).

54. *In re Round's Will*, 25 Misc. 101, 54 N. Y. Supp. 710.

55. *In re Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695.

56. *England.*—Smith v. Tebbitt, L. R. 1 P. & D. 398, 428.

*California.*—*In re Wilson's Estate*, 117 Cal. 262, 49 Pac. 172, 711.

*Michigan.*—Hibbard v. Baker, 141 Mich. 124, 104 N. W. 399.

*New Jersey.*—Garrison v. Garrison, 15 N. J. Eq. 266. The court said: "The very best evidence of a man's capacity to dispose of his property by will is the fact of the management and disposition of it in every other respect with prudence and judgment. It is difficult to conceive how it is possible for a man to have the sole control of his property, to buy and sell with judgment, and to dispose of the proceeds judiciously, and yet deny to him the capacity of saying how his property shall be disposed of when death deprives him of his personal control over it." See *Lewis' Case*, 33 N. J. Eq. 219, 232; *White v. Starr*, 47 N. J. Eq. 244, 257, 20 Atl. 875.



make a will existed.<sup>57</sup> In England the rule has been otherwise stated.<sup>58</sup>

*New York.*—*Sheldon v. Dow*, 1 Dem. 503; *In re Merriam's Will*, 16 N. Y. Supp. 738; *In re Halbert's Will*, 15 Misc. 308, 37 N. Y. Supp. 757.

*Oregon.*—*In re Cline's Will*, 24 Or. 175, 33 Pac. 542; *s. c.*, *sub nom.*, *Bain v. Cline*, 33 Pac. 542.

*Tennessee.*—*Gass v. Gass*, 3 Humph. 278.

*Wisconsin.*—*Field v. Pickard*, 126 Wis. 229, 105 N. W. 796.

57. *United States.*—*Harrison v. Rowan*, 3 Wash. C. C. 580, 11 Fed. Cas. No. 6,141; *Newton v. Carbery*, 5 Cranch C. C. 626, 18 Fed. Cas. No. 10,189.

*Connecticut.*—*Nichols v. Wentz*, 78 Conn. 429, 62 Atl. 610; *Kinne v. Kinne*, 9 Conn. 102.

*Georgia.*—*Potts v. House*, 6 Ga. 324, 357.

*Illinois.*—*Craig v. Southard*, 148 Ill. 37, 35 N. E. 361; *Ring v. Lawless*, 190 Ill. 520, 60 N. E. 881; *Waugh v. Moan*, 200 Ill. 298, 65 N. E. 713; *Johnson v. Farrell*, 215 Ill. 542, 74 N. E. 760; *England v. Fawbush*, 204 Ill. 384, 399, 68 N. E. 526. *Compare Meeker v. Meeker*, 75 Ill. 260; *Schneider v. Manning*, 121 Ill. 376, 12 N. E. 267.

*Kentucky.*—*Bramel v. Bramel*, 101 Ky. 64, 39 S. W. 520; *Wise v. Foote*, 81 Ky. 10; *Howard v. Coke*, 7 B. Mon. 655.

*Michigan.*—*Kempsey v. McGinness*, 21 Mich. 123; *Rice v. Rice*, 50 Mich. 448, 15 N. W. 545; *Prentiss v. Bates*, 88 Mich. 567, 50 N. W. 637; *Hoban v. Piquette*, 52 Mich. 346, 361, 17 N. W. 797.

*Missouri.*—*Jackson v. Hardin*, 83 Mo. 175; *Hamon v. Hamon*, 180 Mo. 685, 698, 79 S. W. 422; *Winn v. Grier*, 117 S. W. 48; *Brinkman v. Rueggessick*, 71 Mo. 553; *Couch v. Gentry*, 113 Mo. 248, 20 S. W. 890.

*New Jersey.*—*Bannister v. Jackson*, 45 N. J. Eq. 702, 17 Atl. 692.

*New York.*—*Stewart's Exr. v. Lisenard*, 26 Wend. 255; *Coit v. Patchen*, 77 N. Y. 533; *In re Bird-sall's Will*, 13 N. Y. Supp. 421 (surrogate's court); *Matter of Sea-*

*grist's Will*, 1 App. Div. 615, 37 N. Y. Supp. 496.

*Ohio.*—*West v. Knoppenberger*, 4 Ohio C. C. (N. S.) 305.

*Pennsylvania.*—*Vogelsong's Estate*, 196 Pa. St. 194, 46 Atl. 424; *Richmond's Estate*, 206 Pa. St. 219, 55 Atl. 970.

*Washington.*—*In re Gorkow's Estate*, 20 Wash. 563, 56 Pac. 385.

*West Virginia.*—*Stewart v. Lyons*, 54 W. Va. 665, 47 S. E. 442.

**Reason for Distinction.**—"The testator may not have sufficient strength of memory or vigor of intellect to carry on an extensive business, or even to make and digest all parts of a single contract, yet he may be competent to direct the distribution of his property by will, for this is a subject of which he may often have thought." *White v. Starr*, 47 N. J. Eq. 244, 258, 20 Atl. 875; *Perkins v. Perkins*, 116 Iowa 253, 90 N. W. 55; *In re Convey's Will*, 52 Iowa 197, 2 N. W. 1084; *Meeker v. Meeker*, 74 Iowa 352, 37 N. W. 773; *Howell v. Taylor*, 50 N. J. Eq. 428, 26 Atl. 566; *Bennett v. Bennett*, 50 N. J. Eq. 439, 26 Atl. 573; *Crowson v. Crowson*, 172 Mo. 691, 702, 72 S. W. 1065, and local cases cited.

**Willingness of Witness To Do Business With Testator.**—It is not material whether or not a witness would have done business with the testator. *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990.

58. *Burdette v. Thompson*, reported in a note to *Broughton v. Knight*, L. R. 3 P. & D. (Eng.) 64, 72. "From the character of the act it requires the consideration of a larger variety of circumstances than is required in other acts, for it involves reflection upon the claims of the several persons who by nature, or through other circumstances, may be supposed to have claims on the testator's bounty, and the power of considering these several claims and of determining in what proportion the property shall be divided amongst the claimants; and, therefore, whatever degrees there may be of soundness of mind the highest degree

(C.) PARTICULAR TRANSACTIONS.—Particular business transactions of the testator may be shown if entered into about the time the will was made, as may the circumstances connected with them in so far as they indicated his mental state,<sup>59</sup> as his character as a business man and the pecuniary standing of one to whom a power of

must be required for making a will." This view is approved in *Freeman v. Freeman*, 19 Ont. 141, 154.

**Test Not Uniformly Applied.** "The capacity to manage property is always a topic well worthy of consideration in inquiries like the present. But in most cases it implies the guidance and restraint involved in the control of expenditure to the bounds of an income more or less limited." If the income is too large relatively to the wants of the testator such a test is not to be applied. In such a case the question of judicious generosity may be gone into. *Smith v. Tebbitt*, L. R. 1 P. & D. (Eng.) 398, 428.

**59. Alabama.**—*Stubbs v. Houston*, 33 Ala. 555.

*California.*—*In re Wax's Estate*, 106 Cal. 343, 39 Pac. 624.

*Illinois.*—*Dillman v. McDanel*, 222 Ill. 276, 78 N. E. 591; *Craig v. Southard*, 148 Ill. 37, 35 N. E. 361; *Graham v. Deuterman*, 217 Ill. 235, 75 N. E. 480; *Snell v. Weldon*, 87 N. E. 1022.

*Indiana.*—*Staser v. Hogan*, 120 Ind. 207, 217, 21 N. E. 911, 22 N. E. 990 (all that was done may be shown, but an opinion as to how it was done is inadmissible).

*Iowa.*—*Sim v. Russell*, 90 Iowa 656, 57 N. W. 601.

*Massachusetts.*—*Woodward v. Sullivan*, 152 Mass. 470, 25 N. E. 837.

*Minnesota.*—*In re Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144.

*Montana.*—*In re Miller's Estate*, 97 Pac. 935.

*New Jersey.*—*Fluck v. Rea*, 51 N. J. Eq. 233, 27 Atl. 636; *White v. Starr*, 47 N. J. Eq. 244, 257, 20 Atl. 875; *In re Barber's Will* (N. J. Eq.), 49 Atl. 826; *Lee's Will*, 46 N. J. Eq. 193, 18 Atl. 525; *Garrison v. Garrison*, 15 N. J. Eq. 266, 279.

*New York.*—*Horn v. Pullman*, 72 N. Y. 269; *Dickie v. Van Vleck*, 5

Redf. Sur. 284; *Reynolds v. Root*, 62 Barb. 250; *In re Peck's Will*, 62 Hun 622, 17 N. Y. Supp. 248; *In re Berrien's Will*, 58 Hun 610, 12 N. Y. Supp. 585.

*Pennsylvania.*—*Shreiner v. Shreiner*, 178 Pa. St. 57, 35 Atl. 974; *Gatley's Estate*, 4 Pa. Dist. 52; *Napfle's Estate*, 134 Pa. St. 492, 19 Atl. 679.

*Vermont.*—*Titus v. Gage*, 70 Vt. 13, 39 Atl. 246.

*West Virginia.*—*Kerr v. Lunsford*, 31 W. Va. 659, 678, 8 S. E. 493; *Ward v. Brown*, 53 W. Va. 227, 264, 44 S. E. 488; *Stewart v. Lyons*, 54 W. Va. 665, 47 S. E. 442.

*Wisconsin.*—*Loughney v. Loughney*, 87 Wis. 92, 58 N. W. 250 (securing written evidence of indebtedness from draughtsman of will at time of its execution).

**Evidence of Fickleness and Caprice** in connection with a single business matter does not carry conviction. *Jackson v. Hardin*, 83 Mo. 175.

**Service as Juror.**—Decedent's service as a juror during the time he is said to have been afflicted may be shown; it is not, however, conclusive as to his mental state. *In re Knox's Will*, 123 Iowa 24, 98 N. W. 468.

**Witness.**—Acts and conduct of testator as a witness may be shown. *Gurley v. Park*, 135 Ind. 440, 35 N. E. 279; *In re Halbert's Will*, 15 Misc. 308, 37 N. Y. Supp. 757; *In re Draper's Estate*, 215 Pa. St. 314, 64 Atl. 520. They may be convincing as to his capacity. *In re Case* (Conn.), 52 Atl. 403.

Testimony given by testator may be received to meet testimony showing that he was incoherent in his statements; and, if properly authenticated, might be competent as evidence in chief. *Kerr v. Lunsford*, 31 W. Va. 659, 677, 8 S. E. 493.

**Testator's Testimony Before Grand Jury** is excluded by statute, *Pin-*

attorney was given;<sup>60</sup> and so of the persons appointed executors.<sup>61</sup> The transaction of business with contestant may be shown.<sup>62</sup>

**Discharge of Public Duties.**—Testimony showing that testator held public office after the will was made should be accompanied by proof of the manner in which he performed his duties.<sup>63</sup> The proper discharge of public duties of a non-official nature may be shown.<sup>64</sup>

(D.) **EXTENT OF BUSINESS TRANSACTIONS.**—The extent to which the testator conducted business may be shown.<sup>65</sup>

(E.) **SUCCESS IN BUSINESS.**—Especial significance attaches to evidence showing that success attended the business conducted by the testator,<sup>66</sup> or that his transactions were unbusinesslike if previous business ability was possessed by him.<sup>67</sup>

(F.) **ASSISTANCE.**—It may be shown to what extent the testator

ney's Will, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144.

60. *Frery v. Gusha*, 59 Vt. 257, 9 Atl. 549.

61. *Prather v. McClelland*, 76 Tex. 574, 587, 13 S. W. 543.

**The General Reputation of the Executor** may be shown as a circumstance reflecting upon the testator's capacity. The latter's knowledge of such reputation may be shown by indirect evidence. *McGinnis v. Kempsey*, 27 Mich. 363.

**The Wealth of the Executor** is irrelevant. *Murphree v. Senn*, 107 Ala. 424, 18 So. 264.

62. *Bradley v. Palmer*, 193 Ill. 15, 85, 61 N. E. 856; *Sim v. Russell*, 90 Iowa 656, 57 N. W. 601; *Bonnemort v. Gill*, 165 Mass. 493, 43 N. E. 299.

63. *Ray v. Ray*, 98 N. C. 566, 4 S. E. 526.

64. *Wait v. Westfall*, 161 Ind. 648, 68 N. E. 271.

65. *California*.—*Estate of Dole*, 147 Cal. 188, 81 Pac. 534.

*Illinois*.—*Wilcoxon v. Wilcoxon*, 165 Ill. 454, 46 N. E. 369; *Trubey v. Richardson*, 224 Ill. 136, 79 N. E. 592; *Owen v. Crumbaugh*, 228 Ill. 380, 81 N. E. 1044, 119 Am. St. Rep. 442; *Snell v. Weldon*, 87 N. E. 1022.

*Iowa*.—*Hanrahan v. O'Toole*, 117 N. W. 675.

*Kentucky*.—*Bush v. Lisle*, 89 Ky. 393, 12 S. W. 762.

*Michigan*.—*Hoban v. Piquette*, 52 Mich. 346, 360, 17 N. W. 797.

*Missouri*.—*Wood v. Carpenter*, 166 Mo. 465, 66 S. W. 172; *McFadin v. Catron*, 120 Mo. 252, 267, 25 S. W. 506; *Sayre v. Trustees*, 192 Mo. 95, 123, 90 S. W. 787; *Archambault*

*v. Blanchard*, 198 Mo. 384, 426, 95 S. W. 834; *Winn v. Grier*, 117 S. W. 48.

*New Jersey*.—*VanRiper v. VanRiper* (N. J. Eq.), 59 Atl. 244.

*New York*.—*Thompson v. Thompson*, 21 Barb. 107; *Thompson v. Quimby*, 2 Bradf. Sur. 449; *LaBau v. Vanderbilt*, 3 Redf. Sur. 384, 436; *Shaw's Will*, 2 Redf. 107, 135; *Brown v. Torrey*, 24 Barb. 583.

*Ohio*.—*General Convention v. Crocker*, 7 Ohio C. C. 327.

*Pennsylvania*.—*In re Cox's Estate*, 167 Pa. St. 501, 31 Atl. 747.

**Transaction of Minor Matters** of a routine nature is not of controlling importance. *Hess v. Killebrew*, 209 Ill. 193, 70 N. E. 675.

66. *United States*.—*Turner v. Hand*, 3 Wall Jr. 88, 24 Fed. Cas. No. 14,257.

*Delaware*.—*Truitt v. Cullen*, 3 Penne. 311, 50 Atl. 174.

*Illinois*.—*American Bible Soc. v. Price*, 115 Ill. 623, 642, 5 N. E. 126.

*Indiana*.—*Wait v. Westfall*, 161 Ind. 648, 68 N. E. 271.

*Michigan*.—*Hibbard v. Baker*, 141 Mich. 124, 104 N. W. 399.

*Missouri*.—*Fulbright v. Perry County*, 145 Mo. 432, 46 S. W. 955; *Wood v. Carpenter*, 166 Mo. 465, 487, 66 S. W. 172; *Weston v. Hanson*, 212 Mo. 248, 268, 111 S. W. 44.

*New York*.—*In re Skaats' Will*, 74 Hun 462, 26 N. Y. Supp. 494; *Lavin v. Thomas*, 123 App. Div. 113, 108 N. Y. Supp. 112.

*Tennessee*.—*Gass v. Gass*, 3 Humph. 278.

67. *Dillman v. McDanel*, 222 Ill.

was aided by others in doing business,<sup>68</sup> and the reason assistance was rendered.<sup>69</sup>

(G.) **DECREASE OF ESTATE.** — Proof that testator's estate has diminished in value is not evidence of his incapacity.<sup>70</sup>

(H.) **INDIFFERENCE TO BUSINESS MATTERS.** — Failure of a very aged person to give the same attention to routine business matters brought to his attention as formerly is not significant.<sup>71</sup>

(I.) **BUSINESS CAPACITY.** — Dullness concerning business matters in an illiterate person does not necessarily indicate testamentary incapacity.<sup>72</sup>

(J.) **ERROR IN VALUATION OF PROPERTY.** — It is competent to show that testator overvalued the property devised; the circumstance is of but slight evidentiary value,<sup>73</sup> at least it is not conclusive against the possession of capacity.<sup>74</sup>

(K.) **WRITINGS.** — All kinds of writings executed by the testator or prepared under his direction are admissible on the issue of competency, but not to prove the facts recited in them.<sup>75</sup> Besides

276, 78 N. E. 591; *McReynolds v. Smith* (Ind.), 86 N. E. 1009.

**Sale of Property.** — If it is claimed that property was sold at less than its value testimony may be received to show what it was worth. *Kerr v. Lunsford*, 31 W. Va. 659, 675, 8 S. E. 493.

**Remote Facts** may be proved to show lack of business capacity and knowledge of the extent of the estate. *Manatt v. Scott*, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293.

68. *Smith v. Tebbitt*, L. R. 1 P. & D. (Eng.) 398, 435; *Ring v. Lawless*, 190 Ill. 520, 60 N. E. 881; *Bower v. Bower*, 142 Ind. 194, 41 N. E. 523; *Manatt v. Scott*, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293; *Arnold v. Arnold* (Ky. L. Rep.), 17 S. W. 203; *Williams v. Lee*, 47 Md. 321; *Holton v. Cochran*, 208 Mo. 314, 415, 106 S. W. 1035.

69. *Graham v. Deuterman*, 206 Ill. 378, 69 N. E. 237; *In re Stufflebeam's Will*, 135 Iowa 338, 112 N. W. 815.

70. *Hall v. Hall*, 17 Pick. (Mass.) 373.

71. *In re Brower's Will*, 112 App. Div. 370, 98 N. Y. Supp. 438.

72. *Matter of Gross*, 14 N. Y. St. 429, affirming 7 N. Y. St. 739.

73. *Stokes v. Shippen*, 13 Bush (Ky.) 180.

74. *Hall v. Perry*, 87 Me. 569, 33 Atl. 160.

**Undervaluation of Estate.** — The failure to appreciate the value of devised property as affected by recently changed conditions is not significant. *Collins v. Osborn*, 34 N. J. Eq. 511.

75. *England.* — *Waring v. Waring*, 6 Moore P. C. 341, 367, 13 Eng. Reprint 715.

*Alabama.* — *Stubbs v. Houston*, 33 Ala. 555; *Bulger v. Ross*, 98 Ala. 267, 12 So. 803 (letters).

*California.* — *Huyck v. Rennie*, 151 Cal. 411, 90 Pac. 929.

*Connecticut.* — *Barber's Appeal*, 63 Conn. 393, 412, 27 Atl. 973, 22 L. R. A. 10 (diaries).

*Illinois.* — *Scott v. Scott*, 212 Ill. 597, 72 N. E. 708 (business letters); *Snell v. Weldon*, 87 N. E. 1022; *Reynolds v. Adams*, 90 Ill. 134, 146; *Wilcoxon v. Wilcoxon*, 165 Ill. 454, 46 N. E. 369.

*Iowa.* — *Bates v. Bates*, 27 Iowa 110.

*Kentucky.* — *Morris v. Morton*, 14 Ky. L. Rep. 360, 20 S. W. 287.

*Louisiana.* — *Succession of Jones*, 120 La. 986, 45 So. 965 (social letters).

*Massachusetts.* — *Jenkins v. Weston*, 200 Mass. 488, 86 N. E. 955.

*Minnesota.* — *Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144.

showing the condition of his mind they are competent to show his attitude toward the objects of his bounty. It is immaterial whether they were written before or after the execution of the will if they serve to show his mental state at that time.<sup>76</sup> Papers prepared by the testator may be potent proof of capacity or incapacity.<sup>77</sup>

(a.) *Accounts Kept by Testator.*—Books of account in testator's handwriting are competent to show business capacity or the lack of it.<sup>78</sup>

(b.) *Accounts Rendered by Agent.*—The accounts rendered a testator during a long series of years, prior and subsequent to the will, by the person who was in charge of his estate are admissible to show the careful and intelligent attention given by him to business details. They should be read to the jury instead of being put in evidence unread, and this regardless of their correctness.<sup>79</sup>

*New Jersey.*—*White v. Starr*, 47 N. J. Eq. 244, 257, 20 Atl. 875.

*New York.*—*Carroll v. Norton*, 3 Bradf. Sur. 291; *In re Ogden's Will*, 2 N. Y. Supp. 345; *In re Iredale's Will*, 53 App. Div. 45, 65 N. Y. Supp. 533 (memorandum of property owned by testator); *Scott v. Barker* (App. Div.), 113 N. Y. Supp. 695. See *In re Skaats' Will*, 74 Hun 462, 26 N. Y. Supp. 494.

*Oregon.*—*Chrisman v. Chrisman*, 16 Or. 127, 145, 18 Pac. 6.

*Pennsylvania.*—*In re Draper's Estate*, 215 Pa. St. 314, 64 Atl. 520.

*Vermont.*—*Foster's Exrs. v. Dickerson*, 64 Vt. 233, 251, 24 Atl. 253 (letters).

*Wisconsin.*—*In re Blakely's Will*, 48 Wis. 294, 4 N. W. 337 (letters).

**Inaccuracies in Calculation.**—If a paper has been received to prove that testator made inaccuracies in a computation, another paper in his handwriting is admissible to show a correct computation. *Berry v. Safe Deposit Co.*, 96 Md. 45, 64, 53 Atl. 720.

**A Contract to Which Testator Was a Party**, checks, letters, receipts and other documents, wholly or partially in his handwriting; his bank accounts and amendments to a city charter in his handwriting are competent if prepared within a period sufficiently connected with the testamentary act to illustrate its character and the state of his mind when he performed that act. *Wise v. Foote*, 81 Ky. 10.

A bond executed by testator is inadmissible unless he read it or heard it read. *Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144.

**Unauthenticated Papers.**—An unsigned and undated letter, found among decedent's papers and purporting to be addressed to her executor, is not admissible. *Murphree v. Senn*, 107 Ala. 424, 18 So. 264.

**A Petition Prepared by the Attorney of the Testator** and which was read to the latter, is admissible as part of the *res gestae* and to meet the attorney's opinion that testator was insane when it was prepared. *Foster's Exrs. v. Dickerson*, 64 Vt. 233, 248, 24 Atl. 253.

<sup>76.</sup> *Bradley v. Palmer*, 193 Ill. 15, 85, 61 N. E. 856; *Marx v. McGlynn*, 88 N. Y. 357, 374.

<sup>77.</sup> *Williams v. Lee*, 47 Md. 321.

**Bank Checks Drawn After the Will Was Made**, in connection with its provisions, have been regarded as authoritative proofs of "sanity which cannot be overcome by a thousand vague recollections of witnesses to testator's eccentric behavior." *Wright's Estate*, 202 Pa. St. 395, 51 Atl. 1031.

<sup>78.</sup> *Smith v. Tebbitt*, L. R. 1 P. & D. (Eng.) 398, 427; *White v. Starr*, 47 N. J. Eq. 244, 257, 20 Atl. 875; *Dickie v. VanVleck*, 5 Redf. Sur. (N. Y.) 284; *Irish v. Smith*, 8 Serg. & R. (Pa.) 573.

<sup>79.</sup> *Bright's Appeal*, 49 Conn. 456.

(c.) *Instruments Received*.—It has been held that writings received by the testator are competent if he has acted upon them.<sup>80</sup> It must be shown that he has done so in person.<sup>81</sup>

(L.) *TIME OF TRANSACTIONS*.—Special significance may attach to business transactions contemporaneous with the will or during the period incompetency is alleged to have existed,<sup>82</sup> or subsequent thereto,<sup>83</sup> or to the execution of the will,<sup>84</sup> especially when the in-

80. *Stubbs v. Houston*, 33 Ala. 555.

*Letters Received by Testator* and found among his papers, with pencil memoranda in his handwriting showing their dates, are admissible without other proof of authenticity or that they were received in the usual course of business, the only purpose of receiving them being to show his capacity in connection with his replies thereto. They should be read to the jury. *Barber's Appeal*, 63 Conn. 393, 414, 27 Atl. 973, 22 L. R. A. 10.

81. *Wright v. Tatham*, 5 Cl. & F. (Eng.) 670 (the question was fully discussed in the above case and the conclusion reached that letters addressed to the testator by his acquaintances which recognized him as an intelligent person were not admissible on its being long after found that they had been in his possession, without proof that he had acted upon them); *Crumbaugh v. Owen*, 238 Ill. 497, 87 N. E. 312.

82. *England*.—*Aitken v. McMeckan*, L. R. (1895) App. Cas. 310. *United States*.—*Newton v. Carbery*, 5 Cranch C. C. 626, 18 Fed. Cas. No. 10,189.

*Illinois*.—*Brownfield v. Brownfield*, 43 Ill. 147; *Johnson v. Farrell*, 215 Ill. 542, 74 N. E. 760; *Schmidt v. Schmidt*, 201 Ill. 191, 66 N. E. 371; *Graham v. Deuterma*, 217 Ill. 235, 75 N. E. 480.

*Kentucky*.—*Morris v. Morton*, 14 Ky. L. Rep. 360, 20 S. W. 287.

*Maryland*.—*Berry v. Safe Deposit Co.*, 96 Md. 45, 53 Atl. 720; *Home of the Aged v. Bantz*, 69 Atl. 376.

*Michigan*.—*Peninsular Tr. Co. v. Barker*, 116 Mich. 333, 74 N. W. 508.

*Missouri*.—*Couch v. Gentry*, 113 Mo. 248, 20 S. W. 890; *Sayre v. Trustees*, 192 Mo. 95, 129, 90 S. W. 787; *Riley v. Sherman*, 144 Mo. 354, 364, 45 S. W. 1077; *Cash v.*

*Lust*, 142 Mo. 630, 640, 44 S. W. 724; *Catholic University v. O'Brien*, 181 Mo. 68, 93, 79 S. W. 901.

*Nebraska*.—*In re Owen's Estate*, 73 Neb. 840, 103 N. W. 675.

*New Jersey*.—*In re Wheaton's Will*, 68 N. J. Eq. 562, 59 Atl. 886; *Lee's Case*, 46 N. J. Eq. 193, 18 Atl. 525.

*New York*.—*Potter v. McAlpine*, 3 Dem. 108; *In re Birdsall's Will*, 13 N. Y. Supp. 421 (surrogate's court); *In re Peck's Will*, 62 Hun 622, 17 N. Y. Supp. 248; *In re Soule's Will*, 3 N. Y. Supp. 259, 19 N. Y. St. 532 (surrogate's court); *affirmed*, 11 N. Y. Supp. 949, 32 N. Y. St. 1136 (no opinion); *In re Gray's Will*, 52 Hun 614, 5 N. Y. Supp. 464; *In re Allison's Estate*, 58 Hun 608, 12 N. Y. Supp. 324, 124 N. Y. 665, 27 N. E. 855 (no opinion); *In re Skaats' Will*, 74 Hun 462, 26 N. Y. Supp. 494; *In re Ogden's Will*, 2 N. Y. Supp. 345; *In re Richardson's Will*, 51 App. Div. 637, 64 N. Y. Supp. 944; *In re Woolsey's Will*, 17 Misc. 547, 41 N. Y. Supp. 263; *In re Dwyer's Will*, 29 Misc. 382, 61 N. Y. Supp. 903; *Heyzer v. Morris*, 110 App. Div. 313, 97 N. Y. Supp. 131; *In re Wendel's Will*, 43 Misc. 571, 89 N. Y. Supp. 543; *Scott v. Barker* (App. Div.), 113 N. Y. Supp. 695.

*Pennsylvania*.—*Cameron's Estate*, 14 Pa. Co. Ct. 247; *Gateley's Estate*, 4 Pa. Dist. 52; *Stevenson v. Kingsley*, 8 Pa. Dist. 245; *Wright's Estate*, 202 Pa. St. 395, 51 Atl. 1031.

83. *Crumbaugh v. Owen*, 238 Ill. 497, 87 N. E. 312; *Ducasse's Heirs v. Ducasse*, 120 La. 731, 45 So. 565; *Boylan v. Meeker*, 28 N. J. L. 274; *Shreiner v. Shreiner*, 178 Pa. St. 57, 35 Atl. 974; *In re Blakely's Will*, 48 Wis. 294, 4 N. W. 337.

84. *In re Draper's Estate*, 215 Pa. St. 314, 64 Atl. 520.

capacity asserted is because of the gradual decay of testator's faculties from age.<sup>85</sup>

(M.) **WEIGHT OF EVIDENCE.** — Proof of success in business is more persuasive of the possession of mentality than the opinions of witnesses.<sup>86</sup> It outweighs evidence showing that testator entertained peculiar opinions,<sup>87</sup> or exhibited marked eccentricities of conduct.<sup>88</sup>

(N.) **TESTATOR MUST HAVE BEEN A PARTY.** — Transactions to which testator was not a party are immaterial, and so of evidence of a transaction entered into to avoid litigation.<sup>89</sup>

**3. Testamentary Acts.** — A. **FORMER WILL.** — a. *Different Disposition of Estate.* — A former will made by the testator when concededly competent and which disposed of his property differently from the will in issue is generally held to be admissible.<sup>90</sup>

**Effect of Variance.** — A substantial variance in the terms of a former will from that in issue only affects the weight to be given it as proof of the testator's intention.<sup>91</sup> The weight to which it is entitled may be increased by the circumstances.<sup>92</sup> Changes in the

**85.** *Entwistle v. Meikle*, 180 Ill. 9, 22, 54 N. E. 217; *Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144. The court observed: "It must be clear that, upon the issue as to the testator's capacity to do business, evidence of his business acts at or about the time in question, and of his declarations, oral or written, tending to show his comprehension or non-comprehension of daily occurrences in his business, or relating to his business, would more satisfactorily show the condition and quality of his mental faculties than the opinions of witnesses."

**86.** *Graham v. Deuterman*, 217 Ill. 235, 75 N. E. 480; *Bush v. Lisle*, 89 Ky. 393, 12 S. W. 762; *Chrisman v. Chrisman*, 16 Or. 127, 144, 18 Pac. 6; *Ward v. Brown*, 53 W. Va. 227, 264, 44 S. E. 488; *Mueller v. Pew*, 127 Wis. 288, 106 N. W. 840.

**87.** *Thompson v. Thompson*, 21 Barb. (N. Y.) 107.

**88.** *Wait v. Westfall*, 161 Ind. 648, 68 N. E. 271; *Iverson v. Iverson*, 80 App. Div. 599, 80 N. Y. Supp. 1011.

**89.** *Pooler v. Cristman*, 145 Ill. 405, 34 N. E. 57.

**90.** *Alabama.* — *Hughes v. Hughes*, 31 Ala. 519, overruling *Roberts v. Trawick*, 13 Ala. 68; *Seale v. Chambliss*, 35 Ala. 19.

*Michigan.* — *Beaubien v. Cicotte*, 12 Mich. 459, 488 ("it is true, of course, that making one will does

not, of itself, render it at all unlikely that another will may be substituted; but previous preferences and plans may have a plain bearing upon an issue where the question arises whether the testator has understandingly and of his own free will changed his settled views.").

*New York.* — *Shaw's Will*, 2 Redf. Sur. 107, 130; *Matter of White's Will*, 121 N. Y. 406, 24 N. E. 935, affirming 52 Hun 613, 5 N. Y. Supp. 295.

*Pennsylvania.* — *Titlow v. Titlow*, 54 Pa. St. 216; *Heister v. Lynch*, 1 Yeates 108; *Starrett v. Douglass*, 2 Yeates 46; *Irish v. Smith*, 8 Serg. & R. 573; *Norris v. Shepard*, 20 Pa. St. 475.

*Contra*, *Roe v. Taylor*, 45 Ill. 485; *Rankin v. Rankin*, 61 Mo. 295 (will made five years prior to the one in issue).

**91.** *Thornton v. Thornton*, 39 Vt. 122, 159.

**92.** **Special Consideration** may be given former wills substantially like the one in question except that they discriminated more largely against the contestant because the latter is thereby shown to express the long entertained purpose of the decedent, formed when fully competent. *La-Bau v. Vanderbilt*, 3 Redf. Sur. (N. Y.) 384, 437; *Barlow v. Waters*, 16 Ky. L. Rep. 426, 28 S. W. 785. The principle is applied in *In re Rock-*

beneficiaries in different wills do not evidence incapacity,<sup>93</sup> unless the later will, contrary to the previous one, diverts the estate from its natural course. In that case it may be very strong evidence of incompetency.<sup>94</sup>

b. *Similar Disposition*.—A former will which disposes of the estate in approximately the same manner as the will in issue is also admissible,<sup>95</sup> though not admitted to probate if proved by the testimony of the attesting witnesses,<sup>96</sup> and it was made while the testator was insane.<sup>97</sup> On this question the authorities are not agreed.<sup>98</sup>

**Evidentiary Value.**—A former will similar to the one in issue is the strongest kind of evidence to show soundness of mind at the time the contested will was made. It is stronger than the declarations and statements of a testator made about the time it was executed.<sup>99</sup>

c. *Part of the Res Gestae*.—A former will, read and explained to the testator in connection with the execution of a later will, is admissible as part of the *res gestae*.<sup>1</sup>

d. *Canceled Will*.—A canceled will, made when testator was sane, is admissible.<sup>2</sup>

hill's Estate, 208 Pa. St. 510, 57 Atl. 989.

93. *In re Wilson's Estate*, 117 Cal. 262, 49 Pac. 172, 711.

94. *Shaw's Will*, 2 Redf. Sur. (N. Y.) 107, 130.

95. *Newton v. Carberry*, 5 Cranch C. C. 626, 18 Fed. Cas. No. 10,189 ("the fact that she altered her will several times is not, of itself, evidence of insanity; on the contrary, the consistency of the several wills with each other, as to the general plan of disposition of her property, shows that the subject occupied much of her thoughts for many years, and that her mind was in a sound, disposing state"); *Kaenders v. Montague*, 180 Ill. 300, 54 N. E. 321; *Freund v. Becker*, 235 Ill. 513, 85 N. E. 610; *Nieman v. Schnitker*, 181 Ill. 400, 55 N. E. 151; *Dillman v. McDanel*, 222 Ill. 276, 286, 78 N. E. 591; *Perkins v. Perkins*, 116 Iowa 253, 90 N. W. 55; *Kerr v. Lunsford*, 31 W. Va. 659, 678, 8 S. E. 493.

**Circumstances Affect Admissibility.**—The admissibility of such evidence depends largely upon other testimony. The mere fact that the testator had caused a previous will, of the same or like import, to be prepared could not of itself throw any light upon the state of mind at the time the last will was made if it was

prepared by direction of another person. *Brown v. Mitchell*, 87 Tex. 140, 26 S. W. 1059.

96. *Tobin v. Jenkins*, 29 Ark. 151.

97. **Purpose for Which Admissible.**—"The will made while he was insane and his conversation in regard to it would, with other evidence, tend to rebut the presumption of sanity arising from the form or character of the will offered for probate, if any such presumption could be exercised or should be claimed. The two papers differ but little in form, and exhibit equal intelligence and capacity. . . . The conclusion would be justified that if, while unquestionably insane, the decedent executed intelligently a will, it cannot be claimed from the fact that the will offered for probate appears to be the work of a rational mind that he was sane when he executed it." *Ross v. McQuiston*, 45 Iowa 145.

98. *Dillman v. McDanel*, 222 Ill. 276, 78 N. E. 591.

99. *Nieman v. Schnitker*, 181 Ill. 400, 55 N. E. 151. See *Hagan v. Sone*, 68 App. Div. 60, 74 N. Y. Supp. 109.

1. *Vall v. Hall*, 17 Pick. (Mass.) 373.

2. *Irish v. Smith*, 8 Serg. & R.



e. *Need Not Be Executed.*—It is immaterial whether former wills were executed or unexecuted if they were drawn under the instructions of the testator.<sup>3</sup> Their unlikeness affects only the weight to be given them, and the length of time they remained unexecuted is not convincing that they did not represent the testator's intention.<sup>4</sup>

f. *Minutes.*—Minutes for a will are also admissible.<sup>5</sup>

g. *Contents of Former Will.*—If the necessary search has been unsuccessfully made for an earlier will, whether it was formally executed or not, its contents may be proved,<sup>6</sup> as may the contents of a destroyed will.<sup>7</sup>

B. THE WILL IN ISSUE. — a. *Admissibility.*—The will itself is clearly admissible,<sup>8</sup> though not admitted to probate,<sup>9</sup> and notwithstanding there may be a later will.<sup>10</sup>

b. *Necessity.*—If the disposition made of the estate is relied on to show incapacity the will may be an essential item of evidence,<sup>11</sup> or at least an important one.<sup>12</sup>

c. *Endorsements on Will.*—An endorsement on a will showing that it has been proved and admitted to probate is improperly received in evidence in a case which is close on the facts.<sup>13</sup>

(Pa.) 573. The court observed: It was proper for the jury to be informed what had been testator's intentions when his understanding was unquestionable. If he afterwards made a different disposition when weakened by disease, without some reason to be shown by the defendant, it was a circumstance which, combined with others, might not be unworthy of attention. It might not be of much weight, and it admitted of explanation; but it certainly went for something.

3. *Thompson v. Ish*, 99 Mo. 160, 182, 12 S. W. 510, 17 Am. St. Rep. 552; *Armstrong v. Armstrong*, 69 N. J. Eq. 817, 66 Atl. 399; *Love v. Johnston*, 34 N. C. (12 Ired. L.) 355; *Thornton's Exr. v. Thornton's Heirs*, 39 Vt. 122, 158.

4. *Thornton v. Thornton*, 39 Vt. 122, 158; *Kerr v. Lunsford*, 31 W. Va. 659, 678, 8 S. E. 493.

5. *Love v. Johnston*, 34 N. C. (12 Ired. L.) 355.

6. *McConnell v. Wildes*, 153 Mass. 487, 26 N. E. 1114.

7. *Hagan v. Sone*, 68 App. Div. 60, 74 N. Y. Supp. 109.

8. *McDaniel v. Crosby*, 19 Ark. 533, 546; *Crandall's Appeal*, 63 Conn. 365, 28 Atl. 531; *Duffield v. Morris*, 2 Har. (Del.) 375; *In re Harvey's*

*Will* (Iowa), 94 N. W. 559; *Whitman v. Morey*, 63 N. H. 448, 2 Atl. 899; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220.

• *An Original Probated Will* is admissible although a statute makes the copy of the record of it admissible. *Brack v. Boyd*, 202 Ill. 440, 66 N. E. 1073.

9. *Crenshaw v. Johnson*, 120 N. C. 270, 26 S. E. 810.

10. *Floore v. Green*, 26 Ky. L. Rep. 1073, 83 S. W. 133 (it is at least competent to show that testator had contemplated the distribution of property in accordance with the later will); *Sewall v. Robbins*, 139 Mass. 164, 29 N. E. 650.

11. *Townshend v. Townshend*, 7 Gill (Md.) 10; *McFadin v. Catron*, 120 Mo. 252, 629, 120 S. W. 506; *Moore v. Caldwell*, 6 Ohio C. C. (N. S.) 484 (the will itself now, as in Hamlet's time, is to a great extent "the thing"); *Kaufman v. Caughman*, 49 S. C. 159, 27 S. E. 16; *Wisener v. Maupin*, 2 Baxt. (Tenn.) 342.

12. *In re Kiedaish's Will*, 13 N. Y. Supp. 255.

13. *Weston v. Teufel*, 213 Ill. 291, 72 N. E. 908; *Craig v. Southard*, 148 Ill. 37, 35 N. E. 361.

d. *Construction of Will.* — The court may construe the will to aid the jury in determining whether it was the product of a rational mind; but must not explain the weight to be given it as construed in determining that issue.<sup>14</sup>

e. *Calling Subscribing Witnesses.* — All the available subscribing witnesses should be called as witnesses before the will is read; but the order in which they may be called is not material.<sup>15</sup> Disagreement in their testimony is not cause for excluding the will.<sup>16</sup> Error in permitting a will to be read without calling a particular witness is cured by calling him afterwards.<sup>17</sup> Where the presumption of capacity is indulged proof of the handwriting of the witnesses is sufficient in case of their death, absence or incapacity.<sup>18</sup>

f. *Inspection.* — The will may be submitted to the closest scrutiny of every individual juror.<sup>19</sup>

g. *Instructions for Drawing.* — The memorandum from which the will was drawn, if written or dictated by the testator, is admissible,<sup>20</sup> though they may not be alike in all particulars.<sup>21</sup>

h. *Manner of Execution.* — The manner in which it was written and executed is material.<sup>22</sup>

i. *The Signature.* — The manner in which the name of the testator was spelled may be significant.<sup>23</sup> The signature may be evidence of the condition of the body and mind of the testator,<sup>24</sup> and be very important if it is alleged to have been made when the testator was afflicted with delirium tremens.<sup>25</sup> It may be com-

14. *In re Blood's Will*, 62 Vt. 359, 19 Atl. 770.

15. *Lamb v. Lippincott*, 115 Mich. 611, 73 N. W. 887; *Whitman v. Morey*, 63 N. H. 448, 2 Atl. 899.

16. *Kaufman v. Caughman*, 49 S. C. 159, 27 S. E. 16.

17. *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 882.

18. *Thompson v. Kyner*, 65 Pa. St. 368.

19. *Moore v. McDonald*, 68 Md. 321, 333, 12 Atl. 117.

By Consent of Both Parties the court may allow the will to be taken to the jury room; but not as a matter of right. *Moore v. McDonald*, 68 Md. 321, 333, 12 Atl. 117.

20. *Floore v. Green*, 26 Ky. L. Rep. 1073, 83 S. W. 133; *Kinne v. Johnson*, 60 Barb. (N. Y.) 69 (and has been given weight).

21. *Armstrong v. Armstrong*, 69 N. J. Eq. 817, 66 Atl. 399.

22. *Taylor v. McClintock* (Ark.), 112 S. W. 405; *Tobin v. Jenkins*, 29 Ark. 151; *Davis v. Culvert*, 5 Gill & J. (Md.) 269, 301; *McMechen v. McMechen*, 17 W. Va. 683, 707.

Unusual Forms of Expression are not convincing evidence of incompetency. *In re Buchan's Will*, 16 Misc. 204, 38 N. Y. Supp. 1124.

Unusual Number of Attesting Witnesses. — It is comparatively unimportant that a will was witnessed by an unusual number of people. The fact may be explained by showing that the testator in superintending the execution of the will of another had it signed by a like number. *In re Segrist's Will*, 1 App. Div. 615, 37 N. Y. Supp. 496.

23. *In re Abel's Estate* (Nev.), 93 Pac. 227.

Unusual Signature. — Prefixing "Mrs." to the signature of a will in favor of the testatrix's husband, being an unusual thing for her to do, has been regarded as an evidence of thought and as conclusive of consciousness. *In re Walther's Will*, 7 N. Y. Supp. 417.

24. *In re Abel's Estate* (Nev.), 93 Pac. 227.

25. *Lee's Case*, 46 N. J. Eq. 193, 214, 18 Atl. 525; *Fluck v. Rea*, 51 N. J. Eq. 233, 27 Atl. 636; *In re*

pared with signatures made while he was in normal condition.<sup>26</sup>

**j. Mistake in Will.**—A mistake in the will whereby property not owned by the testator is described and property owned by him is omitted is not very persuasive, though relevant.<sup>27</sup> It may be shown that a part of the property owned by the testator was not included in the will because of the scrivener's mistake.<sup>28</sup> A mistake in the Christian name of the executor is not significant though the testator drew the will.<sup>29</sup>

**(1.) Excess of Bequests.**—The fact that the bequests exceed the testator's personal estate may "be adminicular proof to help in determining a case of doubtful capacity, yet, standing alone, it is not sufficient" to show incapacity.<sup>30</sup>

**(2.) Devise of Conveyed Property.**—Devising land to a person who holds title thereto is not a significant,<sup>31</sup> though a relevant, fact.<sup>32</sup>

**k. Scope of Will.**—Its scope is a relevant circumstance. Some wills are short and plain and easy to be understood; others are long and complicated.<sup>33</sup>

**l. Proof of Memory.**—If the will correctly names a large number of beneficiaries the fact is significant.<sup>34</sup> Other circumstances may make it strong evidence to show the state of the testator's memory.<sup>35</sup>

**m. Illegal Provision.**—The fact that some of the provisions in a will are repugnant to law is not evidence of incapacity unless the testator was a lawyer.<sup>36</sup>

Shreiber's Will, 5 N. Y. Supp. 47 (surrogate's court); *In re Mabie's Will*, 5 Misc. 179, 24 N. Y. Supp. 855. (See *In re Kearney's Will*, 69 App. Div. 481, 74 N. Y. Supp. 1045;) *Wright's Estate*, 10 Pa. Dist. 133.

**26.** *Abel's Estate* (Nev.), 93 Pac. 227; *Lee's Case*, 46 N. J. Eq. 193, 214, 18 Atl. 525.

**Inability To Sign.**—Inability to sign the will or make a mark without assistance does overcome affirmative testimony as to competency. *In re Patterson's Will*, 26 Abb. N. C. 395, 13 N. Y. Supp. 463.

**27.** See *Seebrook v. Fedawa*, 30 Neb. 424, 436, 46 N. W. 650; *Marks v. Bryant*, 4 Hen. & M. (Va.) 91.

**28.** *In re Owen's Estate*, 73 Neb. 840, 103 N. W. 675.

**29.** *In re Buchan's Will*, 16 Misc. 204, 38 N. Y. Supp. 1124.

**30.** *Tunison v. Tunison*, 4 Bradf. Sur. (N. Y.) 138, 148.

**31.** *Winn v. Grier* (Mo.), 117 S. W. 48. It may be shown that the testator furnished the money to pay for it.

**32.** *Fountain v. Brown*, 38 Ala.

72; *Goodbar v. Lidikey*, 136 Ind. 1, 35 N. E. 691.

**33.** *Kempsey v. McGinnis*, 21 Mich. 123, 146; *Sheldon v. Dow*, 1 Dem. (N. Y.) 503; *McMaster v. Scriven*, 85 Wis. 162, 55 N. W. 149.

The fact that all the witnesses are legatees under the will has been remarked upon as closing the avenues of evidence. *Smith v. Tebbitt*, L. R. 1 P. & D. (Eng.) 398, 435.

**34.** *Hanrahan v. O'Toole* (Iowa), 117 N. W. 675; *In re Mabie's Will*, 5 Misc. 179, 24 N. Y. Supp. 855 (surrogate's court).

**35.** *Collins v. Brazill*, 63 Iowa 432, 19 N. W. 338; *Carpenter v. Hatch*, 64 N. H. 573, 15 Atl. 219; *Shreiner v. Shreiner*, 178 Pa. St. 57, 35 Atl. 974; *Wright's Estate*, 10 Pa. Dist. 133.

**36.** *In re Soule's Will*, 3 N. Y. Supp. 259, 19 N. Y. St. 532 (surrogate's court), *affirmed*, 11 N. Y. Supp. 949, 32 N. Y. St. 1136 (no opinion).

**Devise in Favor of Guardian.**—A devise by a ward in favor of his guardian is *prima facie* evidence of

n. *Assertion of Status*.—The instrument sought to be established as a will is admissible to show, in connection with other proof, that the person who executed it was within the statute.<sup>37</sup>

o. *Disposition Made of Estate*.—The effect of the natural or unnatural disposition made of the estate has been the occasion for much discussion and for divergent opinions respecting the inference to be drawn concerning the capacity of the testator. That consideration is usually regarded as a circumstance bearing upon the question of competency,<sup>38</sup> at least if the case be doubt-

insanity, and casts upon the proponents of the will the burden of showing beyond reasonable doubt the validity of the will. *Breed v. Pratt*, 18 Pick. (Mass.) 115.

37. *Haddock v. Boston & M. R. Co.*, 146 Mass. 155, 15 N. E. 495, 4 Am. St. Rep. 295.

38. *England*.—*Banks v. Goodfellow*, L. R. 5 Q. B. 549, 571; *Brogden v. Brown*, 2 Addams Ecc. 441.

*Alabama*.—*Hughes v. Hughes*, 31 Ala. 519; *Schieffelin v. Schieffelin*, 127 Ala. 14, 28 So. 687; *Leeper v. Taylor*, 47 Ala. 221; *Roberts v. Tra- wick*, 13 Ala. 68; *Fountain v. Brown*, 38 Ala. 72.

*Arkansas*.—*Ouachita Baptist College v. Scott*, 64 Ark. 349, 42 S. W. 536; *Taylor v. McClintock*, 112 S. W. 405.

*Colorado*.—*In re Shapter's Estate*, 35 Colo. 578, 85 Pac. 688, 6 L. R. A. (N. S.) 575.

*Connecticut*.—*Crandall's Appeal*, 63 Conn. 365, 28 Atl. 531.

*District of Columbia*.—*Barbour v. Moore*, 4 App. Cas. 535, 548, modified by *Morgan v. Morgan*, 30 App. Cas. 436, 449, where it is said: "Our opinion is that a so-called unnatural or unjust disposition of the testator's estate by a will that in its terms and recitals betrays no other indication whatever of a disordered mind or defective memory cannot be submitted to the jury as a circumstance indicative of the want of the necessary testamentary capacity. Where, however, there is other evidence tending to show that the testator labored under an insane delusion, at the time of making the will, with respect to a certain person or thing, and the distribution made of the estate is in accord therewith, or indicates the effect of such declaration, then, as in the case of undue influ-

ence, such provision may become a circumstance to be considered in connection with the extrinsic evidence tending to show the existence of such delusion.

*Georgia*.—*Griffin v. Griffin*, R. M. Charl. 217 (It was said: "But notwithstanding the testimony of the witnesses which establishes so conclusively the continuous derangement of the testator, yet if the will proclaimed a rational disposition of his property, such a will as every one would say was honorable, righteous and natural, such a disposition would establish a lucid interval, not to be controlled by proof of even habitual insanity. The general rule is recognized in *Perguson v. Etcherson*, 91 Ga. 785, 18 S. E. 29).

*Illinois*.—*Pooler v. Cristman*, 145 Ill. 405, 34 N. E. 57, correcting a statement in *Rutherford v. Morris*, 77 Ill. 397, 414; *England v. Fawbush*, 204 Ill. 384, 68 N. E. 526; *Trubey v. Richardson*, 224 Ill. 136, 79 N. E. 592; *Donnan v. Donnan*, 236 Ill. 341, 86 N. E. 279; *Dillman v. McDanel*, 222 Ill. 276, 78 N. E. 591 ("Intrinsic evidence of the will itself, arising from the unreasonableness or injustice of its provisions, taking into view the state of the testator's property, family and the claims of particular individuals, is competent"); *McCommon v. McCommon*, 151 Ill. 428, 38 N. E. 145; *French v. French*, 215 Ill. 470, 74 N. E. 403; *Dowie v. Sutton*, 227 Ill. 183, 203, 81 N. E. 395, 126 Ill. App. 47; *Graham v. Deuterman*, 206 Ill. 378, 69 N. E. 237; *Piper v. Andricks*, 209 Ill. 564, 71 N. E. 18.

*Indiana*.—*Burkhart v. Gladish*, 123 Ind. 337, 24 N. E. 118; *Addington v. Wilson*, 5 Ind. 137; *Lamb v. Lamb*, 105 Ind. 456, 5 N. E. 171.

*Iowa*.—*Manatt v. Scott*, 106 Iowa

ful,<sup>39</sup> though the distributees are remote relatives, if the devise is in favor of strangers.<sup>40</sup>

203, 216, 76 N. W. 717, 68 Am. St. Rep. 293; *Sim v. Russell*, 90 Iowa 656, 57 N. W. 601; *Howe v. Richards*, 112 Iowa 220, 83 N. W. 909.

*Kentucky*.—*Newcomb v. Newcomb*, 96 Ky. 120, 27 S. W. 997; *McMeekin v. McMeekin*, 2 Bush 79; *Bush v. Lisle*, 89 Ky. 393, 12 S. W. 762; *Bradshaw v. Butler*, 30 Ky. L. Rep. 1249, 100 S. W. 837; *Bramel v. Bramel*, 18 Ky. L. Rep. 1074, 39 S. W. 520; *Zimlich v. Zimlich*, 90 Ky. 657, 14 S. W. 837; *Walls v. Walls*, 30 Ky. L. Rep. 948, 99 S. W. 969.

*Louisiana*.—*Chandler v. Barrett*, 21 La. Ann. 58 (if an habitual state of insanity is not shown and the acts of folly are rare and distant from the date of the will, if that is wise and judicious it will be presumed to be the product of a capable mind).

*Maryland*.—*Crockett v. Davis*, 81 Md. 134, 147, 31 Atl. 710; *Jennings v. Pendergast*, 10 Md. 346.

*Michigan*.—*In re Morse's Estate*, 146 Mich. 463, 109 N. W. 858; *Rivard v. Rivard*, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566; *Spencer v. Terry's Estate*, 133 Mich. 39, 94 N. W. 372.

*Missouri*.—*Hughes v. Rader*, 183 Mo. 630, 82 S. W. 32, 54; *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506.

*New Hampshire*.—*Whitman v. Morey*, 63 N. H. 448, 2 Atl. 899.

*New Jersey*.—*Middleditch v. Williams*, 45 N. J. Eq. 726; *Clifton v. Clifton*, 47 N. J. Eq. 227, 240, 21 Atl. 333; *Pancoast v. Graham*, 15 N. J. Eq. 294 (important as corroborating the attesting witnesses); *Smith v. Smith*, 48 N. J. Eq. 566, 25 Atl. 11 ("the law looks upon an inofficious will with suspicion, but, if it can be accounted for on other reasonable hypotheses, it will not be attributed to mental incapacity").

*New York*.—*LaBau v. Vanderbilt*, 3 Redf. Sur. 384, 424; *In re Kiedaich's Will*, 13 N. Y. Supp. 255; *In re Pendleton's Will*, 5 N. Y. Supp. 849; *McGown v. Underhill*, 115 App. Div. 638, 101 N. Y. Supp. 313; *In re Rogers' Will*, 52 Misc. 412, 103 N. Y. Supp. 423; *In re Nelson's Will*, 97 App. Div. 212, 89 N. Y. Supp.

865; *In re Donohue's Will*, 97 App. Div. 205, 89 N. Y. Supp. 871.

*North Carolina*.—*In re Burns' Will*, 121 N. C. 336, 28 S. E. 519.

*Ohio*.—*Ousley v. Witherton*, 13 Ohio C. C. 298.

*Pennsylvania*.—*Bitner v. Bitner*, 65 Pa. St. 347, 362 ("certainly that which outrages common feeling and displays a want of ordinary natural affection, is a fact to be considered along with other evidence on the question of unsoundness or delusion of mind"); *Wright's Estate*, 202 Pa. St. 395, 51 Atl. 1031; *In re Draper's Estate*, 215 Pa. St. 314, 64 Atl. 520.

*Tennessee*.—*Kirkpatrick v. Jerkins*, 96 Tenn. 85, 33 S. W. 819.

*Texas*.—*Prather v. McClelland*, 76 Tex. 574, 587, 13 S. W. 543 (Tex. Civ. App.), 26 S. W. 657.

*Washington*.—*In re Gorkow's Estate*, 20 Wash. 563, 56 Pac. 385.

*Wisconsin*.—*In re Cole's Will*, 49 Wis. 179, 5 N. W. 346.

*Contra*, *Estate of Nelson*, 132 Cal. 182, 64 Pac. 294. Compare *In re Wilson's Estate*, 117 Cal. 262, 49 Pac. 172, 711.

It has been said that inequality among testator's children may be a circumstance going to show improper influence, but nothing more. *Thomas v. Stump*, 62 Mo. 275. The later cases are to the contrary. See *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506; *Hughes v. Rader*, 183 Mo. 630, 82 S. W. 32, 54.

**Importance of Evidence.**—Such a fact, standing alone, may not prove anything; but connected with various other facts and circumstances it may form a strong link in the testimony. No competent means of ascertaining the truth ought to be rejected. *Roberts v. Trawick*, 13 Ala. 68, 85. See *M'Diarmid v. M'Diarmid*, 3 Blyth N. S. 374, 4 Eng. Reprint 1373.

39. *Slaughter v. Heath*, 127 Ga. 747, 57 S. E. 69; *Tomkins v. Tomkins*, 1 Bailey L. (S. C.) 92; *McMechen v. McMechen*, 17 W. Va. 683.

40. *Ward v. Brown*, 53 W. Va. 227, 265, 44 S. E. 488.

**Capriciousness of Devise** is not evidence of insanity. *Herbert v.*

(1.) **Scope of the Inquiry.**—The testimony must be directed to showing whether the estate has been extravagantly and unreasonably disposed of, or whether it has been disposed of as might probably be expected from one in the situation of the testator.<sup>41</sup>

(2.) **Inutility.**—The fact that the devisees would have been entitled to the estate under the law may be considered;<sup>42</sup> but in that connection the fact that they were the objects of the testator's regard and affection may be weighed.<sup>43</sup>

(3.) **Value of Evidence.**—The weight to be given such evidence must be proportioned to the inequality of the provisions made for the distributees,<sup>44</sup> and the relations existing between them and the testator.<sup>45</sup>

Winn, 24 La. Ann. 385; *In re Merri-*  
man, 62 Hun 621, 16 N. Y. Supp.  
738 (devise to government); *Ful-*  
bright v. Perry County, 145 Mo. 432,  
46 S. W. 955; *Martin v. Bowdern*,  
158 Mo. 379, 59 S. W. 227; *Schnei-*  
der v. Vosburgh, 143 Mich. 476, 106  
N. W. 1129; *Taylor v. McClintock*  
(Ark.), 112 S. W. 405. But it has  
been said that the unusual and ex-  
traordinary character of the be-  
quests may be evidence of incapacity.  
*Denison's Appeal*, 29 Conn. 399.

41. *Peck v. Cary*, 27 N. Y. 9, 84  
Am. Dec. 220.

42. *Hodge v. Rambow* (Ala.), 45  
So. 678.

43. *Banks v. Goodfellow*, L. R. 5  
Q. B. (Eng.) 549, 571.

**Weight.**—The fact that a will  
makes the same provision for a wife  
as is prescribed by law in case of  
intestacy, has been regarded as not  
very significant though the remain-  
der of the estate was devised to a  
stranger. *Truitt v. Cullen*, 3 Penne.  
(Del.) 311, 50 Atl. 174.

44. *Kevil v. Kevil*, 2 Bush (Ky.)  
614.

**Slight Additional Evidence of  
Aberration** may be sufficient if  
strangers are preferred to wife and  
children. *Slaughter v. Heath*, 127  
Ga. 747, 57 S. E. 69.

If the disposition made of the  
estate is unnatural and inconsistent  
with the obligation of the testator,  
the proponents must give some ex-  
planation. *In re Budlong*, 126 N.  
Y. 423, 27 N. E. 945; *In re Lowen-*  
stein's Will, 2 Misc. 323, 21 N. Y.  
Supp. 931; *In re Soden's Will*, 38  
Misc. 25, 76 N. Y. Supp. 877; *Gay v.*  
*Gillilan*, 92 Mo. 250, 264, 5 S. W., 7,

1 Am. St. Rep. 712; *Phillips v.*  
*Chater*, 1 Dem. (N. Y.) 533. It is  
otherwise where the will and order  
for probate makes a *prima facie*  
case. *Ousley v. Witheron*, 13 Ohio  
C. C. 298.

**The Circumstances Must Be Ex-**  
**traordinary** to justify the inference  
of testamentary incapacity merely  
because an heir is disinherited.  
*Spencer v. Terry's Estate*, 133 Mich.  
39, 94 N. W. 372.

**Conflicting Wills.**—The making  
of a will disinheriting a wife a few  
days after executing one in which  
she was the sole beneficiary is a sig-  
nificant circumstance in connection  
with professed love and affection for  
her. *Rathjens v. Merrill*, 38 Wash.  
442, 80 Pac. 754.

**Evidence Distrusted in England.**  
In cases of unsoundness of mind the  
contents of a will are very danger-  
ous ground to rest upon, even when  
connected with other testimony; but  
in cases where there is no unsound-  
ness of mind (in the proper sense  
of that term) but rather an absence  
of intellect, and the only question is  
whether the deceased person knew  
what he was doing, the con-  
tents of the will can rarely be  
brought to throw light on that  
subject. *Swinfen v. Swinfen*, 27  
Beav. (Eng.) 148.

45. **If an Estrangement** is shown  
to have existed between contestant  
and testator, the manner in which  
the latter disposed of his property  
is not of importance. The presump-  
tion is in favor of the correctness  
of his action. *Meeker v. Meeker*, 75  
Ill. 260; *Andrews' Case*, 33 N. J.  
Eq. 514.

The will may contain such inherent evidence of mental incapacity as, in connection with the estate, family and claims of the particular members thereof upon the testator, to be most persuasive,<sup>46</sup> and require satisfactory evidence to show that it was the product of a competent mind,<sup>47</sup> especially if contrary to the declared intentions of the testator.<sup>48</sup> On the other hand, "the rationality of the act goes to show the reason of the testator,"<sup>49</sup> if the will was writ-

46. *England*. — *Smith v. Tebbitt*, L. R. 1 P. & D. 398, 436.

*Arkansas*. — *Tobin v. Jenkins*, 29 Ark. 151, 162.

*Georgia*. — *Pergason v. Etcherson*, 91 Ga. 785, 18 S. E. 29; *Franklin v. Belt*, 130 Ga. 37, 60 S. E. 146.

*Illinois*. — *French v. French*, 215 Ill. 470, 74 N. E. 403.

*Indiana*. — *Swygart v. Willard*, 166 Ind. 25, 76 N. E. 755.

*Iowa*. — *Hardenburg v. Hardenburg*, 123 Iowa 1, 109 N. W. 1014 (may indicate an insane delusion).

*Kentucky*. — *Hawkins v. Grimes*, 13 B. Mon. 257; *Carlin v. Baird*, 11 Ky. L. Rep. 932, 13 S. W. 434; *Mendenhall v. Tungate*, 95 Ky. 208, 24 S. W. 431; *McDonald v. McDonald*, 27 Ky. L. Rep. 607, 85 S. W. 1084.

*Louisiana*. — *Godden v. Burke*, 35 La. Ann. 160, 171.

*Maryland*. — *Davis v. Calvert*, 5 Gill & J. 269, 300.

*Missouri*. — *Holton v. Cochran*, 208 Mo. 314, 416, 106 S. W. 1035.

*New York*. — *In re Gannon's Will*, 2 Misc. 329, 21 N. Y. Supp. 960, affirmed, without opinion, 139 N. Y. 654, 35 N. E. 207; *In re Shaw's Will*, 2 Redf. Sur. 107, 129; *In re Lockwood's Will*, 8 N. Y. Supp. 345 (surrogate's court); *In re Ely's Estate*, 16 Misc. 228, 39 N. Y. Supp. 177 (surrogate's court); *In re Simon's Will*, 47 Misc. 552, 95 N. Y. Supp. 981.

*Pennsylvania*. — *Pidcock v. Potter*, 68 Pa. St. 342; *Patterson v. Patterson*, 6 Serg. & R. 55; *Norris v. Shepard*, 20 Pa. St. 475; *Leech v. Leech*, 1 Phila. 244.

*Rhode Island*. — *Beattie v. Thomas*, 16 R. I. 13, 11 Atl. 172.

47. *Sherley v. Sherley*, 81 Ky. 240; *Harrell v. Harrell*, 1 Duv. (Ky.) 203; *Chappell v. Trent*, 90 Va. 849, 901, 19 S. E. 314.

The Georgia Code (§ 3258) provides that if a testator bequeaths

his entire estate to strangers, to the exclusion of his wife and children, the will should be closely scrutinized, and, upon the slightest evidence of aberration of intellect, probate should be refused. This has no relation to heirs who are remote or collateral kindred of the testator. *Wetter v. Habersham*, 60 Ga. 193. Neither does it apply where both the legatees and the kindred excluded are children. *Credille v. Credille*, 123 Ga. 673, 51 S. E. 628.

48. *Harwood v. Baker*, 3 Moore P. C. 282, 13 Eng. Reprint 117.

Public Sentiment respecting the equity of a will cannot be proved. *McFadin v. Catron*, 120 Mo. 252, 266, 25 S. W. 506.

49. *England*. — *Cartwright v. Cartwright*, 1 Phill. Ecc. 90 (In this case the testator had undoubtedly been insane prior to the will and became so thereafter. The court observed: "If the fact be so that he has done as rational an act as can be, without any assistance from another person, what more there is to be proved, I don't know, unless the gentlemen could prove by any authority or law what the length of the lucid interval is to be, whether an hour, a day, or a month. I know no such law as that." It is observed of this case that it shows "a more indulgent view of the effect of insanity, as affecting testamentary incapacity, than has latterly prevailed." *Banks v. Goodfellow*, L. R. 5 Q. B. (Eng.) 549, 559).

*Connecticut*. — *Crandall's Appeal*, 63 Conn. 365, 28 Atl. 531.

*Kentucky*. — *Newcomb v. Newcomb*, 96 Ky. 120, 27 S. W. 997; *M'Daniel's Will*, 2 J. J. Marsh. 331; *Hubbard's Will*, 6 J. J. Marsh. 59.

*Maine*. — *In re Chandler's Will*, 102 Me. 72, 90, 66 Atl. 215; *Hall v. Perry*, 87 Me. 569, 33 Atl. 160.

ten by him or in accordance with his instructions,<sup>50</sup> though he had

*Maryland.* — *Brown v. Ward*, 53 Md. 376, 394.

*Michigan.* — *Blackman v. Andrews*, 150 Mich. 322, 114 N. W. 218.

*New Jersey.* — *Clifton v. Clifton*, 47 N. J. Eq. 227, 240, 21 Atl. 333.

*New York.* — *Gombault v. Public Admr.*, 4 Bradf. Sur. 226, 239; *In re Connor's Will*, 29 Misc. 391, 61 N. Y. Supp. 910; *In re Peck*, 17 N. Y. Supp. 248, 42 N. Y. St. 898; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220.

*Pennsylvania.* — *Leech v. Leech*, 1 Phila. 244; *Buchanan v. Pierie*, 205 Pa. St. 123, 54 Atl. 583.

*Virginia.* — *Young v. Barner*, 27 Gratt. 96.

**Effect.** — "In all questions of testamentary capacity, particularly where the evidence is conflicting, the courts are inclined much to consider the dispositions contained in a will. If such dispositions be in themselves consistent with the situation of the testator, in conformity with his affections and previous declarations — if they be such as might justly have been expected — this is of itself said to be persuasive evidence of testamentary capacity." *Young v. Barner*, 27 Gratt. (Va.) 96; *Buchanan v. Pierie*, 205 Pa. St. 123, 54 Atl. 583.

A will which directs that the estate shall go to the relative of one through whom the testator received it "is the most lucid proof of testamentary capacity." *In re McKean's Will*, 31 Misc. 703, 66 N. Y. Supp. 44.

**Circumstances Affecting Competency of Will.** — "If the other evidence in the case affords satisfactory proof that, at the time the above codicil was made, the testator was not possessed of testamentary capacity, then, of course, the internal evidence of the terms of the codicil itself is of no value, as it was not the testator's will. On the other hand, if such evidence does not amount to such proof, then the internal evidence is material, and may become important. While the question of testamentary capacity under the evidence *abunde* the internal proof, is a very close one, yet we are inclined to the opinion that it does not preclude the proponents from the

right to have considered the internal evidence of the terms of the codicil. The evidence is plainly in harmony with what we should expect to be the rational and natural instinct of the testator. The character of the codicil therefore in this case becomes significant. It manifests a rational act. Its provisions are just, reasonable and natural, in harmony with natural justice, and have a tendency to prove a normal state of mind." *In re Chandler's Will*, 102 Me. 72, 90, 66 Atl. 215.

<sup>50</sup>. *Iowa.* — *Bever v. Spangler*, 93 Iowa 576, 598, 61 N. W. 1072 (it is important if the will was written by the testator).

*Kentucky.* — *Henning v. Stevenson*, 118 Ky. 318, 80 S. W. 1135 (the jury may consider the will itself, "which, when wholly written by the testator is potent evidence of the condition of his mind at the time"); *Morris v. Morton's Exrs.*, 14 Ky. L. Rep. 360, 20 S. W. 287; *Overton v. Overton*, 18 B. Mon. 61; *Harper's Will*, 4 Bibb 244 (unquestionable proof of capacity); *Bush v. Lisle*, 89 Ky. 393, 12 S. W. 762; *Savage v. Bulger*, 25 Ky. L. Rep. 763, 76 S. W. 361; *Bramel v. Bramel*, 18 Ky. L. Rep. 1074, 39 S. W. 520.

*Mississippi.* — *Mullens v. Cottrell*, 41 Miss. 291, 334.

*Missouri.* — *Wood v. Carpenter*, 166 Mo. 465, 487, 66 S. W. 172; *Archambault v. Blanchard*, 198 Mo. 384, 427, 95 S. W. 834; *Martin v. Bowdern*, 158 Mo. 379, 59 S. W. 227; *Weston v. Hanson*, 212 Mo. 248, 267, 111 S. W. 44.

*New Jersey.* — *Stoutenburgh v. Hopkins*, 43 N. J. Eq. 577, 12 Atl. 689.

*New York.* — *Carroll v. Norton*, 3 Bradf. Sur. 291, 318; *In re Cornelius' Will*, 23 Misc. 434, 51 N. Y. Supp. 877; *In re Cruger's Will*, 36 Misc. 477, 73 N. Y. Supp. 812 (the writing of a holographic will may be persuasive against the contention of physical inability and its construction convincing as to mental capacity).

*Pennsylvania.* — *Cameron's Estate*,



been afflicted mentally for a considerable time before its execution.<sup>51</sup>

(A.) NOT CONCLUSIVE. — All the cases recognize that inequality in the terms of a will is but a circumstance to be weighed in connection with the other evidence, regardless of the reasons which actuated the testator.<sup>52</sup> And this is the rule though there has been

14 Pa. Co. Ct. 247; Napf's Estate, 134 Pa. St. 492, 19 Atl. 679.

*Virginia*. — Wallen v. Wallen, 107 Va. 131, 57 S. E. 596; Temple v. Temple, 1 Hen. & M. 476.

**Weight of Evidence.** — "The circumstance that a writing exhibited for probate as a last will and testament was wholly written by the testator himself, is *prima facie* evidence that he was in his senses and able to make a will at the time of writing the same, so that the *onus probandi* to repel that presumption lies on those who wish to impugn it; and proof that the testator's intellects were greatly impaired by the use of opium and ardent spirits, and that in consequence thereof he was frequently incapable of business, is not sufficient to repel the presumption without proof that such was his condition at the time when the writing was executed." Temple v. Temple, 1 Hen. & M. (Va.) 476, approved in Wallen v. Wallen, 107 Va. 131, 57 S. E. 596.

**51.** Cartwright v. Cartwright, 1 Phill. Ecc. (Eng.) 90. In this case the judge observed: "The strongest and best proof that can arise as to a lucid interval is that which arises from the act itself of making the will. That I look upon as the thing to be first examined, and if it can be established that it is a rational act, rationally done, the whole case is proved." The facts in this case are set out in Von De Veld v. Judy, 143 Mo. 348, 44 S. W. 1117.

**52.** *England*. — Boughton v. Knight, L. R. 3 P. & D. 64.

*Canada*. — McLaughlin v. McLellan, 26 Can. Sup. 646.

*Alabama*. — Knox v. Knox, 95 Ala. 495, 11 So. 125, 36 Am. St. Rep. 235; Hughes v. Hughes, 31 Ala. 519; Henry v. Hall, 106 Ala. 84, 99, 17 So. 187.

*Arkansas*. — Taylor v. McClintock, 112 S. W. 405.

*California*. — In re Carpenter, 79

Cal. 382, 21 Pac. 835; In re Wilson's Estate, 117 Cal. 262, 49 Pac. 172, 711; Estate of Nelson, 132 Cal. 182, 64 Pac. 294.

*Connecticut*. — In re Case, 52 Atl. 403.

*District of Columbia*. — Barbour v. Moore, 4 App. Cas. 535, 548; Morgan v. Morgan, 30 App. Cas. 436.

*Georgia*. — Franklin v. Belt, 130 Ga. 37, 60 S. E. 146; Slaughter v. Heath, 127 Ga. 747, 57 S. E. 69.

*Illinois*. — Taylor v. Pegram, 151 Ill. 106, 37 N. E. 837; Snow v. Benton, 28 Ill. 306; Meeker v. Meeker, 75 Ill. 260; Schneider v. Manning, 121 Ill. 376, 12 N. E. 267; Entwistle v. Meikle, 180 Ill. 9, 24, 54 N. E. 217; Schmidt v. Schmidt, 201 Ill. 191, 66 N. E. 371; England v. Fawbush, 204 Ill. 384, 394, 68 N. E. 526; Waters v. Waters, 222 Ill. 26, 78 N. E. 1; Freeman v. Easley, 117 Ill. 317, 7 N. E. 656; Nieman v. Schnitker, 181 Ill. 400, 55 N. E. 151; Donnan v. Donnan, 236 Ill. 341, 86 N. E. 279; Salisbury v. Aldrich, 118 Ill. 199, 8 N. E. 777; Hollenbeck v. Cook, 180 Ill. 65, 54 N. E. 154; Kaenders v. Montague, 180 Ill. 300, 54 N. E. 321.

*Indiana*. — Addington v. Wilson, 5 Ind. 137; Rarick v. Ulmer, 144 Ind. 25, 42 N. E. 1099.

*Iowa*. — Manatt v. Scott, 106 Iowa 203, 216, 76 N. W. 717, 68 Am. St. Rep. 293; Bomgardner v. Andrews, 55 Iowa 638, 8 N. W. 481; Smith v. James, 72 Iowa 515, 34 N. W. 309; In re Trotter's Will, 117 Iowa 417, 90 N. W. 750; Perkins v. Perkins, 116 Iowa 253, 90 N. W. 55; Hanrahan v. O'Toole, 117 N. W. 675.

*Kentucky*. — Kevill v. Kevill, 2 Bush 614; Munday v. Taylor, 7 Bush 491; Hoerth v. Zable, 92 Ky. 202, 17 S. W. 360. Compare Carlin v. Baird, 11 Ky. L. Rep. 932, 13 S. W. 434.

*Maryland*. — Davis v. Calvert, 5 Gill & J. 269, 301; Horner v. Buckingham, 103 Md. 556, 64 Atl. 41;

Gesell *v.* Baugher, 100 Md. 677, 60 Atl. 481.

*Massachusetts.* — *Barker v. Comins*, 110 Mass. 477 (does not affect the burden of proof).

*Michigan.* — *In re Morse's Estate*, 146 Mich. 463, 109 N. W. 858; *Rivard v. Rivard*, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566; *McGinnis v. Kempsey*, 27 Mich. 363 (unless the circumstances are extraordinary); *Reichert v. Reichert*, 144 Mich. 295, 107 N. W. 1057. See *Spencer v. Terry's Estate*, 133 Mich. 39, 94 N. W. 372.

*Minnesota.* — *In re Hess' Will*, 48 Minn. 504, 51 N. W. 614, 31 Am. St. Rep. 665.

*Missouri.* — *Maddox v. Maddox*, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734; *McFadin v. Catron*, 120 Mo. 252, 272, 25 S. W. 506; *Moore v. Moore*, 67 Mo. 192; *Hughes v. Rader*, 183 Mo. 630, 82 S. W. 32, 54; *Story v. Story*, 188 Mo. 110, 86 S. W. 225; *Conner v. Skaggs*, 213 Mo. 334, 348, 111 S. W. 1132.

*New Hampshire.* — *Whitman v. Morey*, 63 N. H. 448, 2 Atl. 899.

*New Jersey.* — *Turnure v. Turnure*, 35 N. J. Eq. 437; *Middleditch v. Williams*, 45 N. J. Eq. 726, 17 Atl. 826, 4 L. R. A. 738; *Goble v. Grant*, 3 N. J. Eq. 629; *Collins v. Osburn*, 34 N. J. Eq. 511; *Garrison v. Garrison*, 15 N. J. Eq. 266, 283; *Andrews' Case*, 33 N. J. Eq. 514; *Turner v. Cheesman*, 15 N. J. Eq. 243, 257; *Armstrong v. Armstrong*, 69 N. J. Eq. 817, 66 Atl. 399; *Smith v. Smith*, 48 N. J. Eq. 566, 25 Atl. 11.

*New York.* — *Gamble v. Gamble*, 39 Barb. 373; *LaBau v. Vanderbilt*, 3 Redf. Sur. 384, 424; *In re Finn's Estate*, 1 Misc. 280, 22 N. Y. Supp. 1066; *Potter v. M'Alpine*, 3 Dem. 108; *Matter of Tracy*, 11 N. Y. St. 103; *Clarke v. Davis*, 1 Redf. Sur. 249; *In re Carver's Will*, 3 Misc. 567, 23 N. Y. Supp. 753 (surrogate's court), 75 Hun 612, 28 N. Y. Supp. 1126 (no opinion); *Bristed v. Weeks*, 5 Redf. Sur. 529, 541; *Phillips v. Chater*, 1 Dem. 533; *Mairs v. Freeman*, 3 Redf. Sur. 181, 210; *Dobie v. Armstrong*, 160 N. Y. 584, 55 N. E. 302; *Buchanan v. Belsey*, 65 App. Div. 58, 72 N. Y. Supp. 601; *In re*

*Budlong's Will*, 126 N. Y. 423, 27 N. E. 945.

*Oregon.* — *Potter v. Jones*, 20 Or. 239, 252, 25 Pac. 769.

*Pennsylvania.* — *Bitner v. Bitner*, 65 Pa. St. 347, 362; *Estate of Woods*, 13 Phila. 236; *Lenhart's Estate*, 199 Pa. St. 618, 49 Atl. 305.

*South Carolina.* — *Lee v. Lee*, 4 McCord 183; *Kirkwood v. Gordon*, 7 Rich. L. 474; *Kaufman v. Kaufman*, 49 S. C. 159, 27 S. E. 16; *Means v. Means*, 5 Strobb. L. 167, 191.

*Virginia.* — *Wallen v. Wallen*, 107 Va. 131, 57 S. E. 596.

*Washington.* — *In re Gorkow's Estate*, 20 Wash. 563, 56 Pac. 385.

*West Virginia.* — *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. 489.

**Argument.** — "The right to dispose of one's property by will is most solemnly assured by law, and is a most valuable incident to ownership, and does not depend on its judicious use. The beneficiaries of a will are as much entitled to protection as any other property owners; and courts abdicate their functions when they permit the prejudices of a jury to set aside a will merely upon suspicion, or because it does not conform to their ideas of what is just and proper." *In re McDevitt*, 95 Cal. 17, 30 Pac. 101; *King v. Rowan*, 82 Miss. 1, 34 So. 325.

Apparent inequality or inequity will not alone warrant the presumption of mental incapacity. It may only be considered as a circumstance, in connection with other facts, bearing on the condition of the testator's mind. As the decedent preferred some of her brothers to her natural heirs it was material, in looking into the inequities of the will, to know that, in remembering proponents, she forgot several other brothers and a sister in abject poverty. A will which bestows property on the wealthy and overlooks the claims to bounty of those who are poor in like relationship does not commend itself as reasonable or natural. It is a circumstance suggesting a disordered mind or the working of sinister influences. *Manatt v. Scott*, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293.

a breach of an obligation to provide for a person,<sup>53</sup> and where the estate has been devised to a stranger rather than to collateral relatives,<sup>54</sup> or even direct heirs.<sup>55</sup> The fact that collateral relatives are omitted may indicate testator's possession of memory, rather than otherwise.<sup>56</sup>

(B.) INSTRUCTIONS.—It is error to characterize the inequitable clauses as an important element in determining the question of competency.<sup>57</sup> The matter should not be specially alluded to in the charge,<sup>58</sup> unless in a qualified way with due limitations.<sup>59</sup> It is, however, a proper subject for discussion by counsel.<sup>60</sup>

(4.) **Proof of Inequality.**—The unaccepted report of a master in chancery, upon which no decree has been rendered, finding the amount of contestant's interest in a partnership with his father, the testator, and that such interest was conveyed to the latter upon assurances that the estate should become contestant's, is not admissible to show unreasonableness in the will.<sup>61</sup>

(5.) **Provisions May Be Explained.**—So-called unnatural provisions in a will may be explained to rebut any inference of incapacity that might be drawn therefrom.<sup>62</sup>

53. *Bulger v. Ross*, 98 Ala. 267, 12 So. 803; *Smith v. James*, 72 Iowa 515, 34 N. W. 309.

54. *Smith v. James*, 72 Iowa 515, 34 N. W. 309; *Spencer v. Terry's Estate*, 133 Mich. 39, 94 N. W. 372; *In re Isaac's Estate* (Neb.), 107 N. W. 1016; *In re Snelling*, 136 N. Y. 515, 32 N. E. 1006; *Stewart v. Lyons*, 54 W. Va. 665, 47 S. E. 442.

55. *Catholic University v. O'Brien*, 181 Mo. 68, 79 S. W. 901; *Heyzer v. Morris*, 110 App. Div. 313, 97 N. Y. Supp. 131; *Field v. Pickard*, 126 Wis. 229, 105 N. W. 796.

56. *Collins v. Brazill*, 63 Iowa 432, 19 N. W. 338.

57. *Barbour v. Moore*, 4 App. Cas. (D. C.) 535, 549; *Donnan v. Donnan*, 236 Ill. 341, 86 N. E. 279; *In re Knox's Will*, 123 Iowa 24, 98 N. W. 468.

58. *Stokes v. Shippen*, 13 Bush (Ky.) 180; *Broadus v. Broadus*, 10 Bush (Ky.) 299; *Herbert v. Long*, 15 Ky. L. Rep. 427, 23 S. W. 658; *Zimlich v. Zimlich*, 90 Ky. 657, 14 S. W. 837. *Contra*, *Graham v. Duterma*, 206 Ill. 378, 69 N. E. 237.

59. *King v. Rowan*, 82 Miss. 1, 34 So. 325.

60. *In re Burns' Will*, 121 N. C. 336, 28 S. E. 519.

61. *Nash v. Hunt*, 116 Mass. 237.

62. *Alabama*.—*Burney v. Torrey*, 100 Ala. 157, 174, 14 So. 685.

*California*.—*In re Wilson's Estate*, 117 Cal. 262, 49 Pac. 172, 711.

*District of Columbia*.—*Turner v. American Security & T. Co.*, 29 App. Cas. 460 (an agreement between husband and wife relating to the separate estate of each).

*Iowa*.—*Parsons v. Parsons*, 66 Iowa 754, 21 N. W. 570, 24 N. W. 564 (the conduct of legatees toward the testator may be shown); *Manatt v. Scott*, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293 (defendant's testimony as to his financial condition, ill-health and expenditures on his wife's property are relevant to show the reasonableness of the disposition she made of it).

*Kentucky*.—*Lancaster v. Lancaster*, 27 Ky. L. Rep. 1127, 87 S. W. 1137; *Munday v. Taylor*, 7 Bush 491.

*Maryland*.—*Horner v. Buckingham*, 103 Md. 556, 64 Atl. 41.

*New Hampshire*.—*Patten v. Cilley*, 67 N. H. 520, 42 Atl. 47.

*New Jersey*.—*In re Wintermute's Will*, 27 N. J. Eq. 447; *Wintermute v. Wilson*, 28 N. J. Eq. 437; *Clifton v. Clifton*, 47 N. J. Eq. 227, 240, 21 Atl. 333.

*New York*.—*In re Burk's Will*, 2 Redf. Sur. 239; *In re Springsted's*

(A.) PAROL EVIDENCE. — Parol testimony is competent to establish inequality, as by showing relationship and conditions in life,<sup>63</sup> and the consideration for a contract between the contestant and testator.<sup>64</sup>

(B.) SOURCE OF ESTATE. — It may be shown that the estate devised was in part acquired by those who are not beneficiaries in the will, and that the testator recognized their rights thereto while competent.<sup>65</sup> Such evidence is relevant to show the circumstances under which the testator was placed and the probable motive actuating him.<sup>66</sup> The kind and quality of the labor performed by the heirs for the testator are relevant matters in some courts, but not so regarded in some others.<sup>67</sup> But it has been held that "argument is not needed to show that the manner in which the decedent acquired his estate was wholly immaterial upon the issue as to whether the paper in question was or was not valid as his last will."<sup>68</sup> Such

Will, 55 Hun 603, 8 N. Y. Supp. 596; *Phillips v. Chater*, 1 Dem. 533; *In re Journeay's Will*, 15 App. Div. 567, 44 N. Y. Supp. 548; *Dobie v. Armstrong*, 27 App. Div. 520, 50 N. Y. Supp. 801; *Dunham v. Dunham*, 63 App. Div. 264, 71 N. Y. Supp. 330; *Heyzer v. Morris*, 110 App. Div. 313, 97 N. Y. Supp. 131; *In re Armstrong's Will*, 55 Misc. 487, 106 N. Y. Supp. 671.

*Ohio*. — *Varner v. Varner*, 16 Ohio C. C. 386.

*Oregon*. — *In re Cline's Will*, 24 Or. 175, 33 Pac. 542; *s. c.*, *sub nom.* *Bain v. Cline*, 33 Pac. 542.

*Pennsylvania*. — *Napfle's Estate*, 134 Pa. St. 492, 19 Atl. 679; *Buchanan v. Pierie*, 205 Pa. St. 123, 54 Atl. 583; *Draper's Estate*, 215 Pa. St. 314, 64 Atl. 520.

*Tennessee*. — *Kirkpatrick v. Jenkins*, 96 Tenn. 84, 33 S. W. 819.

*Texas*. — *Prather v. McClelland* (Tex. Civ. App.), 26 S. W. 657.

*West Virginia*. — *Stewart v. Lyons*, 54 W. Va. 665, 47 S. E. 442.

*Wisconsin*. — *In re Blakely's Will*, 48 Wis. 294, 4 N. W. 337.

<sup>63</sup>. *Manatt v. Scott*, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293; *Ford v. Ford*, 7 Humph. (Tenn.) 92 (blood relationship may be shown by evidence of reputation).

**A Book Printed at Testator's Expense** and referred to by him as giving a correct account of his family is admissible. *Wood v. Sawyer*, 61 N. C. (Phil. L.) 251, 277.

<sup>64</sup>. *Nash v. Hunt*, 116 Mass. 237.

<sup>65</sup>. *Burney v. Torrey*, 100 Ala. 157, 174, 14 So. 685; *In re Wilson's Estate*, 117 Cal. 262, 49 Pac. 172, 711 (it is not usually significant); *Pergason v. Etcherson*, 91 Ga. 785, 18 S. E. 29 (it is immaterial that the person through whom the testator derived the estate did not contest the will); *Crockett v. Davis*, 81 Md. 134, 147, 31 Atl. 710; *Stoutenburgh v. Hopkins*, 43 N. J. Eq. 577, 12 Atl. 689; *In re Lyddy's Will*, 53 Hun 629, 5 N. Y. Supp. 636, *affirming* 4 N. Y. Supp. 468; *Beattie v. Thomason*, 16 R. I. 13, 11 Atl. 172.

**Understanding of Witness** that testator derived estate through will of another is incompetent. *In re Jones' Estate*, 130 Iowa 177, 106 N. W. 610.

<sup>66</sup>. *Floore v. Green*, 26 Ky. L. Rep. 1073, 83 S. W. 133.

<sup>67</sup>. *Burkhart v. Gladish*, 123 Ind. 337, 24 N. E. 118. *Contra*, *Couch v. Gentry*, 113 Mo. 248, 20 S. W. 890; *Maddox v. Maddox*, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734.

**Earnings of Heir**. — It is competent for one who would have been an heir if there had been no will and for whom no provision is made, to show that most of the money realized from a business was the result of her own efforts and labor. *Ras-dall v. Brush*, 31 Ky. L. Rep. 1138, 104 S. W. 749.

<sup>68</sup>. *Ormsby v. Webb*, 134 U. S. 47, 65.

testimony is inadmissible if it stands alone; but in connection with testator's declarations of intention to restore part of the estate received from his father to his brothers and sisters is admissible if they or their heirs have been made his beneficiaries.<sup>69</sup>

(C.) EXTENT OF ESTATE.—It is relevant to show the value and extent of the testator's estate.<sup>70</sup> But it is not material what the extent of a woman's estate was seventeen years before the will was executed.<sup>71</sup>

(D.) FINANCIAL CONDITION OF RELATIVES.—It is competent to show the financial condition of the relatives of testatrix if he had knowledge thereof. The fact may be illustrative of the reasonableness or unreasonableness of the will.<sup>72</sup> The rule applies to the condition

69. *McMechen v. McMechen*, 17 W. Va. 683, 714.

70. *Alabama*.—*Hodge v. Ram-bow*, 45 So. 678; *Fountain v. Brown*, 38 Ala. 72; *Johnson v. Armstrong*, 97 Ala. 731, 12 So. 72.

*Arkansas*.—*McDaniel v. Crosby*, 19 Ark. 533, 546; *Taylor v. McClintock*, 112 S. W. 405; *Tobin v. Jenkins*, 29 Ark. 151.

*Iowa*.—*Manatt v. Scott*, 106 Iowa 203, 217, 76 N. W. 717, 68 Am. St. Rep. 293; *In re Wharton's Will*, 132 Iowa 714, 109 N. W. 492; *Hertrich v. Hertrich*, 114 Iowa 643, 87 N. W. 689.

*Maryland*.—*Davis v. Calvert*, 5 Gill & J. 269, 301.

**How Shown.**—The amount received by testatrix from her husband's estate may be shown by the reports of the executor and the receipts given by the testatrix; the husband's will is not admissible. *Pooler v. Cristman*, 145 Ill. 405, 34 N. E. 57.

The final report and petition for the discharge of the executor is admissible. *Hertrich v. Hertrich*, 114 Iowa 643, 87 N. W. 689.

71. *Smith v. Ryan*, 136 Iowa 335, 112 N. W. 8.

72. *Alabama*.—*Fountain v. Brown*, 38 Ala. 72; *Stubbs v. Houston*, 33 Ala. 555; *Johnson v. Armstrong*, 97 Ala. 731, 12 So. 72.

*Arkansas*.—*McDaniel v. Crosby*, 19 Ark. 533, 546; *Ouachita Baptist College v. Scott*, 64 Ark. 349, 42 S. W. 536.

*Illinois*.—*Dillman v. McDanel*, 222 Ill. 276, 290, 78 N. E. 591.

*Indiana*.—*Gurley v. Park*, 135 Ind.

440, 35 N. E. 279; *Lamb v. Lamb*, 105 Ind. 456, 5 N. E. 171.

*Iowa*.—*In re Wharton's Will*, 132 Iowa 714, 109 N. W. 492; *Manatt v. Scott*, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293; *Sim v. Russell*, 90 Iowa 656, 57 N. W. 601; *Stutsman v. Sharpless*, 125 Iowa 335, 101 N. W. 105 (the means of a mother for caring for children may be regarded).

*Kentucky*.—*Henning v. Stevenson*, 26 Ky. L. Rep. 159, 80 S. W. 1135; *Rasdall v. Brush*, 31 Ky. L. Rep. 1138, 104 S. W. 749; *Gutman v. Turner*, 27 Ky. L. Rep. 386, 85 S. W. 185.

*Maine*.—*Hall v. Perry*, 87 Me. 569, 33 Atl. 160.

*Maryland*.—*Davis v. Calvert*, 5 Gill & J. 269, 301.

*Missouri*.—*McFadin v. Catron*, 120 Mo. 252, 267, 25 S. W. 506.

*New Jersey*.—*Clifton v. Clifton*, 47 N. J. Eq. 227, 242, 21 Atl. 333; *Stoutenburgh v. Hopkins*, 43 N. J. Eq. 577, 12 Atl. 689.

*New York*.—*Bristed v. Weeks*, 5 Redf. Sur. 529, 542; *In re Merriman*, 62 Hun 621, 16 N. Y. Supp. 738.

*Tennessee*.—*Kirkpatrick v. Jenkins*, 96 Tenn. 85, 33 S. W. 819.

*Texas*.—*Trezevant v. Rains* (Tex. Civ. App.), 25 S. W. 1092.

*Vermont*.—*Fairchild v. Bascomb*, 35 Vt. 398, 417; *Crocker v. Chase*, 57 Vt. 413.

*Virginia*.—*Wallen v. Wallen*, 107 Va. 131, 57 S. E. 596.

**Such Proof** should be made by general testimony; deeds are not essential. *McFadin v. Catron*, 120 Mo. 252, 267, 25 S. W. 506.

**Proof of Mere Expectancies**

and health of the sole beneficiary under the will,<sup>73</sup> and where children have been disinherited under the delusion that they were not legitimate.<sup>74</sup>

(E.) AID GIVEN TO RELATIVES. — The extent to which testator had aided or failed to aid his relatives may be shown.<sup>75</sup>

(F.) OTHER PROVISION. — It may be shown that provision has been made otherwise for a distributee.<sup>76</sup>

(G.) RELATIONS OF TESTATOR AND DISTRIBUTE. — The relations which existed between a distributee and the testator may be shown,<sup>77</sup> and

should not be made, unless of such a nature as to have been known and considered by testator. *Stutsman v. Sharpless*, 125 Iowa 335, 101 N. W. 105.

**Financial Loss to a Devisee Resulting From the Acts of the Testator** as his agent may not be proved to show the non-existence of a reason for making such devisee's share less than that of others. "Such character of testimony would defeat the right, in almost every instance, to dispose of one's property by last will and testament. What was just and reasonable under the circumstances should have been left" to the testator, and not to the jury. *Stokes v. Shippen*, 13 Bush (Ky.) 180.

**73.** *Smith v. Ryan*, 136 Iowa 335, 112 N. W. 8.

**74.** *Johnson v. Johnson*, 105 Md. 81, 65 Atl. 918.

**Exceptions.** — Such testimony is inadmissible if the will expresses that the sum devised to one of the devisees, added to the advancements made to him, would make his share equal to those of others in like relationship. *Wood v. Carpenter*, 166 Mo. 465, 485, 66 S. W. 172. It is also inadmissible when offered in connection with evidence that title to property in the name of the testator was in consequence of a mistake. *Shorb v. Brubaker*, 94 Ind. 165.

**75.** *Bush v. Delano*, 113 Mich. 321, 71 N. W. 628 (the importance of such evidence is slight).

**Admission by Silence.** — A contestant is not bound to deny the testator's testimony as to the sum given him when the statement was merely collateral to the matter under investigation; hence his silence is not an admission. *Frery v. Gusha*, 59 Vt. 257, 9 Atl. 549.

**76.** *Burney v. Torrey*, 100 Ala. 157, 173, 14 So. 685.

**An Understanding Between Testator and His Wife** that he should provide for some of their heirs and she for others, may be proved. It will be presumed that she will carry out her obligation. *In re Owens' Estate*, 73 Neb. 840, 103 N. W. 675.

**Will of Third Person.** — A will executed prior to decedent's will by his wife, and of which he had knowledge when his will was made, is admissible to explain the large legacy testator left to a son who was not substantially recognized in the mother's will. *Varner v. Varner*, 16 Ohio C. C. 386.

**77.** *England.* — *Smee v. Smee*, L. R. 5 P. D. 84.

*Illinois.* — *Piper v. Andricks*, 209 Ill. 564, 71 N. E. 18; *Pooler v. Cristman*, 145 Ill. 405, 34 N. E. 57.

*Indiana.* — *Burkhart v. Gladish*, 123 Ind. 337, 24 N. E. 118.

*Iowa.* — *Ross v. Ross*, 117 N. W. 1105.

*Michigan.* — *Rivard v. Rivard*, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566; *Spencer v. Terry's Estate*, 133 Mich. 39, 94 N. W. 372.

*Nebraska.* — *In re Isaac's Estate*, 107 N. W. 1016.

*New Jersey.* — *Matter of Wintermute's Will*, 27 N. J. Eq. 447.

*New York.* — *Carroll v. Norton*, 3 Bradf. Sur. 291.

*Pennsylvania.* — *Norris v. Sheppard*, 20 Pa. St. 475.

*Tennessee.* — *Kirkpatrick v. Jenkins*, 96 Tenn. 85, 33 S. W. 819.

*Vermont.* — *Fairchild v. Bascomb*, 35 Vt. 398, 417; *Crocker v. Chase*, 57 Vt. 413.

*West Virginia.* — *Stewart v. Lyons*, 54 W. Va. 665, 47 S. E. 442.

the acts and conduct of an heir toward him;<sup>78</sup> and proof of those which existed between the latter and the father of an heir may be shown as cumulative. The remoteness of the evidence in point of time affects only the weight to be given it.<sup>79</sup>

(H.) ATTITUDE TOWARD RELATIVES. — The family of the testator, the relative condition of its members and the terms on which he stood with them, and the claims of particular individuals upon him are relevant matters,<sup>80</sup> including those formerly existing between him and contestant,<sup>81</sup> unless remoteness of relationship is great.<sup>82</sup> If ill-feeling existed between the testator and contestant the latter must show its groundlessness so far as the former was concerned.<sup>83</sup>

(a.) *Scope of Inquiry.* — The investigation into family affairs should be limited to showing the capacity of the testator.<sup>84</sup>

78. *In re Case* (Conn.), 52 Atl. 403; *In re Berrien's Will*, 58 Hun 610, 12 N. Y. Supp. 585.

79. *Sherley v. Sherley*, 81 Ky. 240; *Bost v. Bost*, 87 N. C. 477.

80. *England.* — *Smith v. Tebbitt*, L. R. 1 P. & D. 398, 429 ("The natural play of the affections gives the last assurance of a mind at ease, and its interruption, often the first sign of mental disorder").

*Arkansas.* — *McDaniel v. Crosby*, 19 Ark. 533, 546.

*California.* — *In re Wilson's Estate*, 117 Cal. 262, 49 Pac. 172.

*Illinois.* — *McCommon v. McCommon*, 151 Ill. 428, 38 N. E. 145; *Piper v. Andricks*, 209 Ill. 564, 71 N. E. 18; *Cheney v. Goldy*, 225 Ill. 394, 80 N. E. 289.

*Indiana.* — *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990.

*Iowa.* — *Parsons v. Parsons*, 66 Iowa 754, 21 N. W. 570, 24 N. W. 564 (testimony as to the treatment of testator by a legatee is not improper as against the objection that it related to a personal transaction); *Howe v. Richards*, 112 Iowa 220, 83 N. W. 909.

*Kentucky.* — *Stokes v. Shippen*, 13 Bush 180; *Floore v. Green*, 26 Ky. L. Rep. 1073, 83 S. W. 133.

*Maryland.* — *Davis v. Calvert*, 5 Gill & J. 209, 301.

*Michigan.* — *Beaubien v. Cicotte*, 12 Mich. 459, 488 ("In all cases of this character it has been customary to allow a wide range of inquiry into the family relations, and the terms upon which they have lived. It would be impossible to obtain a

clear idea concerning motives and probabilities without it. These cases are determined generally upon circumstantial evidence, and it must be received upon all points tending to throw light upon the various family relations").

*North Carolina.* — *In re Burns' Will*, 121 N. C. 336, 28 S. E. 519.  
*Vermont.* — *Thornton v. Thornton*, 39 Vt. 122, 158.

*Wisconsin.* — *Ballantine v. Proudfoote*, 62 Wis. 216, 22 N. W. 392.

**Reason.** — "Hostility and aversion to those who are bound to one by the ties of kindred and blood are admitted as proof upon the question of sanity, not alone because there exists such hostility, but because it is altogether without cause, or based upon some delusion. The aversion of one person to another is by itself no proof of insanity; but coupled with the fact that is is without cause, or is founded upon some delusion, it may be." *Brown v. Ward*, 53 Md. 376, 387.

81. *Cheney v. Goldy*, 225 Ill. 394, 80 N. E. 289; *Swygart v. Willard*, 166 Ind. 25, 76 N. E. 755; *Brelsford v. Aldridge* (Ind. App.), 84 N. E. 1090.

Admissions of testator respecting his conduct at remote times may be proved. *Brashears v. Orme*, 93 Md. 442, 49 Atl. 620.

82. *Turner v. King*, 17 Ky. L. Rep. 871, 32 S. W. 941, 33 S. W. 405.

83. *Scarborough v. Baskin*, 65 S. C. 558, 573, 44 S. E. 63.

84. *Estate of Lang*, 65 Cal. 19, 2 Pac. 491.

(b.) *Basis for Evidence.*—The mere opinion of the testator that some of his children had misused and mistreated him, and a contrary opinion on their part is too intangible to be the basis of an instruction.<sup>85</sup>

(c.) *How Shown.*—*Generally.*—Letters received by testator from a contestant long prior to the decease of the former are competent to show the latter's affection for him.<sup>86</sup> But letters which indicate only the existence of natural feelings between near relatives are immaterial.<sup>87</sup> Acts of kindness done a testator by his relatives cannot be proved to show his ungrounded aversion for them unless his knowledge thereof is shown.<sup>88</sup> The contestant may testify to the relations which existed between him and the testator,<sup>89</sup> as may persons who heard statements of the testator and who had been requested to advise him of their views respecting his relative and the treatment he should accord her.<sup>90</sup> If cordial feeling has long been maintained a witness may testify that it was terminated by the testator,<sup>91</sup> without cause on witness' part.<sup>92</sup>

*Declarations of Hostility to Testator.*—It may be shown that relatives of the testator made public declarations of hostility to him even though they may not have been communicated to testator before the will was made. Such testimony tends to show the reasonableness of his conduct and the known hostility of the declarants.<sup>93</sup>

(I.) *INTEREST IN BENEFICIARY.*—The attitude of a testator toward a charity which is a beneficiary under the will may be shown,<sup>94</sup> as may the care given the testator by a beneficiary.<sup>95</sup>

(J.) *HABITS OF HEIR.*—A son who has been disinherited may show that he was industrious and of good habits.<sup>96</sup> And the contrary

85. *Shorb v. Brubaker*, 94 Ind. 165.

86. *Howe v. Richards*, 112 Iowa 220, 83 N. W. 909 (they are not within the rule that excludes declarations of a party in his own behalf, nor inadmissible under the statute concerning transactions with a deceased person).

87. *Fraser v. Jennison*, 42 Mich. 206, 225, 3 N. W. 882.

88. *Mansfield v. Frobisher*, 111 Mass. 311.

89. *Cheney v. Goldy*, 225 Ill. 394, 80 N. E. 289.

90. *Hoyt v. Hoyt*, 112 N. Y. 493, 515, 20 N. E. 402.

91. *Manatt v. Scott*, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293.

92. *Pelamourges v. Clark*, 9 Iowa 1 (such testimony deals with a fact rather than an opinion).

93. *Stevens v. Leonard*, 154 Ind. 67, 56 N. E. 27, 77 Am. St. Rep. 446.

94. *Henning v. Stevenson*, 26 Ky.

L. Rep. 159, 80 S. W. 1135 ("the evidence was competent for it only placed the jury in the light of the circumstances surrounding the testatrix, and aided them in determining whether she took a rational survey of her estate and disposed of it according to a fixed purpose of her own"); *Lewis' Case*, 33 N. J. Eq. 219 (testator's patriotism may be shown if he makes the government his residuary legatee); *General Convention v. Crocker*, 7 Ohio C. C. 327 (it may be shown that the will of a widow was made in accordance with the wishes of her husband assented to by her during his lifetime).

95. *Denning v. Butcher*, 91 Iowa 425, 59 N. W. 69; *Grant v. Stamler*, 68 N. J. Eq. 555, 59 Atl. 890; *Moore v. Caldwell*, 6 Ohio C. C. (N. S.) 484.

96. *Frary v. Gusha*, 59 Vt. 257, 9 Atl. 549. But compare *Couch v.*



may be shown.<sup>97</sup> Proof of intoxication soon after the will was executed would tend to prove his habit in that regard.<sup>98</sup>

(K.) BUSINESS CAPACITY OF HEIR. — A change of purpose on the part of a testator toward an heir may be explained by showing that the latter had been tested in a great business enterprise and met the expectations of the former.<sup>99</sup>

(L.) FINANCIAL CONDITION OF STRANGER. — The financial condition of a legatee who was a mere acquaintance of the testator cannot be shown,<sup>1</sup> though he was the sole legatee and testator left near of kin.<sup>2</sup>

(M.) CHARACTER OF LEGATEE. — The character of a legatee is immaterial if testator was without knowledge of it.<sup>3</sup>

(N.) HABITS OF LEGATEE. — Testator's knowledge of the intemperate habits of the legatee is a relevant fact.<sup>4</sup>

(O.) RELATIONS BETWEEN TESTATOR AND BENEFICIARY. — As bearing upon the motive of testator in making a stranger a legatee it is competent to show the nature of the relations which existed between them.<sup>5</sup>

(P.) FIXED PURPOSE OF TESTATOR. — The testator's deliberate forethought and fixed purpose may be shown.<sup>6</sup> The adoption of wise means to attain a long-cherished business result may explain inequality.<sup>7</sup>

(Q.) EXPLANATIONS IN THE WILL. — Explanations given in the will are to be accepted if not disproved.<sup>8</sup> They may be entitled to much consideration.<sup>9</sup> But false statements in the will as to the sums ad-

Gentry, 113 Mo. 248, 20 S. W. 890, and *Tudor v. Tudor*, 17 B. Mon. (Ky.) 383. The court observed: "The bearing of such testimony upon the question of capacity is very remote and indirect. The affections of a parent are frequently placed on such of his children as are least worthy of his regard, and whose character and conduct bear no comparison, in point of propriety, to some of his other children. Yet they may be the peculiar objects of his bounty, just because by their misconduct, mismanagement or want of thrift they stand more in need of assistance than those do who have been much more energetic, industrious and exemplary in their conduct and general character. To make, therefore, the character of the children or grandchildren a test, or even evidence, of the capacity of the testator would in a great degree restrict the exercise of that arbitrary right, with which the owner of property is invested by law, to dispose of it

as he chooses provided he has sufficient capacity for that purpose."

97. *LaBau v. Vanderbilt*, 3 Redf. Sur. (N. Y.) 384, 432.

98. *Baker v. Baker*, 202 Ill. 595, 612, 67 N. E. 410.

99. *LaBau v. Vanderbilt*, 3 Redf. Sur. (N. Y.) 384, 430.

1. *In re Merriman's Appeal*, 108 Mich. 454, 66 N. W. 372.

2. *Murphree v. Senn*, 107 Ala. 424, 18 So. 264.

3. *In re Morse's Estate*, 146 Mich. 463, 109 N. W. 858.

4. *Fairchild v. Bascomb*, 35 Vt. 398, 417.

5. *In re Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695; *Carpenter v. Hatch*, 64 N. H. 573, 15 Atl. 219.

6. *Gesell v. Baugher*, 100 Md. 677, 60 Atl. 481; *General Convention v. Crocker*, 7 Ohio C. C. 327.

7. *LaBau v. Vanderbilt*, 3 Redf. Sur. (N. Y.) 384, 431.

8. *Graham v. Deuterma*, 206, Ill. 378, 69 N. E. 237.

9. *Graham v. Deuterma*, 206 Ill.

vanced to some of the heirs are evidence of incapacity.<sup>10</sup> And a statement of the reason for testator's action is not determinative of his capacity.<sup>11</sup>

(R.) **SUBSEQUENT CIRCUMSTANCES.**—Circumstances occurring after the making of testator's will are irrelevant.<sup>12</sup> But the rule does not extend to declarations of a contestant offered to rebut testimony to show cordial relations and affection;<sup>13</sup> nor to facts occurring since the testator's decease and confirmatory of his opinion as to the business capacity of a devisee.<sup>14</sup>

**4. Previous Declarations.**—A. OF INTENTION.—The testator's declarations of his intention concerning the manner he proposed to dispose of his estate and the reason therefor may be proved.<sup>15</sup>

378, 69 N. E. 237 (a substantial and sufficient reason for inequality must be accepted if uncontradicted); *Thompson v. Thompson*, 21 Barb. (N. Y.) 107, affirming *Thompson v. Quimby*, 2 Bradf. Sur. (N. Y.) 449; *In re Raplee's Will*, 66 Hun 558, 21 N. Y. Supp. 801, 141 N. Y. 553, 36 N. E. 343 (no opinion).

**A Mistake of Fact** in a will given as a reason for not making a relative a legatee is not fatal. *Estate of Dougherty*, 139 Cal. 10, 72 Pac. 358.

10. *Tobin v. Jenkins*, 29 Ark. 151; *Lamb v. Lamb*, 105 Ind. 456, 5 N. E. 171; *Reid v. Lilly's Exrs.*, 15 Ky. L. Rep. 474, 23 S. W. 955.

11. *Sherley v. Sherley*, 81 Ky. 240.

12. *Wood v. Carpenter*, 166 Mo. 465, 484, 66 S. W. 172; *In re Gannon's Will*, 2 Misc. 329, 21 N. Y. Supp. 960, affirmed, *pro forma*, 139 N. Y. 654, 35 N. E. 207; *Varner v. Varner*, 16 Ohio C. C. 386.

13. *Dunham's Appeal*, 27 Conn. 192.

14. *Prather v. McClelland* (Tex. Civ. App.), 26 S. W. 657.

**The Argument** runs thus: It was in proof that the testator's opinion of his son was that he was easily influenced and would not keep the property devised him in the original will. The codicil was in accord with this opinion. The testimony excluded, though of facts occurring after the codicil, tended to show that this opinion was correct—that the testator's estimate of the character and capacity of his son was not the result of delusion or insanity. This capacity, or want of it, would be

evidenced by future acts of the son. The good or bad judgment of the testator might be shown in this way. Subsequent acts of his son in the conduct of his business, showing the character his father attributed to him, would be relevant evidence. *Prather v. McClelland* (Tex. Civ. App.), 26 S. W. 657.

15. *England.*—*Harwood v. Baker*, 3 Moore P. C. 282, 13 Eng. Reprint 117.

*Alabama.*—*Seale v. Chambliss*, 35 Ala. 19; *Bulger v. Ross*, 98 Ala. 267, 12 So. 803; *Couch v. Couch*, 7 Ala. 519.

*Arkansas.*—*Flowers v. Flowers*, 74 Ark. 212, 85 S. W. 242.

*Delaware.*—*Truitt v. Cullen*, 3 Penne. 311, 50 Atl. 174.

*Georgia.*—*Williamson v. Nabers*, 14 Ga. 286, 308; *Griffin v. Griffin's Exrs.*, R. M. Charl. 217.

*Illinois.*—*Baker v. Baker*, 202 Ill. 595, 611, 67 N. E. 410; *Cheney v. Goldy*, 225 Ill. 394, 80 N. E. 289; *Crumbaugh v. Owen*, 238 Ill. 497, 87 N. E. 312.

*Indiana.*—*Lamb v. Lamb*, 105 Ind. 456, 5 N. E. 171; *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990 (against unequal distribution among children); *Goodbar v. Lidikey*, 136 Ind. 1, 35 N. E. 691, 43 Am. St. Rep. 296.

*Iowa.*—*Bever v. Spangler*, 93 Iowa 576, 603, 61 N. W. 858; *In re Estate of Goldthorp*, 94 Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400. See *In re Kah's Estate*, 136 Iowa 116, 113 N. W. 563.

*Kansas.*—*Schnee v. Schnee*, 61 Kan. 643, 60 Pac. 738.

*Kentucky.*—*Morris v. Morton's Exrs.*, 14 Ky. L. Rep. 360, 20 S. W.

a. *Ground on Which Received.*—Intention, purpose, mental peculiarity and condition are mainly ascertainable through the medium afforded by language. Hence, language which has a tendency to prove a condition not in its nature temporary and transient, though prior in time to the act which is questioned, is admissible on the theory that what is once proved to exist must be presumed to continue till the contrary be shown. Its weight will depend upon its significance and proximity.<sup>16</sup>

287; Harper's Will, 4 Bibb 244 (entitled to great weight if repeated and the subject was particularly discussed); Bush v. Lisle, 89 Ky. 393, 12 S. W. 762; Hoskins v. Hoskins, 9 Ky. L. Rep. 915, 7 S. W. 546; Bradshaw v. Butler, 30 Ky. L. Rep. 1249, 100 S. W. 837.

Maine.—Hall v. Perry, 87 Me. 569, 33 Atl. 160, 47 Am. St. Rep. 352.

Maryland.—Griffith v. Dufferderfer, 50 Md. 466; Moore v. McDonald, 68 Md. 321, 338, 12 Atl. 117.

Massachusetts.—May v. Bradlee, 127 Mass. 414.

Michigan.—McHugh v. Fitzgerald, 103 Mich. 21, 61 N. W. 354; Estate of Lefevre, 102 Mich. 568, 61 N. W. 3; Peninsular Tr. Co. v. Barker, 116 Mich. 333, 74 N. W. 508; Bush v. Delano, 113 Mich. 321, 71 N. W. 628.

Minnesota.—Hammond v. Dike, 42 Minn. 273, 44 N. W. 61; Woodcock v. Johnson, 36 Minn. 217, 30 N. W. 894.

Mississippi.—Sheehan v. Kearney, 21 So. 41, 35 L. R. A. 102.

Missouri.—Crowson v. Crowson, 172 Mo. 691, 703, 72 S. W. 1065; Rule v. Maupin, 84 Mo. 587.

Montana.—In re Miller's Estate, 37 Mont. 545, 97 Pac. 935.

New Jersey.—See Den v. Vancleve, 5 N. J. L. 589, 655, for a full discussion by a divided court. It is said in Goble v. Grant, 3 N. J. Eq. 629, that such declarations are admissible only when offered to repel or sustain a charge of fraud or circumvention of the devisee in obtaining the will. But their competency is favored in Turner v. Cheesman, 15 N. J. Eq. 243, 265.

New York.—In re Folts' Will, 71 Hun 492, 24 N. Y. Supp. 1052; Labau v. Vanderbilt, 3 Redf. Sur. 384, 437; Clapp v. Fullerton, 34 N. Y. 190; In re Clearwater's Will, 2 N. Y. Supp. 99, 17 N. Y. St.

794 (surrogate's court); In re Gray's Will, 52 Hun 614, 5 N. Y. Supp. 464; Pilling v. Pilling, 45 Barb. 86; Gombault v. Public Admr., 4 Bradf. Sur. 226, 241; In re Will of Langton, 1 Tucker Sur. 301, 328; Van Guysling v. Van Kuren, 35 N. Y. 70; In re Pendleton's Will, 5 N. Y. Supp. 849; Dobie v. Armstrong, 27 App. Div. 520, 50 N. Y. Supp. 801, 160 N. Y. 584, 55 N. E. 302; Dunham v. Dunham, 63 App. Div. 264, 71 N. Y. Supp. 330.

Ohio.—Moore v. Caldwell, 6 Ohio C. C. (N. S.) 484.

Oregon.—Potter v. Jones, 20 Or. 239, 252, 25 Pac. 769, 12 L. R. A. 161.

Pennsylvania.—Norris v. Sheppard, 20 Pa. St. 475.

Texas.—Patterson v. Lamb, 21 Tex. Civ. App. 512, 52 S. W. 98; Brown v. Mitchell, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64, reversing (Tex. Civ. App.), 29 S. W. 927 (instructions to attorney may be proved).

Vermont.—Foster's Exrs. v. Dickerson, 64 Vt. 233, 264, 24 Atl. 253; Thornton v. Thornton, 39 Vt. 122, 159.

West Virginia.—McMechen v. McMechen, 17 W. Va. 683, 714.

Wisconsin.—In re Blakely's Will, 48 Wis. 294, 4 N. W. 337.

16. Shailer v. Bumstead, 99 Mass. 112; Woodward v. Sullivan, 152 Mass. 470, 25 N. E. 837.

Reason.—Such declarations tend to show both imposition and incompetency, because where a will is made contrary to previously declared intentions it is such an improbable and unexpected circumstance as requires explanation before the mind is satisfied that it was deliberately and understandingly done. Such evidence may not always be very satisfactory, but we think it is admissible, and as little liable to be misapplied

b. *Cause of Condition*. — Such declarations, if recent, are admissible in cases of doubtful capacity from death-bed sickness as well as where the condition is attributable to other causes.<sup>17</sup>

c. *Harmony With Will*. — Strict conformity of the will to the declarations is not essential to the competency of the latter in favor of the proponent;<sup>18</sup> nor is opposition of the will thereto a reason for excluding them when offered by the contestant.<sup>19</sup>

d. *Negative Character*. — It is not an objection to them that they were negative in character,<sup>20</sup> as that they disclosed the purpose to die without making a will,<sup>21</sup> or that they were general in character.<sup>22</sup>

e. *Not Acted Upon*. — It is immaterial to the admissibility of declarations concerning intention that they were not accompanied by acts.<sup>23</sup>

f. *Circumstances May Affect Admissibility*. — Remoteness of time and change of circumstances may be ground for excluding proof of declarations.<sup>24</sup>

g. *Foundation Must Be Laid*. — It has been held that proof of declarations must be preceded by substantive proof of incapacity or they cannot be shown.<sup>25</sup>

as any other, and sometimes may be very satisfactory and conclusive, especially when taken in connection with other circumstances. *Dennison's Appeal*, 29 Conn. 399.

In *Thornton v. Thornton*, 39 Vt. 122, 159, the court observed: Such evidence informs the triers of the preferences of the testator and the operations of his mind upon the subject, when he was confessedly in sound health, and thus aids them in determining whether the instrument in question was the work of the same will. See *Bever v. Spangler*, 93 Iowa 576, 603, 61 N. W. 1072.

In *McMechen v. McMechen*, 17 W. Va. 683, 714, the court said: "Upon the question of testamentary capacity evidence is admissible of declarations by the testator that he had received the largest portion of his father's estate, and that he intended by his will to restore a part thereof to his brothers and sisters, where the will shows that he made them or their children beneficiaries.

. . . It is natural for a testator to provide for those nearest him, and to give them the whole of his property. When there is any doubt of his competency to make a will, the fact that he has devised a very considerable portion of his property to others of his relations or to

strangers is proper to be considered by the jury; also, it is proper for the proponents of the will, if they can, by proper and relevant testimony, to explain why it was that the testator disposed of his property in the manner he did." See *Stewart v. Lyons*, 54 W. Va. 665, 47 S. E. 442.

17. *Hammond v. Dike*, 42 Minn. 273, 44 N. W. 61; *Stewart's Exr. v. Lipenard*, 26 Wend. (N. Y.) 255, 313; *Irish v. Smith*, 8 Serg. & R. (Pa.) 573.

18. *In re Pickett's Will*, 49 Or. 127, 89 Pac. 377.

19. *Denison's Appeal*, 29 Conn. 399.

20. *Denison's Appeal*, 29 Conn. 399.

21. *Bower v. Bower*, 142 Ind. 194, 41 N. E. 523; *In re Soden's Will*, 38 Misc. 25, 76 N. Y. Supp. 877; *Allston v. Jones*, 17 Barb. (N. Y.) 276, 287; *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314.

22. *Denning v. Butcher*, 91 Iowa 425, 441, 59 N. W. 69.

23. *Thornton v. Thornton*, 39 Va. 122, 158.

24. *Bonnemort v. Gill*, 165 Mass. 493, 43 N. E. 299.

25. *Shailer v. Bumstead*, 99 Mass. 112, 123; *Cawthorn v. Haynes*, 24 Mo. 236; *Tunison v. Tunison*, 4

h. *Weight To Be Given.* — Such testimony is said to be strong proof of capacity if the will and previously declared intentions correspond,<sup>26</sup> and is especially important if in writing.<sup>27</sup> Their evidentiary value is affected by the cause of the condition of the declarant.<sup>28</sup>

**Not Conclusive.** — The fact that the will does not correspond with the maker's previously expressed purpose does not show incompetency.<sup>29</sup>

**B. CONCERNING OTHER MATTERS.** — Other declarations than those which relate to testamentary intention are competent if they tend to illustrate the capacity of the testator. They are never received to show the truth of the facts stated.<sup>30</sup>

Bradf. Sur. (N. Y.) 138; Norris v. Sheppard, 20 Pa. St. 475.

26. Couch v. Couch, 7 Ala. 519; Roberts v. Trawick, 13 Ala. 68; Baker v. Baker, 202 Ill. 595, 608, 67 N. E. 410; Means v. Means, 6 Rich. L. (S. C.) 1; Kaufman v. Caughman, 49 S. C. 159, 27 S. E. 16, 61 Am. St. Rep. 808.

27. McNinch v. Charles, 2 Rich. L. (S. C.) 229, 238; *In re Burns' Will*, 121 N. C. 336, 28 S. E. 519; Brown v. Mitchell, 87 Tex. 140, 26 S. W. 1059; Bryant v. Pierce, 95 Wis. 331, 70 N. W. 480. See Wurzell v. Beckman, 52 Mich. 478, 18 N. W. 226.

28. **Declarations Made Long After the Time to Which the Inquiry Is Directed** can be of but little value. They ought to have some direct connection with and tend to show the condition of the mind at the time the will was made. The period of time over which such declarations may extend depends much upon the character of the unsoundness of mind alleged or attempted to be proved. If it be of short duration, as arising from drunkenness, the declarations, to be of any value, must be near to the time the act in question was to be performed. If from old age or other like infirmity a much wider latitude may be allowed. Rule v. Maupin, 84 Mo. 587.

**No Certain Value.** — Declarations of intention are receivable if there is doubt as to capacity, but they diminish in importance as the grade of capacity increases, and are valueless if the mind of the declarant is sound and vigorous. Tunison v. Tunison, 4 Bradf. Sur. (N. Y.) 138.

29. Berry v. Safe Deposit & Tr. Co., 96 Md. 45, 56, 53 Atl. 720; Titlow v. Titlow, 54 Pa. St. 216 (a change of intention is of no importance if there be a sound mind unconstrained).

30. *Connecticut.* — Canada's Appeal, 47 Conn. 450, 463.

*Iowa.* — Manatt v. Scott, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293.

*Maine.* — Robinson v. Adams, 62 Me. 369, 412, 16 Am. Rep. 473 (the examination must not be confined to a single declaration or conversation, but must sometimes embrace many years and many declarations).

*Maryland.* — Colvin v. Warford, 20 Md. 357, 389.

*Massachusetts.* — Woodward v. Sullivan, 152 Mass. 470, 25 N. E. 837.

*Michigan.* — Roberts v. Bidwell, 136 Mich. 191, 98 N. W. 1000; Harring v. Allen, 25 Mich. 505.

*Minnesota.* — *In re Brown*, 38 Minn. 112, 35 N. W. 726.

*Missouri.* — Jones v. Roberts, 37 Mo. App. 163, 181; Bush v. Bush, 87 Mo. 480; Gibson v. Gibson, 24 Mo. 227; Rule v. Maupin, 84 Mo. 587; Thompson v. Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; Crowson v. Crowson, 172 Mo. 691, 703, 72 S. W. 1065; Hamon v. Hamon, 180 Mo. 685, 699, 79 S. W. 422; Pratte v. Coffman, 33 Mo. 71.

*New Jersey.* — Boylan v. Meeker, 28 N. J. L. 274.

*New York.* — Waterman v. Whitney, 11 N. Y. 157; Matter of Woodward, 167 N. Y. 28, 60 N. E. 233; Roche v. Nason, 185 N. Y. 128, 77 N. E. 1077 (declarations concerning

An Exception seems to have been made as to their competency to show the facts stated where a testator while sane expressed the opinion that he had been insane for twenty years.<sup>31</sup> And a verified answer, in which testator stated his physical and mental condition, has been held admissible.<sup>32</sup> The exception does not include declarations made while insane;<sup>33</sup> and declarations inconsistent with the will may be proved to show the inequality or unnaturalness of its provisions.<sup>34</sup>

a. *All Declarations Competent.*—The testimony must not be limited to a single declaration, but must cover all declarations made concerning the same matter, regardless of time.<sup>35</sup>

b. *Whole Conversation Admissible.*—The statements made to the testator by the person who heard his declaration, at the time it was made, are admissible in connection therewith.<sup>36</sup> It is not necessary to show that what was said to testator is essential to understand what was said by him.<sup>37</sup>

c. *Explanation of Will.*—Apparently inequitable provisions in a will may be explained by the testator's declarations.<sup>38</sup>

d. *Source of Estate.*—Declarations are competent to show who assisted the testator in accumulating the estate devised.<sup>39</sup>

e. *Affections and Hostility.*—Testator's attitude toward the members of his family may be shown by his declarations,<sup>40</sup> if not

health are not to be taken as evidence of their truth).

*Virginia.*—Wallen v. Wallen, 107 Va. 131, 57 S. E. 596.

**Purposes for Which Competent.**

Retention or loss of memory, tenacity or vacillation of purpose, existing at the date of the will, long cherished purposes, settled convictions, deeply rooted feelings, opinions, affections or prejudices, or other intrinsic or enduring peculiarities of mind, inconsistent with the dispositions made in the will may be proved by testator's declarations. They are also competent to rebut any inference arising from its non-revocation. Shailer v. Bumstead, 99 Mass. 112, 126.

31. Ross v. McQuiston, 45 Iowa 145; Colvin v. Warford, 20 Md. 357, 389.

32. Manatt v. Scott, 106 Iowa 203, 76 N. W. 717 68 Am. St. Rep. 293. But compare Roche v. Nason, 185 N. Y. 128, 77 N. E. 1077.

33. Estate of Lang, 65 Cal. 19, 2 Pac. 491; May v. Bradley, 127 Mass. 414.

34. Beattie v. Thompson, 16 R. I. 13, 11 Atl. 172 (promise to convey property to wife from whom it was

in part acquired; devise in favor of testator's relatives, ignoring step-children); In re Estate of Van Alstine, 26 Utah 193, 72 Pac. 942.

35. Robinson v. Adams, 62 Me. 369, 413, 16 Am. Rep. 473.

36. Mullins v. Cottrell, 41 Miss. 291, 326; Matter of Potter, 161 N. Y. 84, 55 N. E. 387.

37. Garrus v. Davis, 234 Ill. 326, 84 N. E. 924.

38. Burney v. Torrey, 100 Ala. 157, 174, 14 So. 685, 46 Am. St. Rep. 33; Waters v. Waters, 222 Ill. 26, 78 N. E. 1; In re Mason's Will (Vt.), 72 Atl. 329; In re Blakely's Will, 48 Wis. 294, 4 N. W. 337.

39. Burney v. Torrey, 100 Ala. 157, 174, 14 So. 685, 46 Am. St. Rep. 33.

40. England. — Smith v. Tebbitt, 36 L. J., P. 97, L. R. 1 P. 398, 429, 16 L. T. 841.

United States. — Throckmorton v. Holt, 160 U. S. 552, 574.

Arkansas. — Taylor v. McClintock, 112 S. W. 405.

Connecticut. — Denison's Appeal, 29 Conn. 399; Canada's Appeal, 47 Conn. 450, 464 (verified petition in chancery).

Illinois — Reynolds v. Adams, 90

too remote to bear on the question of capacity.<sup>41</sup> In Tennessee it is otherwise as to testator's declarations concerning his relations with his wife.<sup>42</sup>

f. *Mental Condition.* — Declarations indicative of the mental con-

Ill. 134, 147; *Cockeram v. Cockeram*, 17 Ill. App. 604; *England v. Fawbush*, 204 Ill. 384, 401, 68 N. E. 526; *Slingloff v. Bruner*, 174 Ill. 561, 51 N. E. 772.

Iowa. — *Bever v. Spangler*, 93 Iowa 576, 603, 61 N. W. 1072.

Kentucky. — *Lucas v. Cannon*, 13 Bush 650; *Howard's Will*, 5 T. B. Mon. 199.

Maryland. — *Moore v. McDonald*, 68 Md. 321, 339, 12 Atl. 117.

Massachusetts. — *Mansfield v. Frobisher*, 111 Mass. 311; *Woodbury v. Obear*, 7 Gray 467.

Michigan. — *Beaubien v. Cicotte*, 12 Mich. 459, 486.

Missouri. — *McFadin v. Catron*, 120 Mo. 252, 266, 25 S. W. 506; *Rule v. Maupin*, 84 Mo. 587; *Gibson v. Gibson*, 24 Mo. 227.

New Hampshire. — *Whitman v. Morey*, 63 N. H. 448, 2 Atl. 899.

New York. — *In re Gray's Will*, 52 Hun 614, 5 N. Y. Supp. 464; *Will of Langton*, 1 Tucker Sur. 301, 328 (beneficiary under the will).

North Carolina. — *In re Burns' Will*, 121 N. C. 336, 28 S. E. 519.

Ohio. — *Moore v. Caldwell*, 6 Ohio C. C. (N. S.) 484.

Pennsylvania. — *Norris v. Sheppard*, 20 Pa. St. 475.

Tennessee. — *Kirkpatrick v. Jenkins*, 96 Tenn. 85, 33 S. W. 819.

Utah. — *In re Estate of Van Alstine*, 26 Utah 193, 72 Pac. 942.

Vermont. — *Foster's Exrs. v. Dickerson*, 64 Vt. 233, 263, 24 Atl. 253; *In re Mason's Will*, 72 Atl. 329.

Virginia. — *Wallen v. Wallen*, 107 Va. 131, 57 S. E. 596.

Wisconsin. — *Ballantine v. Proudfoot*, 62 Wis. 216, 22 N. W. 392.

**Reason.** — "There is no ground for an exception in favor of the admissibility of declarations of a deceased person as to the state of his affections when the mental or testamentary capacity of the deceased is not in issue. When such an issue is made, it is one which relates to a state of mind which was involuntary

and over which the deceased had not the control of the sane individual, and his declarations are admitted, not as any evidence of their truth, but only because he made them, and that is an original fact from which, among others, light is sought to be reflected upon the main issue of testamentary capacity. The truth or falsity of such declarations is not important upon such an issue (unless that for the purpose of showing delusion it may be necessary to give evidence of their falsity), but the mere fact that they were uttered may be most material evidence upon that issue. The declarations of the sane man are under his control, and they may or may not reflect his true feelings, while the utterances of the man whose mind is impaired from disease or old age are not the result of reflection and judgment, but spontaneous outpourings from mental weakness or derangement. The difference between the two, both as to the manner and subject of the declarations, might be obvious. It is quite apparent therefore that the declarations of the deceased are properly received upon the question of his state of mind, whether mentally strong and capable or weak and incapable, and that from all the testimony, including his declarations, his mental capacity can probably be determined with considerable accuracy. Whether the utterances are true or false cannot be determined from their mere statement, and they are without value as proof of their truth, whether made by the sane or insane, because they are in either case unsworn declarations." *Throckmorton v. Holt*, 180 U. S. 552, 574; *Wallen v. Wallen*, 107 Va. 131, 57 S. E. 596.

<sup>41</sup>. *Fraser v. Jennison*, 42 Mich. 206, 225, 3 N. W. 882; *Titlow v. Titlow*, 54 Pa. St. 216.

<sup>42</sup>. *English v. Ricks*, 117 Tenn. 73, 95 S. W. 189.

dition of the testator are not admissible unless made about the time the will was executed.<sup>43</sup>

g. *Remoteness*. — Remote declarations may be proved if they are reaffirmed by late ones,<sup>44</sup> and may sometimes be shown independently of reaffirmations, in the absence of evidence tending to show a change of declarant's purpose.<sup>45</sup>

C. CONTEMPORANEOUS DECLARATIONS. — a. *Admissible*. — The declarations of the testator at the time the will was made may be shown in connection with other facts and circumstances.<sup>46</sup>

b. *Their Value*. — They are the most satisfactory evidence that can be adduced.<sup>47</sup>

D. SUBSEQUENT. — COMPETENCY. — Declarations made by testator soon after the will was executed expressive of what he had done or intended to do are competent as illustrative of his capacity at the time in issue.<sup>48</sup> But it has been ruled that a declaration as

43. *Clements v. McGinn* (Cal.), 33 Pac. 920.

44. *Baker v. Baker*, 202 Ill. 595, 612, 67 N. E. 410.

45. *Denison's Appeal*, 29 Conn. 399 (not cause for exclusion that they were made "long before" the will); *Robinson v. Adams*, 62 Me. 369, 412, 16 Am. Rep. 473; *Davis v. Calvert*, 5 Gill & J. (Md.) 269 (fifteen years before); *Moore v. McDonald*, 68 Md. 321, 339, 12 Atl. 117 (twelve years before); *Estate of Le-fevre*, 102 Mich. 568, 61 N. W. 3; *Herster v. Herster*, 122 Pa. St. 239, 256, 16 Atl. 342, 9 Am. St. Rep. 95.

*Testator's Attitude Toward His Children* four years before the will was written is not too remote. *In re Mason's Will* (Vt.), 72 Atl. 329.

A Trust Deed made three years prior to the will, when testator was sane is admissible. *Glass v. Glass*, 127 Iowa 646, 103 N. W. 1013.

46. *Smith v. Ryan*, 136 Iowa 355, 112 N. W. 8; *Brown v. Mitchell*, 87 Tex. 140, 26 S. W. 1059; *Foster's Exrs. v. Dickerson*, 64 Vt. 233, 264, 24 Atl. 253.

47. *Shailer v. Bumstead*, 99 Mass. 112.

48. *England*. — *Bootle v. Blundell*, 19 Ves. 494, 34 Eng. Reprint 600.

*Connecticut*. — *Canada's Appeal*, 47 Conn. 450 (to show that testator did not understand what he had done).

*Delaware*. — *Ball v. Kane*, 1 Penne. 90, 39 Atl. 778 (the court was divided).

*Georgia*. — *Credille v. Credille*, 123

Ga. 673, 51 S. E. 628, 107 Am. St. Rep. 133.

*Illinois*. — *Reynolds v. Adams*, 90 Ill. 134, 147; *Cockeram v. Cockeram*, 17 Ill. App. 604; *Moore v. Gubbins*, 54 Ill. App. 163.

*Indiana*. — *Swygart v. Willard*, 166 Ind. 25, 76 N. E. 755.

*Iowa*. — *Parsons v. Parsons*, 66 Iowa 754, 21 N. W. 570, 24 N. W. 564 ("If it was to do over again I would make an equal division of my property").

*Kentucky*. — *Lucas v. Cannon*, 13 Bush 650; *Howard's Will*, 5 T. B. Mon. 199 (a declaration as to what has been done and the reason for it is proof, "strong and undoubted, of memory, of reason, and of social affections and moral sense").

*Massachusetts*. — *May v. Bradlee*, 127 Mass. 414; *Shailer v. Bumstead*, 99 Mass. 112.

*Michigan*. — *O'Dell v. Goff*, 149 Mich. 152, 112 N. W. 736, 10 L. R. A. (N. S.) 989; *Haines v. Hayden*, 95 Mich. 332, 54 N. W. 911, 35 Am. St. Rep. 566; *Roberts v. Bidwell*, 136 Mich. 191, 98 N. W. 1000.

*Mississippi*. — *Sheehan v. Kearney*, 21 So. 41, 35 L. R. A. 102.

*Missouri*. — *McFadin v. Catron*, 120 Mo. 252, 266, 25 S. W. 506; *Crowson v. Crowson*, 172 Mo. 691, 703, 72 S. W. 1065.

*New Jersey*. — *Boylan v. Meeker*, 28 N. J. L. 274; *Garrison v. Garrison's Exrs.*, 15 N. J. Eq. 266, 285.

*New York*. — *In re Brunor*, 21



to what had been done is incompetent because it does not bear on the question of capacity.<sup>49</sup> On the other hand, statements as to the contents of the will have been considered evidence of incompetency where they were totally variant from it,<sup>50</sup> and of competency where they corresponded with the will.<sup>51</sup>

a. *Time of Making*.—The time declarations were made is not

App. Div. 259, 47 N. Y. Supp. 681; *Waterman v. Whitney*, 11 N. Y. 157, 168; *Matter of Clark*, 40 Hun 233; *Gombault v. Public Admr.*, 4 Bradf. Sur. 226, 242; *In re Mahoney*, 58 Hun 608, 12 N. Y. Supp. 122; *In re Soden's Will*, 38 Misc. 25, 76 N. Y. Supp. 877 (that no will had been made).

*Ohio*.—*Kuhl v. Reichert*, 2 Ohio C. C. (N. S.) 42; *Moore v. Caldwell*, 6 Ohio C. C. (N. S.) 484.

*Pennsylvania*.—*Rambler v. Tryon*, 7 Serg. & R. 90; *McTaggart v. Thompson*, 14 Pa. St. 149.

*Tennessee*.—*Kirkpatrick v. Jenkins*, 96 Tenn. 85, 33 S. W. 819; *Peery v. Peery*, 94 Tenn. 328, 29 S. W. 1.

*Texas*.—*Brown v. Mitchell*, 87 Tex. 140, 26 S. W. 1059.

*Vermont*.—*Foster's Exrs. v. Dickerson*, 64 Vt. 233, 263, 24 Atl. 253.

**Argument.**—"Subsequent declarations are admissible for the reason that the condition of mind ascertained at a date subsequent to the execution of the will may be presumed to have existed at a prior time. *Waterman v. Whitney*, 11 N. Y. 157; *Beaubien v. Cicotte*, 12 Mich. 459; *Harring v. Allen*, 25 Mich. 505; *Mooney v. Olsen*, 22 Kan. 69." They are also admissible for the purpose of weakening the presumption of the validity of the will to be drawn from its non-destruction during a long period. *Haines v. Hayden*, 95 Mich. 332, 346, 54 N. W. 911, 35 Am. St. Rep. 566.

Such declarations would seem to be symptomatic of the condition of the mind, as exclamations forced by pain or disease from a suffering body are symptomatic of such pain and illustrative of its nature and cause. *Sheehan v. Kearney* (Miss.), 21 So. 41, 35 L. R. A. 102.

"The declarations and conduct of the testator, both before and after he signed the will, are competent as

to the condition of his mind at the time he signed it. They are the pointers to the controlling fact involved in the issue to be submitted to the judgment and discretion of the jury as rational men. These acts and declarations are not received as part of the *res gestae*, but whether made long before or after the making of the will, is immaterial as to their competency. They are circumstances uttered by one having an interest, going to the jury with such weight and credit as that tribunal may give them." *In re Burns' Will*, 121 N. C. 336, 28 S. E. 519.

**Regarded With Suspicion.**—The Lord Chancellor said in *Boote v. Blundell*, 19 Ves. 494, 34 Eng. Reprint 600: "Subsequent papers, though evidence, are certainly to be regarded with considerable jealousy, as a testator is not permitted to prove his own sanity; but upon a question of whether he knew what he was doing the letter is evidence to this extent: He must have been conscious at that time of one of these things—either that he was speaking with reference to a will which he knew he was competent to make at the time, or that the previous act was done in a moment of stupor; and it is impossible to say this is not a most rational inference, that, if he had a doubt upon that subject, he would, with such determined and peculiar purposes, have immediately re-executed his will."

49. *Hill v. Bahrns*, 158 Ill. 314, 41 N. E. 912.

50. *Sisson v. Conger*, 1 Thomp. & C. (N. Y.) 564.

51. *Sutton v. Sadler*, 3 C. B., N. S. (Eng.) 87.

**Occurrences During Illness.**—Declarations made concerning recollection of what occurred during the illness in which the will was executed are not significant. *Henry v. Hall*,

always material,<sup>52</sup> if they tend to show the condition of the testator's mind at the decisive period,<sup>53</sup> at least if the disease with which he was affected was of long standing and progressive in character,<sup>54</sup> or his infirmity was the result of age.<sup>55</sup>

b. *Approval of Will*. — Approval of the scheme of the will may be shown by proof of declarations.<sup>56</sup>

c. *Memory*. — Declarations are competent to show the state of the testator's memory.<sup>57</sup>

d. *Resisting Power*. — Declarations may be proved to show the power of the testator to resist extraneous influences.<sup>58</sup>

e. *Family Relations*. — Subsequent declarations are admissible to show testator's relations toward members of his family.<sup>59</sup>

f. *Basis for*. — It is not cause for excluding proof of declarations that they were based on hearsay,<sup>60</sup> or on conversations alleged to have been had with imaginary persons.<sup>61</sup>

g. *Test of Admissibility*. — The test of the admissibility of testator's declarations is efficiency to illustrate his mental condition at the time the will was executed.<sup>62</sup> The question is one of fact for the discretion of the trial judge.<sup>63</sup>

E. WHEN INADMISSIBLE. — In an early case in the federal circuit court it was held that a testator's declarations, whether prior or subsequent to the will, were inadmissible because mere hearsay, unless offered to prove fraud or circumvention.<sup>64</sup> In Illinois, dec-

106 Ala. 84, 97, 17 So. 187, 54 Am. St. Rep. 22.

52. *In re Estate of Goldthorp*, 94 Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400; *In re Burns' Will*, 121 N. C. 336, 28 S. E. 519; *Herster v. Herster*, 122 Pa. St. 239, 257, 16 Atl. 342, 9 Am. St. Rep. 95.

53. *Haines v. Hayden*, 95 Mich. 332, 347, 54 N. W. 911, 35 Am. St. Rep. 566.

54. *Manatt v. Scott*, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293.

55. *McIntosh v. Moore*, 22 Tex. Civ. App. 22, 53 S. W. 611.

56. *LaBau v. Vanderbilt*, 3 Redf. Sur. (N. Y.) 384, 430; *In re Clearwater's Will*, 2 N. Y. Supp. 99, 17 N. Y. St. 794 (surrogate's court).

57. *Howard's Will*, 5 T. B. Mon. (Ky.) 199; *Davis v. Denny*, 94 Md. 390, 402, 50 Atl. 1037.

58. *Peery v. Peery*, 94 Tenn. 328, 29 S. W. 1; *Bryant v. Pierce*, 95 Wis. 331, 70 N. W. 480.

59. *Crowson v. Crowson*, 172 Mo. 691, 703, 72 S. W. 1065; *Koegel v. Egner*, 54 N. J. Eq. 623, 35 Atl. 394; *Waterman v. Whitney*, 11 N. Y. 157.

60. *Manatt v. Scott*, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293.

61. *In re Woodward*, 167 N. Y. 28, 60 N. E. 233, reversing 52 App. Div. 494, 65 N. Y. Supp. 405.

62. *Hill v. Bahrns*, 158 Ill. 314, 41 N. E. 912; *Lane v. Moore*, 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 430; *Waterman v. Whitney*, 11 N. Y. 157, 169; *Herster v. Herster*, 122 Pa. St. 239, 257, 16 Atl. 342, 9 Am. St. Rep. 95.

If there is no presumption that the subsequent condition existed when the will was made declarations are inadmissible. *Leffingwell v. Bettinghouse*, 151 Mich. 513, 115 N. W. 731; *Crocker v. Chase*, 57 Vt. 413. The question is well argued in the last case which, apparently, favors a more stringent rule than is generally recognized. See *Robinson v. Hutchinson*, 26 Vt. 38.

63. *Grant v. Thompson*, 4 Conn. 203; *Lane v. Moore*, 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 430; *Herster v. Herster*, 122 Pa. St. 239, 257, 16 Atl. 342, 9 Am. St. Rep. 95.

64. *Reasons*. — "If the evidence is offered in support of the instru-

larations inconsistent with the will, no matter when made, are not admissible.<sup>65</sup> And this seems to be the rule in the District of Columbia.<sup>66</sup>

**5. Habits.**—A. INTOXICATION.—a. *Period of Inquiry.*—The intoxication which will avoid a will must have been co-existent with the making of it and must have been inconsistent with ability to discharge the business in hand.<sup>67</sup>

ment it could only have that effect upon the supposition of a uniform consistency of those declarations, not only with the instrument itself, but with the secret intentions of the party, at all times after those declarations were made; and yet how unsafe a criterion would this be when most men will acknowledge the frequent changes of their intentions respecting the disposition of their property by will, before they have committed them to writing. The uniform consistency of those declarations is the chief ground upon which the whole argument in favor of the evidence is rested; and yet, if the evidence be admitted at all, the plaintiffs would be at full liberty to prove opposing declarations of the testator at other times; and thus a door would be open to an inquiry in no respect pertinent to the main subject of investigation, but mischievously calculated to perplex and mislead the jury. That such evidence has sometimes been given is proven by many of the cases read by the defendant's counsel; but it would be very unsafe to consider those instances as laying down a rule of law since in none of them was an objection made to the admission of the evidence, so as to submit its competency to judicial inquiry and decision. *Stevens v. Vancleve*, 4 Wash. C. C. 262, 23 Fed. Cas. No. 13,412.

**65.** *Dickie v. Carter*, 42 Ill. 376; *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837; *Kaenders v. Montague*, 180 Ill. 300, 54 N. E. 321; *England v. Fawbush*, 204 Ill. 384, 68 N. E. 526; *Waters v. Waters*, 222 Ill. 26, 78 N. E. 1.

**66.** *Utermehle v. Norment*, 22 App. Cas. (D. C.) 31, following *Throckmorton v. Holt*, 180 U. S. 552.

**67.** *England.*—*Ayrey v. Hill*, 2 Add. Ecc. 206; *Handley v. Stacey*, 1 Fost. & F. 253.

*California.*—*In re Wilson's Estate*, 117 Cal. 262, 49 Pac. 172.

*Delaware.*—*Truitt v. Cullen*, 3 Penne. 311, 50 Atl. 174; *Ball v. Kane*, 1 Penne. 90, 39 Atl. 778.

*Indiana.*—*Swygart v. Willard*, 166 Ind. 25, 76 N. E. 755.

*Kentucky.*—*Harper's Will*, 4 Bibb. 244.

*Louisiana.*—*Hebert v. Winn*, 24 La. Ann. 385; *Hennessey's Heirs v. Woulfe*, 49 La. Ann. 1376, 22 So. 394.

*Michigan.*—*Pierce v. Pierce*, 38 Mich. 412.

*Missouri.*—*Archambault v. Blanchard*, 198 Mo. 384, 426, 95 S. W. 834.

*Nebraska.*—*Seebrook v. Fedawa*, 30 Neb. 424, 442, 46 N. W. 650.

*New Jersey.*—*Goble v. Grant*, 3 N. J. Eq. 629; *Bannister v. Jackson*, 45 N. J. Eq. 702, 17 Atl. 692; *Fluck v. Rea*, 51 N. J. Eq. 233, 27 Atl. 636; *Elkinton v. Brick*, 44 N. J. Eq. 154, 15 Atl. 391, 1 L. R. A. 161; *In re Gilham's Will*, 64 N. J. Eq. 715, 52 Atl. 690; *Koegel v. Egner*, 54 N. J. Eq. 623, 35 Atl. 394; *Lee's Will*, 46 N. J. Eq. 193, 18 Atl. 525; *Andress v. Weller*, 3 N. J. Eq. 604.

*New York.*—*In re Tiff's Will*, 55 Misc. 151, 106 N. Y. Supp. 362; *Matter of Johnson*, 7 Misc. 220, 27 N. Y. Supp. 649; *Matter of Tracy*, 11 N. Y. St. 103; *In re Schreiber's Will*, 5 N. Y. Supp. 47, 22 N. Y. St. 892; *Peck v. Cary*, 27 N. Y. 9; *In re Jones' Will*, 5 Misc. 199, 25 N. Y. Supp. 109; *In re Halbert's Will*, 15 Misc. 308, 37 N. Y. Supp. 757; *In re Johnson's Will*, 7 Misc. 220, 27 N. Y. Supp. 649; *In re Woolsey's Will*, 17 Misc. 547, 41 N. Y. Supp. 263; *In re Evans' Will*, 37 Misc. 337, 75 N. Y. Supp. 491; *In re Feeney's Will*, 55 Misc. 158, 106 N. Y. Supp.

b. *Habit May Be Shown.* — The foregoing rule does not exclude testimony concerning the general habits of the testator as to the use of intoxicants as a circumstance to be weighed in connection with all the testimony,<sup>68</sup> nor does it exclude evidence of the development of the habit.<sup>69</sup>

c. *Extent and Effect of.* — The extent of indulgence may be shown and the effect thereof,<sup>70</sup> and the condition of the testator when intoxicated.<sup>71</sup> But evidence of the effect of indulgence is important only where there is doubt as to capacity.<sup>72</sup>

d. *Previous to the Will.* — Proof of intoxication previous to the execution of the will is not convincing as to the testator's condition at that time,<sup>73</sup> though the testator was a confirmed drunkard and the execution of the will occurred after a protracted debauch and he had drunk several times on the day it was made.<sup>74</sup> It is irrelevant against affirmative proof of his capacity when the will was

464; *O'Neil v. Murray*, 4 Bradf. Sur. 311.

*Pennsylvania.* — *Levis' Estate*, 140 Pa. St. 179, 21 Atl. 242; *Schusler's Estate*, 198 Pa. St. 81, 47 Atl. 966; *Wright's Estate*, 10 Pa. Dist. 133; *Harmony Lodge's Appeal*, 127 Pa. St. 269, 18 Atl. 10; *Dimond's Estate*, 3 Pa. Dist. 554.

*South Carolina.* — *Black v. Ellis*, 3 Hill 68.

*Virginia.* — *Temple v. Temple*, 1 Hen. & M. 476.

**Occasional or Habitual Fits of Intemperance** are not important unless they affected the mind of the testator and absorbed his reasoning powers. *Harper's Will*, 4 Bibb (Ky.) 244; *In re Sutherland's Will*, 28 Misc. 424, 59 N. Y. Supp. 989; *Haughian v. Conlan*, 86 App. Div. 290, 83 N. Y. Supp. 830.

**Rule Where Inebriety Long Continued.** — "It is established by abundant authority, that inebriety, though long continued and resulting occasionally in temporary insanity, does not require proof of lucid intervals to give validity to the acts of the drunkard, as is required where general insanity is proved; consequently where habitual intoxication is shown there will be no presumption that incapacitating drunkenness existed at the time of making the will. Such a condition at that time must affirmatively appear, or the presumption of capacity will prevail." *Koegel v. Egner*, 54 N. J. Eq. 623, 35 Atl. 394; *Lee's Will*, 46 N. J. Eq.

193, 18 Atl. 525; *Hight v. Wilson*, 1 Dall. (U. S.) 94.

68. *In re Gharky*, 57 Cal. 274; *Ball v. Kane*, 1 Penne. (Del.) 90, 39 Atl. 778; *Truitt v. Cullen*, 3 Penne. (Del.) 311, 50 Atl. 174; *Swygart v. Willard*, 166 Ind. 25, 76 N. E. 755; *In re Peck's Will*, 62 Hun 622, 17 N. Y. Supp. 248.

69. *Swygart v. Willard*, 166 Ind. 25, 76 N. E. 755 (by a non-expert familiar with testator).

70. *In re Wilson's Estate*, 117 Cal. 262, 49 Pac. 172; *Truitt v. Cullen*, 3 Penne. (Del.) 311, 50 Atl. 174; *Swygart v. Willard*, 166 Ind. 25, 76 N. E. 755; *In re Gilham's Will*, 64 N. J. Eq. 715, 52 Atl. 690; *In re Ely's Will*, 16 Misc. 228, 39 N. Y. Supp. 177.

**Effect of Evidence.** — Evidence of frequent sleepiness, flightiness or violent outbursts of passion, resulting from excessive use of intoxicants and narcotics do not show incapacity. *McCullough's Will*, 35 Pitts. L. J. (Pa.) 169; *Wrights' Estate*, 10 Pa. Dist. 133.

Occasional fits of intemperance are not evidence of incapacity. *Violet's Will*, 1 Bibb (Ky.) 617.

71. *In re Estate of Van Alstine*, 26 Utah 193, 72 Pac. 942 (by non-expert testimony).

72. *Bush v. Lisle*, 89 Ky. 393, 12 S. W. 762.

73. *In re Halbert's Will*, 15 Misc. 308, 37 N. Y. Supp. 757.

74. *Peck v. Cary*, 27 N. Y. 9. See *In re Johnson's Will*, 7 Misc. 220, 27 N. Y. Supp. 649; *In re Reed's*

executed.<sup>75</sup> It does not outweigh proof that testator's mind was good when he was sober and the testimony of intimate acquaintances as to the condition of his mind, though the evidence of intoxication was reinforced by expert opinions.<sup>76</sup> Incapacity is not established by proof of attempts to commit suicide while intoxicated.<sup>77</sup> But proof of prior intoxication, in connection with other facts, may be convincing.<sup>78</sup>

*e. Efforts To Cure Habit.* — A realization of the existence of the appetite for intoxicants and a voluntary adoption of the best scientific methods to be cured of it are evidence of sanity rather than of dementia.<sup>79</sup>

*f. Existence of Committee.* — The existence of a committee for a person addicted to intoxication is not conclusive against his capacity to make a will.<sup>80</sup> Its only effect is to shift the burden of proof to the proponent.<sup>81</sup> If nothing is done by a committee for more than twenty years, during which time the drunkard attended to his affairs, it will be presumed that he had reformed.<sup>82</sup>

*g. Expert Opinions.* — The effect of intoxication upon mental capacity is not a question for expert testimony.<sup>83</sup> But an expert may explain the general effects of the excessive use of alcohol.<sup>84</sup>

**B. USE OF NARCOTICS.** — Unless the mind and memory were affected by the use of narcotics when the will was executed, proof of their use is not decisive.<sup>85</sup>

**6. Opinions.** — **A. CONFIRMED BY ACTS ARE COMPETENT.** — The opinions expressed by a testator and confirmed by his acts are competent evidence to show his mental state, though it may not be certain from what cause they originated.<sup>86</sup>

Will, 20 N. Y. Supp. 91 (surrogate's court).

75. Dimond's Estate, 3 Pa. Dist. 554.

76. McIntyre v. McConn, 28 Iowa 483. See *In re Tacke*, 3 N. Y. Supp. 198, 17 N. Y. St. 805.

77. McElwee v. Ferguson, 43 Md. 479; Koegel v. Egner, 54 N. J. Eq. 623, 35 Atl. 394.

78. See *Edge v. Edge*, 38 N. J. Eq. 211; *In re Ely*, 16 Misc. 228, 39 N. Y. Supp. 177.

79. Truitt v. Cullen, 3 Penne. (Del.) 311, 50 Atl. 174.

80. Lewis v. Jones, 50 Barb. (N. Y.) 645, *distinguishing* Matter of Burr, 2 Barb. Ch. (N. Y.) 208, in which a commission was suspended in order that the drunkard might make a will, and Matter of Patterson, 4 How. Prac. (N. Y.) 34, to the same effect, and which contained dicta opposing the principal case.

81. Leckey v. Cunningham, 56 Pa. St. 370.

82. Lecky v. Cunningham, 56 Pa. St. 370. In *Bixler v. Gilleland*, 4 Pa. St. 156, it was thought that such a presumption would arise in thirteen years.

83. Pierce v. Pierce, 38 Mich. 412.

84. Swygart v. Willard, 166 Ind. 25, 76 N. E. 755; Windisch & M. Brew. Co. v. Opp, 17 Ohio C. C. 465.

85. Frost v. Wheeler, 43 N. J. Eq. 573, 12 Atl. 612; Hamilton's Estate, 4 Pa. Dist. 161.

86. **Uncertainty as to Cause of Belief.** — It is not cause for excluding evidence of the acts and opinions of one alleged to be under an insane delusion that it might have been the result of ignorance rather than of delusion. Common observation and daily experience have fully demonstrated that an irrational belief more frequently results from eccentricity, ignorance or association, than from

B. WEIGHT OF. — But erroneous, foolish, and even absurd opinions upon certain subjects are not convincing as against the prudent conduct of business affairs.<sup>87</sup>

C. ADHERENCE TO. — Lifelong adherence to the opinions of youth is not evidence of insanity, though they may have been abandoned by nearly all others who entertained them at such time.<sup>88</sup>

7. **Insane Delusion.** — A. MUST EXIST WHEN WILL MADE. — To establish the invalidity of a will on the ground that the testator made it under an insane delusion, it must be shown that the will was the product of the delusion,<sup>89</sup> or that the latter substantially

insanity. Still, however, as irrationality is one of the results of derangement — one of the indicia by which it manifests itself — it follows that either acts or opinions which are in themselves irrational are proper to be submitted to the jury, and are entitled to more or less weight according to circumstances. There are opinions so contrary to reason that none but a person of unsound mind could entertain them; and, on the other hand, there are those which, although irrational, may be attributed to the causes we have before assigned, rather than to derangement; and in cases where the disease is not clearly and plainly marked, insanity, either partial or total, should not be predicated upon acts or opinions which may properly be referred to any other cause. *Florey v. Florey*, 24 Ala. 241.

87. *Wait v. Westfall*, 161 Ind. 648, 663, 68 N. E. 271; *Thompson v. Thompson*, 21 Barb. (N. Y.) 107; *Bonard's Will*, 16 Abb. Prac. N. S. (N. Y.) 128.

**The Abandonment of an Unreasonable Purpose** is not evidence of incapacity. *LaBau v. Vanderbilt*, 3 Redf. Sur. (N. Y.) 384, 432.

88. *Matter of White*, 15 N. Y. St. 753 (surrogate court).

89. *England.* — *Banks v. Goodfellow*, 39 L. J. Q. B. 237, L. R. 5 Q. B. 549, 22 L. T. 813; *Boughton v. Knight*, 42 L. J., P. 25, L. R. 3 P. 64; *Jenkins v. Morris*, 14 Ch. Div. 674, 42 L. T. 817; *Smee v. Smee*, 49 L. J. P. 8, 5 P. D. 84; *Dew v. Clark*, 1 Add. Ecc. 279, 3 Add. Ecc. 79. *Compare* *Waring v. Waring*, 6 Moore P. C. 341, 13 Eng. Reprint 715; *Smith v. Tebbitt*, 36 L. J. P. 97, L. R. 1 P. 398, 16 L. T. 841. In the

last case it was said: "I conceive the cases to establish this proposition: that, if disease be once shown to exist in the mind of the testator, it matters not that the disease be discoverable only when the mind is addressed to a certain subject, to the exclusion of all others, the testator must be pronounced incapable. Further, that the same result follows, though the particular subjects upon which the disease is manifested have no connection whatever with the testamentary disposition before the court. See *Boughton v. Knight*, 42 L. J., P. 25, L. R. 3 P. 64. It is said of the principal case that it is the only one so holding, and has never been recognized as authority either in England or this country. *Boardman v. Woodman*, 47 N. H. 120, 140. *Arkansas.* — *Taylor v. McClintock*, 112 S. W. 405.

*California.* — *Estate of McKenna*, 143 Cal. 580, 77 Pac. 461; *In re Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695; *Estate of Kendrick*, 130 Cal. 360, 62 Pac. 605.

*Georgia.* — *Wetter v. Habersham*, 60 Ga. 193.

*Illinois.* — *Bauchens v. Davis*, 229 Ill. 557, 82 N. E. 365.

*Indiana.* — *Wait v. Westfall*, 161 Ind. 648; 663, 68 N. E. 271.

*Kentucky.* — *Lancaster v. Lancaster's Exr.*, 27 Ky. L. Rep. 1127, 87 S. W. 1137.

*Maine.* — *In re Randall*, 99 Me. 396, 59 Atl. 552.

*Maryland.* — *Johnson v. Johnson*, 105 Md. 81, 65 Atl. 918; *Gesell v. Baugher*, 100 Md. 677, 60 Atl. 481.

*Michigan.* — *Rice v. Rice*, 50 Mich. 448, 15 N. W. 545; *Peninsular Trust Co. v. Barker*, 116 Mich. 333, 74 N. W. 508.

affected the former.<sup>90</sup> Hence proof of delusions without tendency to show mental incapacity is irrelevant.<sup>91</sup>

**B. ACTS, CONDUCT AND BELIEF.**—Full inquiry may be made into the acts, conduct and beliefs of the testator. The rule in this respect is not different from that which governs the inquiry concerning capacity generally.<sup>92</sup>

**C. TESTATOR'S PERSONALITY.**—Facts and characteristics peculiar to the testator are to be regarded in determining whether he was under a disqualifying delusion.<sup>93</sup>

**D. INFLUENCE OF THIRD PERSON.**—The influence over the testator of a third person and the acts and conduct of such person are relevant.<sup>94</sup>

**E. EXTENT AND SOURCE OF ESTATE.**—The extent of the testator's estate is relevant only to show that if the delusion existed he was controlled by it. The fact that part of it was derived from the contestant's mother may be shown.<sup>95</sup>

**F. REPULSION TO CHILDREN.**—A father's repulsion to his children may be of such a harsh, unreasonable character and so contrary to the whole current of human nature as to lead to the inference that it proceeds from some mental defect in himself, in the absence of any evidence to support it.<sup>96</sup> The fact that charges

*Nebraska.*—*Stull v. Stull*, 1 Neb. (Unof.) 380, 389, 96 N. W. 196.

*New Hampshire.*—*Boardman v. Woodman*, 47 N. H. 120, 140.

*New Jersey.*—*Middleditch v. Williams*, 45 N. J. Eq. 726, 17 Atl. 826, 4 L. R. A. 738; *Gilman v. Ayer* (N. J. Eq.), 47 Atl. 1049 (occasional delusions resulting from defective vision and temporary illness are not significant).

*New York.*—*Coit v. Patchen*, 77 N. Y. 533; *In re Macpherson's Will*, 4 N. Y. Supp. 181, 20 N. Y. St. 868; *In re Jones' Will*, 5 Misc. 199, 25 N. Y. Supp. 109; *Matter of Vedder*, 6 Dem. 92; *In re Iredale's Will*, 53 App. Div. 45, 65 N. Y. Supp. 533; *Dobie v. Armstrong*, 160 N. Y. 584, 55 N. E. 302.

*Ohio.*—*General Convention v. Crocker*, 7 Ohio C. C. 327.

*Oregon.*—*Potter v. Jones*, 20 Or. 239, 253, 25 Pac. 769, 12 L. R. A. 161.

*Pennsylvania.*—*Englert v. Englert*, 198 Pa. St. 326, 47 Atl. 940, 82 Am. St. Rep. 808; *Buchanan v. Pierie*, 205 Pa. St. 123, 54 Atl. 583, 97 Am. St. Rep. 725; *Taylor v. Trich*, 165 Pa. St. 586, 30 Atl. 1053, 44 Am. St. Rep. 679.

*Wisconsin.*—*Will of Cole*, 49 Wis. 179, 5 N. W. 346.

<sup>90.</sup> *Young v. Miller*, 145 Ind. 652, 44 N. E. 757; *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948; *Taylor v. Trich*, 165 Pa. St. 586, 601, 30 Atl. 1053, 44 Am. St. Rep. 679; *Thomas v. Carter*, 170 Pa. St. 272, 33 Atl. 81, 50 Am. St. Rep. 770; *Shreiner v. Shreiner*, 178 Pa. St. 57, 35 Atl. 974; *Hemingway's Estate*, 195 Pa. St. 291, 45 Atl. 726, 78 Am. St. Rep. 815.

<sup>91.</sup> *Shreiner v. Shreiner*, 178 Pa. St. 57, 35 Atl. 974.

<sup>92.</sup> *Smith v. Tebbitt*, 36 L. J., P. 97, L. R. 1 P. 398, 16 L. T. 841; *Edge v. Edge*, 38 N. J. Eq. 211; *Smith v. Smith*, 48 N. J. Eq. 566, 25 Atl. 11; *In re Lockwood's Will*, 8 N. Y. Supp. 345, 28 N. Y. St. 164.

**Value of Property.**—A grossly exaggerated opinion of the value of property may be evidence of delusion. *McReynolds v. Smith* (Ind.), 86 N. E. 1009.

<sup>93.</sup> *Smith v. Smith*, 48 N. J. Eq. 566, 25 Atl. 11; *Bull v. Wheeler*, 6 Dem. (N. Y.) 123.

<sup>94.</sup> *Smith v. Smith*, 48 N. J. Eq. 566, 25 Atl. 11.

<sup>95.</sup> *Taylor v. McClintock* (Ark.), 112 S. W. 405.

<sup>96.</sup> *England.*—*Boughton v.*

made by the testator against the chastity of his daughters were not made beyond the family circle is not convincing against the existence of the delusion.<sup>97</sup>

**G. CHASTITY OF WIFE.** — If the aversion to a child is based on the delusion that it is illegitimate the mother's chastity may be proved, and the contestant may prove her repute as a chaste woman; he is not bound to rely upon the presumption in his favor.<sup>98</sup> If improper relations were charged by the testator to exist between his wife and an individual the latter may testify as to the fact.<sup>99</sup> Physical conditions may account for the renewal of a delusion which had been dismissed from the testator's mind when he was in good health.<sup>1</sup>

**Divorce Proceedings.** — The institution of divorce proceedings may be shown as evidence of testator's hostility to his wife, and of his delusion as to the legitimacy of his children.<sup>2</sup>

**H. DECLARATIONS.** — Testator's declarations may be proved to establish the existence of a delusion, and if it has existed a long time their remoteness from the time of the execution of the will is not an objection.<sup>3</sup> Inconsistency of declarations does not detract from their force, if delusion exists.<sup>4</sup> Declarations made after exe-

Knight, 42 L. J., P. 25, L. R. 3 P. & D. 64.

*Canada.* — Bell v. Lee, 28 Grant Ch. 150.

*Iowa.* — Hardenburgh v. Hardenburgh, 133 Iowa 1, 109 N. W. 1014.

*Maryland.* — Brown v. Ward, 53 Md. 376, 387; Johnson v. Johnson, 105 Md. 81, 65 Atl. 918.

*New Jersey.* — Middleditch v. Williams, 45 N. J. Eq. 726, 17 Atl. 826, 4 L. R. A. 738. See Smith v. Smith, 48 N. J. Eq. 566, 25 Atl. 11.

*New York.* — In re Kahn's Will, 5 N. Y. Supp. 556, 24 N. Y. St. 409.

It is said, arguendo, in Banks v. Goodfellow, 39 L. J. Q. B. 237, L. R. 5 Q. B. 549, 22 L. T. 813: "Thus if, as occurs in a common form of monomania, a man is under a delusion that he is the object of persecution or attack, and makes a will in which he excludes a child for whom he ought to have provided, though he may not have adverted to the child as one of his supposed enemies, it would be but reasonable to infer that the insane condition had influenced him in the disposal of his property."

<sup>97</sup> Hardenburgh v. Hardenburgh, 133 Iowa 1, 109 N. W. 1014.

<sup>98</sup> O'Dell v. Goff, 153 Mich. 643, 117 N. W. 59.

*Contra*, as to evidence of wife's general reputation. Barbo v. Rider, 67 Wis. 598, 31 N. W. 155 (proceeding for appointment of a guardian).

<sup>99</sup> Burkhart v. Gladish, 123 Ind. 337, 24 N. E. 118.

<sup>1</sup> Clapp v. Fullerton, 34 N. Y. 190.

<sup>2</sup> Johnson v. Johnson, 105 Md. 81, 65 Atl. 918; Phillips v. Chater, 1 Dem. (N. Y.) 533.

<sup>3</sup> Morgan v. Morgan, 30 App. Cas. (D. C.) 436, 453; American Bible Soc. v. Price, 115 Ill. 623, 5 N. E. 126; Manatt v. Scott, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293; Robinson v. Adams, 62 Me. 369, 411, 16 Am. Rep. 473; Ballantine v. Proudfoot, 62 Wis. 216, 22 N. W. 392.

**A Letter Written by a Testator** alleged to be possessed of an insane delusion is admissible regardless of where it was written or of proof that it was sent to the party to whom it was addressed. Dowie v. Sutton, 227 Ill. 183, 81 N. E. 395.

**Testator's Declarations Are Competent** to rebut his later allegations against the person toward whom he was deluded. Merrill v. Rolston, 5 Redf. Sur. (N. Y.) 220, 253; Miller v. White, 5 Redf. Sur. (N. Y.) 320.

<sup>4</sup> Smith v. Tebbitt, 36 L. J., P.



cution of the will and concerning transactions subsequent thereto are not admissible to show an insane delusion,<sup>5</sup> unless they tend to show incapacity at the time they were made.<sup>6</sup>

**Occasional Statements** do not indicate such a fixed and persistent belief as amounts to a delusion.<sup>7</sup>

a. *Their Falsity May Be Shown.* — The rule in respect to delusions is the same as where general competency is involved, except that in the former case evidence of the falsity of the declarations may be received.<sup>8</sup> Declarations made by testator are not conclusive as to the existence of the delusion. For the purpose of resolving that question his nature and temperament, the circumstances under which they were made, his habits of life and associations and especially his conduct and intercourse with the person against whom the delusion existed are relevant matters.<sup>9</sup>

b. *Consistent Acts.* — The effect of the presence of the person against whom testator was prejudiced upon the latter and what was said to the former may be shown,<sup>10</sup> as may the testator's conduct toward such person.<sup>11</sup>

c. *Inconsistent Acts.* — Acts inconsistent with the existence of the delusion alleged may be shown,<sup>12</sup> as that the testator did not become excited when speaking of the person against whom the delusion is alleged to have existed.<sup>13</sup>

**Weight of.** — Such proof is not convincing because "it is of the essence of an insane delusion that as it has no basis in reason, so

97, L. R. 1 P. 398, 416, 16 L. T. 841.

5. *In re Merriman's Appeal*, 108 Mich. 454, 66 N. W. 372.

6. *Foster's Exrs. v. Dickerson*, 64 Vt. 233, 266, 24 Atl. 253.

7. *Gesell v. Baugher*, 100 Md. 677, 60 Atl. 481.

8. *Throckmorton v. Holt*, 180 U. S. 552, 574; *Canada's Appeal*, 47 Conn. 450, 464; *O'Dell v. Goff*, 153 Mich. 643, 117 N. W. 59.

**Argument.** — Where proof had been made of testator's declarations the court vindicated the right to show their falsity thus: Of course, for this purpose they must be assumed to be the declarations of a person in possession of all his mental faculties. This being so, proof that they were false was proof that the testator knew them to be so when he uttered them; and to whatever motive the jury might attribute them, they would very properly fail to find that back of the spoken falsehood there was really existing in the heart of the testator that degree of hatred toward the son which the wrongs and insults actually suffered would have

engendered. As the appellees left the testimony the words went to the jury with the point and sting of truth. We think the appellant had the right to show that they were words only, intentionally false, and represented no more certainly than hatred of a slight degree — the question being simply as to like or dislike upon the part of the father. Moreover, in another aspect, it was the right of the appellant to prove that the testator did not make the declarations," because he has done much to render improbable that the father said what is imputed to him. *Canada's Appeal*, 47 Conn. 450, 464.

9. *Estate of Scott*, 128 Cal. 57, 60 Pac. 527; *Smith v. Smith*, 48 N. J. Eq. 566, 25 Atl. 11.

10. *Foster's Exrs. v. Dickerson*, 64 Vt. 233, 247, 24 Atl. 253.

11. *Drew v. Clark*, 3 Add. Ecc. (Eng.) 79; *Smith v. Smith*, 48 N. J. Eq. 566, 25 Atl. 11.

12. *In re Wheaton's Will*, 68 N. J. Eq. 562, 59 Atl. 886.

13. *Mullins v. Cottrell*, 41 Miss. 291, 322.

it cannot be by reason dispersed, and is thus capable of being cherished side by side with other ideas with which it is rationally inconsistent."<sup>14</sup>

I. CORRECTNESS OF CONCLUSIONS. — If it is sought to establish that the testator was possessed by insane delusions it is competent to show facts confirmatory of his contention,<sup>15</sup> as the acts and conduct of the person against whom the delusion is alleged to have existed.<sup>16</sup> The reputation of such person may also be proved,<sup>17</sup> as may his declarations against the testator though the latter is not shown to have had knowledge of them.<sup>18</sup>

a. *Testator's Knowledge.* — The knowledge of a fact possessed by a decedent may not be proved by the statement of a witness; but any fact communicated to decedent may be proved to explain his conduct.<sup>19</sup> Declarations of testator made after execution of the will are competent to prove his knowledge of facts claimed to be the product of delusion.<sup>20</sup>

b. *Subsequent Facts.* — Facts occurring since the will was made

14. Smith v. Tebbitt, 36 L. J., P. 97, L. R. 1 P. 398, 434, 16 L. T. 841.

15. *Arkansas.* — Taylor v. McClintock, 112 S. W. 405.

*California.* — Estate of Scott, 128 Cal. 57, 60 Pac. 527.

*Illinois.* — Owen v. Crumbaugh, 228 Ill. 380, 81 N. E. 1044, 119 Am. St. Rep. 442.

*Indiana.* — Wait v. Westfall, 161 Ind. 648, 660, 68 N. E. 271.

*Michigan.* — *In re* Morse's Estate, 146 Mich. 463, 109 N. W. 858.

*Missouri.* — Conner v. Skaggs, 213 Mo. 334, 348, 111 S. W. 1132.

*New Jersey.* — Wintermute v. Wilson, 28 N. J. Eq. 437; Lewis' Case, 33 N. J. Eq. 219, 229.

*New York.* — Matter of Bethune, 15 N. Y. St. 294 (advice of counsel as to validity of proceedings to annul former marriage of wife); Phillips v. Chater, 1 Dem. 533; Matter of Gross, 14 N. Y. St. 429, *affirming* 7 N. Y. St. 739; *In re* Ziegler, 65 Hun 621, 19 N. Y. Supp. 947; Dobie v. Armstrong, 160 N. Y. 584, 55 N. E. 302; Buchanan v. Belsey, 65 App. Div. 58, 72 N. Y. Supp. 601.

*Oregon.* — *In re* Cline's Will, 24 Or. 175; *s. c.*, *sub nom.*, Bain v. Cline, 33 Pac. 542, 41 Am. St. Rep. 851; Potter v. Jones, 20 Or. 239, 25 Pac. 769, 12 L. R. A. 161.

*Pennsylvania.* — Bennett's Estate, 201 Pa. St. 485, 51 Atl. 336.

**Physiological Facts** may be shown to establish that a legatee is not the

son of a testator — as that he and his wife were white and the legatee bore distinctive marks of negro blood. Florey v. Florey, 24 Ala. 241.

16. Taylor v. McClintock (Ark.), 112 S. W. 405; Huggins v. Drury, 192 Ill. 528, 61 N. E. 652; Schneider v. Manning, 121 Ill. 376, 12 N. E. 267; Reichert v. Reichert, 144 Mich. 295, 107 N. W. 1057; Coit v. Patchen, 77 N. Y. 533; Buchanan v. Pierie, 205 Pa. St. 123, 54 Atl. 583, 97 Am. St. Rep. 725.

**It Is Presumed** that testator was informed of the existence of a deposition in a suit for divorce instituted by him against his wife, and such deposition is competent, not to establish the facts stated, but to show that grounds existed for the alleged delusion. O'Dell v. Goff, 149 Mich. 152, 112 N. W. 736, 10 L. R. A. (N. S.) 989. The writer of the opinion said: "While I have found no case in which this principle is announced, it is recognized in Richards v. Morgan, 4 Best & S. (Eng.) 641; Blanchard v. Hodgkins, 62 Me. 119."

17. Foster's Exrs. v. Dickerson, 64 Vt. 233, 24 Atl. 253; Titus v. Gage, 70 Vt. 13, 39 Atl. 246.

18. Stevens v. Leonard, 154 Ind. 67, 80, 56 N. E. 27, 77 Am. St. Rep. 446.

19. Huyck v. Rennie, 151 Cal. 411, 90 Pac. 929; Slaughter v. Heath, 127 Ga. 747, 57 S. E. 69.

20. Foster's Exrs. v. Dickerson, 64 Vt. 233, 264, 24 Atl. 253.

are relevant in so far as they confirm testator's opinion or show that it was erroneous.<sup>21</sup>

*c. Error in Conclusion.*—Error in weighing evidence is not proof of the existence of a disqualifying delusion.<sup>22</sup> The relation of the facts to the conclusion is not important.<sup>23</sup>

21. *Prather v. McClelland* (Tex. Civ. App.), 26 S. W. 657.

**Character of Contestant** after she was expelled from her father's house is a relevant matter. "The question was whether the alleged insanity which caused the testator to expel his daughter from his house did not continue until the time of the execution of his will, and whether the want of reasonable ground for it did not also continue. Her continued good character was proper to be considered in determining whether there was not want of reasonable ground for his ill-feeling at the time the will was made." *Mullins v. Cottrell*, 41 Miss. 291, 325.

**The Acts, Conduct, Reputation and Character** of the person against whom the delusion is claimed to have existed may be shown so far as they were known to the testator. *Foster's Exrs. v. Dickerson*, 64 Vt. 233, 24 Atl. 253; *Frary v. Gusha*, 59 Vt. 257, 9 Atl. 549; *American Bible Soc. v. Price*, 115 Ill. 623, 640, 5 N. E. 126. See *Addington v. Wilson*, 5 Ind. 137.

The character and reputation of contestant's husband may be shown, her marriage being the cause of the alleged delusion on testator's part. *Taylor v. McClintock* (Ark.), 112 S. W. 405.

**Result of Investigation.**—It may be shown that testator made investigation into a matter concerning which he is alleged to have been deluded and declared that reports on which he relied were unfounded. *Floto v. Floto*, 233 Ill. 605, 84 N. E. 712; *Merrill v. Rush*, 33 N. J. Eq. 537.

22. *California.*—*Estate of Scott*, 128 Cal. 57, 60 Pac. 527.

*District of Columbia.*—*Morgan v. Morgan*, 30 App. Cas. 436, 453.

*Illinois.*—*Bradley v. Palmer*, 193 Ill. 15, 78, 61 N. E. 856.

*Indiana.*—*Wait v. Westfall*, 161 Ind. 648, 660, 68 N. E. 271.

*Michigan.*—*Leffingwell v. Betting-*

*house*, 151 Mich. 513, 115 N. W. 731.

*Missouri.*—*Sayre v. Trustees*, 192 Mo. 95, 126, 90 S. W. 787.

*Nebraska.*—*Stull v. Stull*, 1 Neb. (Unof.) 380, 389, 96 N. W. 196.

*New Jersey.*—*Middleditch v. Williams*, 45 N. J. Eq. 726, 735, 17 Atl. 826, 4 L. R. A. 738; *Smith v. Smith*, 48 N. J. Eq. 566, 25 Atl. 11.

*New York.*—*Phillips v. Chater*, 1 Dem. 533; *In re White's Will*, 121 N. Y. 406, 24 N. E. 935, 52 Hun 613, 5 N. Y. Supp. 295; *Dobie v. Armstrong*, 160 N. Y. 584, 55 N. E. 302.

*Ohio.*—*Moore v. Caldwell*, 6 Ohio C. C. (N. S.) 484.

23. *Taylor v. McClintock* (Ark.), 112 S. W. 405; *Estate of Scott*, 128 Cal. 57, 60 Pac. 527; *Morgan v. Morgan*, 30 App. Cas. (D. C.) 436, 453; *Owen v. Crumbaugh*, 228 Ill. 380, 81 N. E. 1044, 119 Am. St. Rep. 442. ("Thus, where the testator has actual grounds for the suspicion of the existence of something in which he believes, though in fact not well founded and disbelieved by others, the misapprehension of the fact is not a matter of delusion which will invalidate his will"); *Mullins v. Cottrell*, 41 Miss. 291, 317; *Smith v. Smith*, 48 N. J. Eq. 566, 25 Atl. 11; *Matter of White's Will*, 121 N. Y. 406, 24 N. E. 935, 52 Hun 613, 5 N. Y. Supp. 295. The court of appeals said: "If there are facts, however insufficient they may in reality be, from which a prejudiced, or a narrow, or a bigoted mind might derive a particular idea or belief, it cannot be said that the mind is diseased in that respect. The belief may be illogical or preposterous, but it is not, therefore, evidence of insanity in the person. Persons do not always reason logically or correctly from facts, and that may be because of their prejudices or of the perversity or peculiar construction of their minds. Wills, however, do not depend for their validity upon the testator's ability to reason logically, or

**J. CHANGE OF ATTITUDE.** — An unfounded change of attitude toward a person entitled to share in the bounty of a testator, which is persisted in against evidence, is proof of insane delusion.<sup>24</sup> But unless such proof be made that such change was without any cause whatever in reason or in fact, but rested wholly on things imagined, the existence of a delusion cannot be established.<sup>25</sup> An opinion or impression which yields to argument is not a delusion,<sup>26</sup> if the changed opinion is adhered to.<sup>27</sup>

**K. ADHERENCE TO OPINION.** — Adherence to an unfounded belief against evidence and all the probabilities arising out of the conduct, relationship and experience of the parties, is evidence of the existence of a delusion.<sup>28</sup> Facts showing the absence of reason for the belief held by the testator are admissible.<sup>29</sup>

upon his freedom from prejudice." See *In re McKean's Will*, 31 Misc. 703, 66 N. Y. Supp. 44; *Bradley v. Palmer*, 193 Ill. 15, 78, 61 N. E. 856.

**Entertaining an Unwarrantable Conclusion** from existing facts does not show an insane delusion. It is not enough that exaggerated opinions may have been formed, but it is necessary that the conviction controlling the mind should be entirely unfounded and persisted in against all evidence indicating that the facts assumed have no real existence. When a will has been made under an assumption of inferences deduced from circumstances colorably supporting them, it must stand. *Leslie v. Leslie*, 92 N. Y. 936 (no opinion); *In re White's Will*, 52 Hun 613, 5 N. Y. Supp. 295; *General Convention v. Crocker*, 7 Ohio C. C. 327; *Potter v. Jones*, 20 Or. 239, 249, 25 Pac. 769, 12 L. R. A. 161; *Hemingway's Estate*, 195 Pa. St. 291, 45 Atl. 726, 78 Am. St. Rep. 815; *Murdoch's Appeal*, 185 Pa. St. 203, 39 Atl. 816; *Bennett's Estate*, 201 Pa. St. 485, 51 Atl. 336.

24. *Smith v. Tebbitt*, 36 L. J., P. 97, L. R. 1 P. & D. 398, 429; 16 L. T. 841; *Edge v. Edge*, 38 N. J. Eq. 211; *Merrill v. Rolston*, 5 Redf. Sur. (N. Y.) 220, 251.

25. *McGovran's Estate*, 185 Pa. St. 203, 39 Atl. 816.

26. *Gilman v. Ayer* (N. J. Eq.), 47 Atl. 1094; *Phillips v. Chater*, 1 Dem. (N. Y.) 533.

27. *In re Kahn's Will*, 5 N. Y. Supp. 556, 24 N. Y. St. 409.

28. *Arkansas*. — *Taylor v. McClintock*, 112 S. W. 405.

*California*. — *Estate of Kendrick*, 130 Cal. 360, 62 Pac. 605 (The court said: "In order to sustain a contest for the probate of a will for the unsoundness of mind of the testator, by reason of insane delusions, it must be shown that the delusions were not merely temporary hallucinations, or unfounded dislikes or antipathies, or false opinions and beliefs, but were spontaneous and firmly fixed beliefs of a diseased mind, which no argument or evidence could convince to the contrary, and which a rational mind would not entertain." *Estate of Calef*, 139 Cal. 673, 73 Pac. 539.

*Kansas*. — *Medill v. Snyder*, 61 Kan. 15, 58 Pac. 962, 78 Am. St. Rep. 306.

*Mississippi*. — *Mullins v. Cottrell*, 41 Miss. 291, 314.

*Missouri*. — *Knapp v. St. Louis Tr. Co.*, 199 Mo. 640, 667, 98 S. W. 70; *Benoist v. Murrin*, 58 Mo. 307.

*New Jersey*. — *Edge v. Edge*, 38 N. J. Eq. 211.

*New York*. — *Shaw's Will*, 2 Redf. Sur. 107; *Seamen's Friend Soc. v. Hopper*, 33 N. Y. 619, 624; *In re Kahn's Will*, 5 N. Y. Supp. 556, 24 N. Y. St. 409; *Stanton v. Wetherwax*, 16 Barb. 259.

**Absurd Prejudices, Groundless Antipathies**, silly and chimerical hatreds, originating in acknowledged insanity, are evidences of the existence of delusion. *Miller v. White*, 5 Redf. Sur. (N. Y.) 320.

29. *Dew v. Clark*, 3 Add. Ecc. (Eng.) 79; *Lancaster v. Lancaster's*

**L. RECURRENCE OF DELUSION.** — Where an alleged insane delusion is sought to be justified by extrinsic testimony, it is competent to show that the same delusion had previously been entertained by testator without any justifying facts.<sup>30</sup>

**M. INDEPENDENT DELUSIONS.** — It is competent to prove delusions which may not be relied on as a reason for attacking the will in aid of a delusion which is relied on.<sup>31</sup>

**N. SCOPE OF DELUSION.** — The general attitude of the testator towards others than the person affected by the delusion is a relevant matter,<sup>32</sup> as is his attitude toward other matters than that which is the chief subject on which the delusion exists.<sup>33</sup>

**O. CAPACITY TO DO BUSINESS.** — The power to do business properly and converse as usual is not inconsistent with the existence of a delusion disqualifying one from executing a will.<sup>34</sup>

**P. THE WILL.** — The terms and scope of the will may not preclude the existence of a disqualifying delusion on the part of the testator.<sup>35</sup> But the will may be relevant on the issue of the existence of a delusion.<sup>36</sup>

**8. Religious Belief. — Evidence of, Incompetent.** — Evidence concerning the religious belief of a testator is not generally admissible, and if it refers to opinions which rational men might hold its reception may be prejudicial.<sup>37</sup>

Exr., 27 Ky. L. Rep. 1127, 87 S. W. 1137.

**30.** Safe Deposit & Tr. Co. v. Lange, 207 Pa. St. 527, 56 Atl. 1081.

**31.** American Bible Soc. v. Price, 115 Ill. 623, 641, 5 N. E. 126; Robinson v. Adams, 62 Me. 369, 413, 16 Am. Rep. 473; Safe Dep. & Tr. Co. v. Lange, 207 Pa. St. 527, 56 Atl. 1081.

**32.** Merrill v. Rolston, 5 Redf. Sur. (N. Y.) 220, 254.

**33.** Smith v. Tebbitt, 36 L. J., P. 97, L. R. 1 P. 398, 16 L. T. 841.

**34.** England. — Waring v. Waring, 6 Moore P. C. 341, 13 Eng. Reprint 75; Smith v. Tebbitt, 36 L. J., P. 97, L. R. 1 P. 398, 16 L. T. 841; Smea v. Smea, 49 L. J., P. 8, 5 P. D. 84.

Arkansas. — Taylor v. McClintock, 112 S. W. 405.

Illinois. — American Bible Soc. v. Price, 115 Ill. 623, 643, 5 N. E. 126; Orchardson v. Cofield, 171 Ill. 14, 49 N. E. 197, 63 Am. St. Rep. 211, 40 L. R. A. 256.

Kentucky. — Lancaster v. Lancaster's Exr., 27 Ky. L. Rep. 1127, 87 S. W. 1137.

New York. — Shaw's Will, 2 Redf. Sur. 107, 131; In re Lock-

wood's Will, 8 N. Y. Supp. 345, 28 N. Y. St. 345; In re Simon's Will, 47 Misc. 552, 95 N. Y. Supp. 981.

**35.** Morrison v. Maclean's Trustees, 24 D. (Eng.) 663, quoted from in Hope v. Campbell, (1899) App. Cas. 1.

**The Absence of Evidence of Delusions in the Will** is immaterial if their existence has been shown and their continuance proven or assumed. Waring v. Waring, 6 Moore P. C. 341, 358, 13 Eng. Reprint 75.

**36.** Boughton v. Knight, 42 L. J., P. 25, L. R. 3 P. 64; in re Scott's Estate, 128 Cal. 57, 69, 60 Pac. 527; Gilman v. Ayer (N. J. Eq.), 47 Atl. 1049.

**37.** Trubey v. Richardson, 224 Ill. 136, 79 N. E. 592 (a belief in spiritualism and christian science furnishes no test for ascertaining soundness of mind); Brashears v. Orme, 93 Md. 442, 49 Atl. 620; Mullins v. Cottrell, 41 Miss. 291, 325 (a merely erroneous creed, or an aversion to any particular sect, is not evidence of insanity); General Convention v. Crocker, 7 Ohio C. C. 327; Ames v. Ames, 40 Or. 495, 67

A. WHEN FOLLOWED BY DELUSION. — "It is only when such a belief leads the person into insane delusions and induces the making of an irrational will that any religious belief can be allowed to affect the question of testamentary capacity."<sup>38</sup> In the absence of anything peculiar in the temperament or general character of a testator, hallucinations in the matter of religion may evidence a diseased mind if they relate to his experience and are of a personal nature.<sup>39</sup>

B. UNSETTLED OPINIONS. — Fondness for talking on religious subjects and the expression of contradictory opinions may be shown to establish that testator had a vacillating mind.<sup>40</sup> But a change in the belief of an aged testator is not persuasive.<sup>41</sup>

C. SPIRITUALISM. — Belief in spiritualism is not sufficient evidence of incapacity.<sup>42</sup> Hence testimony as to the truth or falsity of that faith is inadmissible, as is testimony that testator was a

Pac. 737; *Gass v. Gass*, 3 Humph. (Tenn.) 278.

**Argument.** — "The fact that an individual holds any particular belief in regard to a future state of existence cannot, of itself, be evidence of an insane delusion or of monomania. An insane delusion is a belief in something impossible in the nature of things, or impossible under the circumstances surrounding the afflicted individual, and which refuses to yield either to evidence or reason. \* \* \* Such a delusion does not exist unless it is one whose fallacy can be certainly demonstrated, for, except such demonstration can be made, it cannot be said that no rational person would entertain the belief. Consequently, no creed or religious belief, in so far as it pertains to an existence after death, can be regarded as a delusion, because there is no test by which it can be tried and its truth or falsity demonstrated. *Gass v. Gass*, 3 Humph. (Tenn.) 278; *Orchardson v. Cofield*, 171 Ill. 14, 49 N. E. 197, 63 Am. St. Rep. 211, 40 L. R. A. 256; *Buchanan v. Pierie*, 205 Pa. St. 123, 54 Atl. 583, 97 Am. St. Rep. 725; *Scott v. Scott*, 212 Ill. 597, 72 N. E. 708; *Owen v. Crumbaugh*, 228 Ill. 380, 81 N. E. 1044, 19 Am. St. Rep. 442.

38. *Trubey v. Richardson*, 224 Ill. 136, 79 N. E. 592; *In re Rohe's Will*, 22 Misc. 415, 50 N. Y. Supp. 392; *Buchanan v. Pierie*, 205 Pa. St. 123, 54 Atl. 583, 97 Am. St. Rep. 725.

**Religious Zeal** is not evidence of insanity, nor is the use of picturesque language in relation to religious subjects. *Williams' Exr. v. Williams*, 15 Ky. L. Rep. 432, 23 S. W. 789; *Scott v. Scott*, 212 Ill. 597, 72 N. E. 708.

**Conversations on Religious Subjects** may be proved as tending to show a testator's state of mind. "Though a man's sanity is generally not determined by his religious creed, yet his opinions may be so absurd as to afford evidence of unsoundness of mind, and they are proper to be considered with other evidence, under proper instructions by the court, as to the effect that they are entitled to." *Mullins v. Cottrell*, 41 Miss. 291, 325.

39. *Smith v. Tebbitt*, 36 L. J., P. 97, L. R. 1 P. 398, 16 L. T. 841 (belief that testatrix was one of the persons of the Trinity and that a stranger in blood, to whom was left the bulk of the property, was another of such persons). In *Boughton v. Knight*, 42 L. J., P. 25, L. R. 3 P. 64, the principal case is mentioned as one of the grosser kind. See *Hope v. Campbell*, (1899) App. Cas. 1.

40. *Brashears v. Orme*, 93 Md. 442, 49 Atl. 620.

41. *Owen v. Crumbaugh*, 228 Ill. 380, 81 N. E. 1044, 119 Am. St. Rep. 442.

42. *California*. — *In re Spencer*, 96 Cal. 448, 31 Pac. 453.

*Illinois*. — *Trubey v. Richardson*, 224 Ill. 136, 79 N. E. 592; *Owen v.*

monomaniac merely because of his belief in it,<sup>43</sup> unless it is shown that the will was the offspring of that faith.<sup>44</sup> But one may have

Crumbaugh, 228 Ill. 380, 81 N. E. 1044, 119 Am. St. Rep. 442 (though the testator was an ultraist); Crumbaugh v. Owen, 238 Ill. 497, 87 N. E. 312.

*Indiana.* — Steinkuehler v. Wempner, 169 Ind. 154, 81 N. E. 482, 15 L. R. A. (N. S.) 673.

*Iowa.* — Otto v. Doty, 61 Iowa 23, 15 N. W. 578; *In re* Will of Dunahugh, 130 Iowa 692, 107 N. W. 925.

*Maine.* — Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473; *In re* Randall, 99 Me. 396, 59 Atl. 552.

*Maryland.* — Brown v. Ward, 53 Md. 376, 393, (action under instructions from spirit).

*Michigan.* — O'Dell v. Goff, 149 Mich. 152, 112 N. W. 736, 10 L. R. A. (N. S.) 989.

*New Jersey.* — Middleditch v. Williams, 45 N. J. Eq. 726, 735, 17 Atl. 826, 4 L. R. A. 738.

*New York.* — Bonard's Will, 16 Abb. Prac. (N. S.) 128; *In re* Halbert's Will, 15 Misc. 308, 37 N. Y. Supp. 757; Matter of Rohe, 22 Misc. 415, 50 N. Y. Supp. 392; Keeler v. Keeler, 51 Hun 636, 3 N. Y. Supp. 629, 20 N. Y. St. 439; Thompson v. Thompson, 21 Barb. 107.

*Pennsylvania.* — Buchanan v. Pierie, 205 Pa. St. 123, 54 Atl. 583, 97 Am. St. Rep. 725; McLroy's Estate, 10 Pa. Dist. 78.

*Wisconsin.* — Matter of Smith's Will, 52 Wis. 543, 8 N. W. 616, 9 N. W. 665, 38 Am. Rep. 756; *In re* Chafin's Will, 32 Wis. 557 (faith in clairvoyants, fortune tellers and mediums).

**Belief Rests on Evidence.** — "The testator's belief in spiritualism was not a morbid fancy, rising spontaneously in his mind, but a conviction produced by evidence. The proofs show that, when he first commenced attending what are called seances, he was inclined to be skeptical; afterwards his mind seemed to be in an unstable condition—he sometimes believed and at others doubted—and that it was not until the spirits gave an extraordinary exhibition of their power, by

printing or painting on a pin, worn by his mother-in-law on her neck, in brilliant letters, which sparkled like diamonds, the word 'Dickie,' a pet name of his dead wife, that his last doubts as to the reality of the manifestations were removed." *Middleditch v. Williams*, 45 N. J. Eq. 726, 17 Atl. 826, 4 L. R. A. 738; *Buchanan v. Pierie*, 205 Pa. St. 123, 54 Atl. 583, 97 Am. St. Rep. 725.

"The Utmost Length to which any court has yet gone on this subject is to declare that a belief in spiritualism may justify the setting aside of a will when it is shown that the testator, through fear, dread or reverence of the spirit with which he believed himself to be in communication, allowed his will and judgment to be overpowered, and, in disposing of his property, followed implicitly the directions which he believed the spirit gave him, but, in such case, the will is set aside, not on the ground of insanity, but of undue influence." *Middleditch v. Williams*, 45 N. J. Eq. 726, 17 Atl. 826, 4 L. R. A. 738; *Buchanan v. Pierie*, 205 Pa. St. 123, 54 Atl. 583, 97 Am. St. Rep. 725; *Thompson v. Hawks*, 14 Fed. 902, is an illustration.

**The Rationality of the Belief,** from the standpoint of a spiritualist, that a medium in a trance might do harm, is competent because it would tend to remove from the mind of the jury the impression that the spiritualistic belief is evidence of insanity. *O'Dell v. Goff*, 149 Mich. 152, 112 N. W. 736, 10 L. R. A. (N. S.) 989. See *s. c.*, 153 Mich. 643, 117 N. W. 59.

43. *O'Dell v. Goff*, 149 Mich. 152, 112 N. W. 736, 10 L. R. A. (N. S.) 989.

44. *Illinois.* — Owen v. Crumbaugh, 228 Ill. 380, 407, 81 N. E. 1044, 119 Am. St. Rep. 442; *Crumbaugh v. Owen*, 238 Ill. 497, 87 N. E. 312; *Orchardson v. Cofield*, 171 Ill. 14, 49 N. E. 297, 63 Am. St. Rep. 211, 40 L. R. A. 256.

*Indiana.* — Steinkuehler v. Wemp-

such a faith in spiritualism as to destroy his testamentary capacity—may think so continually and persistently upon it as to become a monomaniac where it is concerned.<sup>45</sup>

**May Be Important in Connection With Other Facts.**—In connection with proof of feebleness of mind a belief in ghosts and supernatural influences tends to show a state of mind susceptible to undue influence.<sup>46</sup>

**D. CHRISTIAN SCIENCE.**—Employing a nurse who called herself a healer is not evidence of incompetency.<sup>47</sup>

**E. BELIEF IN WITCHCRAFT.**—A will may not be disturbed because the testator believed in witchcraft and that his daughters were witches.<sup>48</sup>

**9. Physical Condition.**—**A. SCOPE OF INQUIRY.**—The scope of the inquiry concerning the physical condition of a testator is limited to showing its effect upon his mental state.<sup>49</sup> Evidence of previous weakness and inability is competent; but no weight can be given it as against proof of competency at the time the will was made.<sup>50</sup> Proof of ordinary physical illness prior to the will is

ner, 169 Ind. 154, 81 N. E. 482, 15 L. R. A. (N. S.) 673.

*Maine.*—Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473; *In re Randall*, 99 Me. 396, 59 Atl. 552.

*New York.*—LaBau v. Vanderbilt, 3 Redf. Sur. 384, 390.

*Pennsylvania.*—McIlroy's Estate, 10 Pa. Dist. 78.

<sup>45.</sup> O'Dell v. Goff, 149 Mich. 152, 112 N. W. 736, 10 L. R. A. (N. S.) 989.

**Loss of Will Power.**—A believer in spiritualism may have such extraordinary confidence in spiritualistic communications—whether those communications reach him through mediums or are received by him as he believes directly—that he is impelled to follow them blindly and implicitly, his free agency is destroyed, and he is constrained to do against his will what he is unable to resist. A will made under such circumstances is obviously not the will of the testator, and is therefore not admissible to probate. We need not speculate as to the ground upon which this conclusion rests. It is utterly unimportant whether it rests upon the ground of absence of testamentary capacity or upon the ground of undue influence. O'Dell v. Goff, 149 Mich. 152, 112 N. W. 736, 10 L. R. A. (N. S.) 989.

**Relevant Facts.**—The terms of the will, the testator's declarations

that he was in direct and active communication with the spirit world, had personally visited the planets, formed an acquaintance with their inhabitants, had been instructed from that world how to make his will, that it was sacred and could not be changed without forfeiting the benefits of the revelation received, and proof that he neglected his business, gave offense to customers in order that he might give exhortations on religious subjects, are competent to show incapacity. McReynolds v. Smith (Ind.), 86 N. E. 1009.

<sup>46.</sup> *In re Storey*, 20 Ill. App. 183; Woodbury v. Obear, 7 Gray (Mass.) 467. See Greenwood v. Cline, 7 Or. 17.

<sup>47.</sup> Trubey v. Richardson, 224 Ill. 136, 79 N. E. 592.

<sup>48.</sup> Addington v. Wilson, 5 Ind. 137; Schild v. Rompf, 9 Ky. L. Rep. 120, 4 S. W. 235 (belief in witchcraft should not be made the occasion for special remarks in the instructions); Matter of Vedder, 6 Dem. Sur. (N. Y.) 92, 104; VanGuysling v. Van Kuren, 35 N. Y. 70; *In re Forman's Will*, 54 Barb. (N. Y.) 274, 297; Lee v. Lee, 4 McCord (S. C.) 183.

<sup>49.</sup> *In re Jones' Estate*, 130 Iowa 177, 106 N. W. 610.

<sup>50.</sup> Armstrong v. Armstrong, 69 N. J. Eq. 817, 66 Atl. 399.



immaterial, as is proof of fits or epilepsy after it was made.<sup>51</sup>

**B. IMPORTANCE OF TESTIMONY.**—Testimony concerning the physical condition of a testator and of the medical treatment administered is competent and may be important as affecting inferences concerning his mental state at a subsequent time.<sup>52</sup>

**C. TEMPORARY DISORDER.**—Proof of a temporary mental flightiness, the result of illness, does not overcome the presumption of sanity.<sup>53</sup> Such testimony is inadmissible if there has been a complete recovery.<sup>54</sup>

**D. NATURE OF DISEASE.**—It may be important to show the nature of the disease which testator had, whether it was of a character which affected the brain.<sup>55</sup> All the cases recognize the propriety of such testimony.

**E. FEEBLENESS.**—Incapacity is not to be inferred from an enfeebled condition of body though accompanied by feebleness of mind,<sup>56</sup> and such condition had continued a long time prior to

51. *Wood v. Carpenter*, 166 Mo. 465, 486, 66 S. W. 172.

52. *Sim v. Russell*, 90 Iowa 656, 57 N. W. 601; *Ross v. Ross*, (Iowa), 117 N. W. 1105; *In re Gilham's Will*, 64 N. J. Eq. 715, 52 Atl. 690; *Christy v. Clarke*, 45 Barb. (N. Y.) 529.

53. *McMasters v. Blair*, 29 Pa. St. 298.

**Temporary Incompetency**, which is but the manifestation of the progress of the disease with which the testator was afflicted, may be explained by medical testimony and shown not to be inconsistent with capacity at other times. *In re Davis' Will*, 91 Hun 209, 36 N. Y. Supp. 344.

54. *Hibbard v. Baker*, 141 Mich. 124, 104 N. W. 399.

55. *Tunison v. Tunison*, 4 Bradf. Sur. (N. Y.) 138, 148.

**The Records of an Asylum** of which the testator had long been an inmate are competent to show that he was free from delusion or hallucination, and that he was there voluntarily and under no restraint. *Draper's Estate*, 215 Pa. St. 314, 64 Atl. 520.

**Physician's Account Books.**—The books of a deceased physician are admissible to show that he treated the testator for a disease of the brain. *Knapp v. St. Louis Tr. Co.*, 199 Mo. 640, 669, 98 S. W. 70.

56. *England.*—*Swinfen v. Swinfen*, 27 Beav. 148, 160.

*California.*—*Estate of Nelson*, 132 Cal. 182, 64 Pac. 294.

*Illinois.*—*Woodman v. Illinois Trust & Sav. Bank*, 211 Ill. 578, 71 N. E. 1099; *Dillman v. McDanel*, 222 Ill. 276, 288, 78 N. E. 591.

*Iowa.*—*Lingle v. Lingle*, 121 Iowa 133, 96 N. W. 708.

*Michigan.*—*O'Connor v. Madison*, 98 Mich. 183, 57 N. W. 105; *Hoban v. Piquette*, 52 Mich. 340, 361, 17 N. W. 797.

*Nebraska.*—*Elliott v. Elliott*, 3 Neb. (Unof.) 832, 92 N. W. 1006; *Stull v. Stull*, 1 Neb. (Unof.) 380, 389, 96 N. W. 196.

*New Jersey.*—*Stoutenburgh v. Hopkins*, 43 N. J. Eq. 577, 12 Atl. 689.

*New York.*—*In re Folts' Will*, 71 Hun 492, 24 N. Y. Supp. 1052; *In re Harris' Will*, 19 Misc. 388, 44 N. Y. Supp. 341; *Horn v. Pullman*, 72 N. Y. 269; *Dobie v. Armstrong*, 160 N. Y. 584, 55 N. E. 302, 27 App. Div. 520, 50 N. Y. Supp. 801; *Dunham v. Dunham*, 63 App. Div. 264, 71 N. Y. Supp. 330; *VanAlst v. Hunter*, 5 Johns. Ch. 148 ("the law looks only to the competency of the understanding, and neither age, nor sickness, nor extreme distress, nor debility of body, will affect the capacity to make a will if sufficient intelligence remains"); *In re Donohue's Will*, 97 App. Div. 205, 89 N. Y. Supp. 871; *Matter of Vedder*, 6 Dem. 92; *In re Patterson's Will*, 26 Abb. N. C. 395, 13 N. Y. Supp. 463;

the making of the will,<sup>57</sup> or resulted from the nature of the injury or disease from which testator suffered and which caused his death,<sup>58</sup> which was near at hand.<sup>59</sup> But evidence of physical weakness, in connection with proof of feeble mentality and the fact that the testator was in a dying condition, is significant.<sup>60</sup>

F. RESULT OF AUTOPSY. — Proof of the disclosures made by an autopsy and of the expert deductions drawn therefrom is not convincing.<sup>61</sup>

G. EXPERT TESTIMONY. — The rule which prevents an expert witness from deciding as to the weight of evidence or the credibility of witnesses precludes an opinion as to the competency of a testator because of his physical condition if it is based upon the testimony of other experts.<sup>62</sup>

H. NON-EXPERT TESTIMONY. — A non-expert who has observed a testator may state his physical condition at a given time.<sup>63</sup> But his opinion is not admissible to show that the testator was physically unable to hold a conversation testified to, the witness not being present when it occurred.<sup>64</sup> The inability of a testator to recognize a person with whom he was well acquainted may be shown by such person.<sup>65</sup>

*In re Metcalfe's Will*, 16 Misc. 180, 38 N. Y. Supp. 1131. See *In re Goodwin*, 95 App. Div. 183, 88 N. Y. Supp. 734.

*Oregon*. — *In re Ames' Will*, 40 Or. 495, 67 Pac. 737; *In re Buren's Will*, 47 Or. 307, 83 Pac. 530.

*Pennsylvania*. — *Masseth v. Masseth*, 213 Pa. St. 434, 62 Atl. 1076 (extreme bodily weakness).

57. *In re Gihon's Will*, 44 App. Div. 621, 60 N. Y. Supp. 65.

58. *In re Wilson's Estate*, 117 Cal. 262, 49 Pac. 172.

"Evidence that the person has a disease which may or must eventuate in mental disease cannot prove, or standing alone tend to prove, that, at a given point of time, he is actually so afflicted. The tendency to infirmity cannot *per se* prove the infirmity." *Horner v. Buckingham*, 103 Md. 556, 64 Atl. 41.

59. *In re Miller's Estate*, 37 Mont. 545, 97 Pac. 935.

The opposing view has been held by a probate court. *In re Estate of Burrows*, 11 Ohio Dec. 229.

60. *In re Doolittle's Estate*, 153 Cal. 29, 94 Pac. 240; *Mendenhall v. Tungate*, 95 Ky. 208, 24 S. W. 431 (inability to communicate); *In re McCarthy's Will*, 65 Hun 624, 20 N. Y. Supp. 581; *In re Rounds' Will*,

25 Misc. 101, 54 N. Y. Supp. 710.

61. Argument. — Such proof can never rise higher than a mere suggestion of a probable enfeeblement of mind, and however strong the proof of that probability it could never outweigh or overcome the testimony of one competent observer of the appearance, conversations, conduct and mental characteristics of the decedent for a series of years; for if there had existed any mental enfeeblement or unsoundness such an observer would most certainly have noticed it. Such proof would seem to be only useful as corroborating and accounting for actual evidence of mental aberration; but such deductions from remote causes should never be accepted as militating against the actual and well attested facts. For unsoundness of mind can only be predicated on some unsound manifestation or development. *LaBau v. Vanderbilt*, 3 Redf. Sur. (N. Y.) 384, 426.

62. *McMechen v. McMechen*, 17 W. Va. 683.

63. *Kosterlecky v. Scherhart*, 99 Iowa 120, 68 N. W. 591.

64. *Higgins v. Carlton*, 28 Md. 115, 137. See *Safe Dep. & Tr. Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

65. *Irish v. Smith*, 8 Serg. & R.

**I. DISEASE AND PROBABILITY OF MENTAL AFFECTION.** — It is not competent to show that in the great majority of cases a particular disease does not produce any effect upon the mind. "The existence of a phenomenon is not at all affected by any dispute as to its cause."<sup>66</sup>

**J. APPEARANCE.** — Testator's apparent physical condition at a given time may be contrasted with such condition at a previous time.<sup>67</sup>

**10. Scope of Inquiry as to Time.** — **A. GENERALLY.** — In the absence of proof of republication of the will the question of competency must be determined by the condition of the testator at the time it was executed.<sup>68</sup> The rule applies in case of the alleged

(Pa.) 573 (if the testator did not know the witness, and this was not owing to a defect in the organ of vision, it would have been strong evidence of imbecility).

**66.** *Landis v. Landis*, 1 Grant Cas. (Pa.) 248. See *In re Gihon's Will*, 44 App. Div. 621, 60 N. Y. Supp. 65.

**Argument.** — "If any witness had assigned paralysis as the cause, you might show his ignorance by showing that this could not be; but the positive evidence of the phenomena of insanity would remain unaffected by this dispute about causes. The offer admits that paralysis does in some cases affect the mind, and proof that, in a majority of cases, it does not do so in no degree rebuts the evidence of the fact in this case. Not one person in a hundred becomes insane by ordinary diseases, yet proof of this fact would cast no light in the hundredth case, or rebut the evidence of its own facts. If it were proved that in no case does paralysis cause insanity, this would not rebut the evidence that in this case it accompanied insanity." *Landis v. Landis*, 1 Grant Cas. (Pa.) 248.

**67.** *Manatt v. Scott*, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293.

**68.** *England.* — *White v. Wilson*, 13 Ves. 87, 33 Eng. Reprint 227.

*United States.* — *Stevens v. Van-cleve*, 4 Wash. C. C. 262, 23 Fed. Cas. No. 13,412.

*Alabama.* — *Knox v. Knox*, 95 Ala. 495, 11 So. 125, 36 Am. St. Rep. 235; *Saxon v. Whitaker*, 30 Ala. 237; *Moore v. Spier*, 80 Ala. 129.

*Arkansas.* — *Tobin v. Jenkins*, 29 Ark. 151.

*Connecticut.* — *Kinne v. Kinne*, 9 Conn. 102.

*Delaware.* — *Lodge v. Lodge's Will*, 2 Houst. 418; *Duffield v. Morris*, 2 Har. 375; *Ball v. Kane*, 1 Penne. 90, 39 Atl. 778.

*District of Columbia.* — *Barbour v. Moore*, 4 App. Cas. 535.

*Georgia.* — *Terry v. Buffington*, 11 Ga. 337.

*Illinois.* — *Craig v. Southard*, 148 Ill. 37, 35 N. E. 361.

*Iowa.* — *Bever v. Spangler*, 93 Iowa 576, 601, 61 N. W. 858; *Blake v. Rourke*, 74 Iowa 519, 38 N. W. 385.

*Kentucky.* — *Threlkeld v. Bond*, 29 Ky. L. Rep. 177, 92 S. W. 606.

*Louisiana.* — *Succession of Jones*, 120 La. 986, 45 So. 965.

*Maine.* — *In re Chandler's Will*, 102 Me. 72, 89, 66 Atl. 215.

*Maryland.* — *Gesell v. Baugher*, 100 Md. 677, 60 Atl. 481; *Kelly v. Kelly*, 103 Md. 548, 63 Atl. 1082; *Jones v. Collins*, 94 Md. 403, 51 Atl. 398; *Davis v. Calvert*, 5 Gill & J. 269, 300; *Baugher v. Gesell*, 103 Md. 450, 63 Atl. 1078.

*Massachusetts.* — *Crowninshield v. Crowninshield*, 2 Gray 524; *Phelps v. Hartwell*, 1 Mass. 71.

*Missouri.* — *Von De Veld v. Judy*, 143 Mo. 348, 44 S. W. 1117; *McFadin v. Catron*, 120 Mo. 252, 266, 25 S. W. 506; *Holton v. Cochran*, 208 Mo. 314, 425, 106 S. W. 1035.

*New Jersey.* — *Whitenack v. Stryker*, 2 N. J. Eq. 8; *In re Gilham's Will*, 64 N. J. Eq. 715, 52 Atl. 690; *O'Brien v. Dwyer*, 45 N. J. Eq. 689, 17 Atl. 777.

intoxication of the testator with the exception that derangement resulting therefrom is regarded as merely temporary;<sup>69</sup> but not where an insane delusion has existed and it is shown that it was the chief or sole cause for making the will as it was made.<sup>70</sup>

**B. PRIOR CONDITION.**—As tending to show the condition of the testator at the time the will was executed, the testimony may cover a considerable period prior thereto; and this whether the inquiry concerns his mental or physical state.<sup>71</sup>

*New York.*—Clarke v. Davis, 1 Redf. Sur. 249; Brown v. Torrey, 24 Barb. 583; Sheldon v. Dow, 1 Dem. 503; *In re Berrien's Will*, 58 Hun 610, 12 N. Y. Supp. 585; *In re Atchley's Will*, 108 N. Y. Supp. 877.

*Oregon.*—Chrisman v. Chrisman, 16 Or. 127, 18 Pac. 6; *In re Prickett's Will*, 49 Or. 127, 89 Pac. 377.

*Pennsylvania.*—Harden v. Hays, 9 Pa. St. 151; Reichenbach v. Ruddach, 127 Pa. St. 564, 18 Atl. 432; Safe Deposit & Tr. Co. v. Lange, 207 Pa. St. 527, 56 Atl. 1081; Thompson v. Kyner, 65 Pa. St. 368, 379.

*Washington.*—Higgins v. Nethery, 30 Wash. 239, 70 Pac. 489.

*West Virginia.*—Kerr v. Lunsford, 31 W. Va. 659, 679, 8 S. E. 493, 2 L. R. A. 668; Martin v. Thayer, 37 W. Va. 38, 16 S. E. 489.

**Competency at the Time a Codicil Is Executed** is proof of a validation of the will and previous codicils. Brown v. Riffin, 94 Ill. 560.

**An Offer of Evidence Unlimited as to Time** is too general. Thompson v. Kyner, 65 Pa. St. 368, 380.

**There Is no Presumption** that insanity existing at a certain time existed at any previous time. *In re Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695.

**But Little Value Is Attached to Evidence** which does not deal with the mental condition of the testator at the time of the testamentary act. *In re Armstrong's Will*, 55 Misc. 487, 106 N. Y. Supp. 671.

69. Peck v. Cary, 27 N. Y. 9.

70. *In re Gannon's Will*, 2 Misc. 329, 21 N. Y. Supp. 960, affirmed, without opinion, 139 N. Y. 654, 35 N. E. 207.

71. *England.*—Waring v. Waring, 6 Moore P. C. 341, 357, 13 Eng. Reprint 715.

*Alabama.*—Fountain v. Brown,

38 Ala. 72; Moore v. Spier, 80 Ala. 129; Moore v. Heineke, 119 Ala. 627, 24 So. 374.

*Arkansas.*—Tobin v. Jenkins, 29 Ark. 151.

*California.*—*In re Wilson's Estate*, 117 Cal. 262, 49 Pac. 172; Huyck v. Rennie, 151 Cal. 411, 90 Pac. 929; *In re Toomes's Estate*, 54 Cal. 509; Estate of McKenna, 143 Cal. 580, 77 Pac. 461.

*Connecticut.*—Dale's Appeal, 57 Conn. 127, 17 Atl. 757; Canada's Appeal, 47 Conn. 450, 463.

*Delaware.*—Steele v. Helm, 2 Marv. 237, 43 Atl. 153; Pritchard v. Henderson, 3 Penne. 128, 146, 50 Atl. 217.

*Georgia.*—Terry v. Buffington, 11 Ga. 337.

*Illinois.*—Harp v. Parr, 168 Ill. 459, 481, 48 N. E. 113; Petefish v. Becker, 176 Ill. 448, 52 N. E. 71; Nieman v. Schnitker, 181 Ill. 400, 55 N. E. 151 (condition when former wills were made).

*Indiana.*—Kenworthy v. Williams, 5 Ind. 375 ("if the deceased had never been of sound mind it would be proper to show that fact, and the extent of the unsoundness. So it would be if the diseased mental action had intervened at a later period of life"); Bower v. Bower, 42 Ind. 194, 41 N. E. 523; Staser v. Hogan, 120 Ind. 207, 217, 21 N. E. 911, 22 N. E. 990.

*Iowa.*—*In re Wharton's Will*, 132 Iowa 714, 109 N. W. 492; Sim v. Russell, 90 Iowa 656, 57 N. W. 601.

*Maryland.*—Brashears v. Orme, 93 Md. 442, 49 Atl. 620; Gesell v. Baugher, 100 Md. 677, 60 Atl. 481; Colvin v. Warford, 20 Md. 357, 389; Davis v. Calvert, 5 Gill & J. 269, 300.

*Massachusetts.*—Jenkins v. Weston, 200 Mass. 488, 86 N. E. 955

a. *Remoteness*. — The objection of remoteness goes rather to the weight than to the competency of such testimony.<sup>72</sup> Its admission is usually within the discretion of the trial judge.<sup>73</sup> But testimony must not relate to matters too far antecedent to the execution of the will,<sup>74</sup> unless the diseased condition has been continuous or progressive,<sup>75</sup> or there has been no special or marked change in

(result of examination three years before will executed).

*Michigan*. — *Spencer v. Terry's Estate*, 133 Mich. 39, 94 N. W. 372; *Conely v. McDonald*, 40 Mich. 150.

*Missouri*. — *Von De Veld v. Judy*, 143 Mo. 348, 44 S. W. 1117; *Hamburger v. Rinkel*, 164 Mo. 398, 64 S. W. 104; *Holton v. Cochran*, 208 Mo. 314, 425, 106 S. W. 1035.

*New Hampshire*. — *Carpenter v. Hatch*, 64 N. H. 573, 15 Atl. 219 (knowledge of amount and character of property eight months prior to will).

*New York*. — *Marx v. McGlynn*, 88 N. Y. 357, 374.

*Ohio*. — *Windisch & M. Brew. Co. v. Opp*, 17 Ohio C. C. 465 (the rule was applied in a hesitating manner to a very conservative situation).

*Pennsylvania*. — *Safe Dep. & Tr. Co. v. Lange*, 207 Pa. St. 527, 56 Atl. 1081; *Irish v. Smith*, 8 Serg. & R. 573 (incapacity may be inferred from anterior facts).

*Vermont*. — *In re Wheelock's Will*, 76 Vt. 235, 56 Atl. 1013; *In re Mason's Will*, 72 Atl. 329 (four years not too remote).

*West Virginia*. — *Kerr v. Lunsford*, 31 W. Va. 659, 681, 8 S. E. 493, 2 L. R. A. 668.

**Argument.** — "In determining the question as to the mental capacity of a testator at the time of executing a will the law admits proof of his words and acts prior and subsequent to that point of time. Presumably the mind neither passes from light into darkness nor emerges from darkness into light instantly; presumably neither capacity nor incapacity is the condition of a moment only. The acts and words at and nearest to the time of execution may have the greater weight of evidence; diminishing in weight as time lengthens in each direction; the jury to determine when they cease to have

any." *Canada's Appeal*, 47 Conn. 450, 463. See *Shailer v. Bumstead*, 99 Mass. 112.

**Application of Testimony.** — Unless it appears otherwise testimony will be regarded as applying to testator's condition about the time of the making of the will if the witness was then in his company. *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837.

72. *Dale's Appeal*, 57 Conn. 127, 17 Atl. 757; *Steele v. Helm*, 2 Marv. (Del.) 237; 43 Atl. 153; *Conely v. McDonald*, 40 Mich. 150.

73. *Turner v. American Security & T. Co.*, 29 App. Cas. (D. C.) 460; *Bower v. Bower*, 142 Ind. 194, 41 N. E. 523; *Shailer v. Bumstead*, 99 Mass. 112, 130; *Jenkins v. Weston*, 200 Mass. 488, 86 N. E. 955; *Hamburger v. Rinkel*, 164 Mo. 398, 64 S. W. 104.

74. *Murphree v. Senn*, 107 Ala. 424, 18 So. 264 (testimony that testator twenty years prior to the will acted on one occasion as if he was temporarily crazy, without more, is unimportant); *In re Morse's Estate*, 146 Mich. 463, 109 N. W. 858 (medical treatments eight and eleven years before); *Hibbard v. Baker*, 141 Mich. 124, 104 N. W. 399 (illness nine years before); *In re Blood's Will*, 62 Vt. 359, 19 Atl. 770.

**An Application for Admission to an Asylum**, made more than two months before the will was executed, was considered not inconsistent with testimony showing discharge therefrom as cured before the will was made. *Keely v. Moore*, 196 U. S. 38.

**Remoteness Not Harmful** if there is ample testimony applicable to the time in issue. *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837.

75. *Estate of Dalrymple*, 67 Cal. 444, 7 Pac. 906; *Pritchard v. Henderson*, 3 Penne. (Del.) 128, 146, 50 Atl. 217; *In re Knox's Will*, 123 Iowa 24, 98 N. W. 468; *Fairchild v. Bascomb*, 35 Vt. 398, 417.

such condition or characteristics.<sup>76</sup> It has been said that the testimony must relate to a time near the execution of the will.<sup>77</sup>

b. *Court May Limit Scope of Inquiry.* — It is competent for the court to limit the scope of the inquiry to a reasonable time before the will was made, and this may be done by a general ruling at the opening of the trial.<sup>78</sup> The exercise of that power will not be disturbed because experts were of the opinion that a better judgment could be formed by extending the limits fixed.<sup>79</sup>

C. *THE RES GESTÆ.* — The acts, conduct and sayings of the testator at the time the will was made and other circumstances connected therewith or directly preceding that event are of especial importance and may be shown in detail.<sup>80</sup> The conversation be-

76. *In re Wheelock's Will*, 76 Vt. 235, 56 Atl. 1013.

77. *In re Bull*, 2 N. Y. Supp. 52, 16 N. Y. St. 674; *Swails v. White*, 149 Pa. St. 261, 24 Atl. 292.

78. *Hardy v. Martin*, 200 Mass. 548, 86 N. E. 939; (six years); *Howes v. Colburn*, 165 Mass. 385, 43 N. E. 125 (eight and a half years).

79. *Howes v. Colburn*, 165 Mass. 385, 43 N. E. 125.

80. *England.* — *Pilkington v. Gray*, 68 L. J. P. C. 63; *Banks v. Goodfellow*, 39 L. J. Q. B. 237, L. R. 5 Q. B. 549, 22 L. T. 813; *Aitken v. McMeckan*, L. R. (1895) App. Cas. 310; *Keays v. McDonnell*, Ir. R. 6 Eq. 611.

*Canada.* — *In re Harrison's Will*, 30 N. Bruns. 164.

*Alabama.* — *Henry v. Hall*, 106 Ala. 84, 98, 17 So. 187, 54 Am. St. Rep. 22; *Mullen v. Johnson*, 47 So. 584; *Leeper v. Taylor*, 47 Ala. 224.

*Arkansas.* — *Taylor v. McClin-*  
*tock*, 112 S. W. 405.

*California.* — *In re Johnson's Estate*, 152 Cal. 778, 93 Pac. 1015; *In re Wilson's Estate*, 117 Cal. 262, 49 Pac. 172.

*Connecticut.* — *Kinne v. Kinne*, 9 Conn. 102.

*Delaware.* — *Truitt v. Cullen*, 3 Penne. 311, 50 Atl. 174.

*Georgia.* — *Smith v. Smith*, 75 Ga. 477.

*Illinois.* — *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837; *Snow v. Benton*, 28 Ill. 306; *Slingloff v. Bruner*, 174 Ill. 561, 51 N. E. 772; *Wilsey v. Ellis*, 89 Ill. App. 632; *Schmidt v. Schmidt*, 201 Ill. 191, 66 N. E.

371; *Rutherford v. Morris*, 77 Ill. 397.

*Iowa.* — *In re Knox's Will*, 123 Iowa 24, 98 N. W. 468 (conversation had with scrivener); *Kostelecky v. Scherhart*, 99 Iowa 120, 68 N. W. 591 (conversation of those present concerning testator's physical condition).

*Kentucky.* — *Munday v. Taylor*, 7 Bush. 491; *Morris v. Morton's Exrs.*, 14 Ky. L. Rep. 360, 20 S. W. 287; *McDaniel's Will*, 2 J. J. Marsh. 331.

*Louisiana.* — *Godden v. Burke*, 35 La. Ann. 160 (such testimony is not affected by a declaration in the code that "proof is not admitted of the dispositions having been made through hatred, anger, suggestion or capitation"); *Succession of Jacobs*, 109 La. 1012, 34 So. 59.

*Maine.* — *In re Chandler's Will*, 102 Me. 72, 91, 66 Atl. 215.

*Maryland.* — *Davis v. Calvert*, 5 Gill & J. 269, 301; *Brown v. Ward*, 53 Md. 376, 394; *Safe Deposit & Tr. Co. v. Berry*, 93 Md. 560, 49 Atl. 401; *McElwee v. Ferguson*, 43 Md. 479, 489; *Baughner v. Gesell*, 103 Md. 450, 63 Atl. 1078.

*Massachusetts.* — *Hall v. Hall*, 17 Pick. 373; *May v. Bradley*, 127 Mass. 414.

*Michigan.* — *In re Dowell's Estate*, 152 Mich. 194, 115 N. W. 972.

*Mississippi.* — *Mullins v. Cottrell*, 41 Miss. 291, 324; *Lum v. Lasch*, 46 So. 559; *Brock v. Luckett's Exrs.*, 4 How. 459, 479.

*Missouri.* — *McFadin v. Catron*, 120 Mo. 252, 267, 25 S. W. 506; *Crowson v. Crowson*, 172 Mo. 691, 72 S. W. 1065; *Catholic University*

*v. O'Brien*, 181 Mo. 68, 92, 79 S. W. 901; *Archambault v. Blanchard*, 198 Mo. 384, 428, 95 S. W. 834; *Weston v. Hanson*, 212 Mo. 248, 267, 111 S. W. 44.

*Montana*.—*In re Miller's Estate*, 37 Mont. 545, 97 Pac. 935.

*Nebraska*.—*Elliott v. Elliott*, 3 Neb. (Unof.) 832, 92 N. W. 1006.

*Nevada*.—*In re Abel's Estate*, 93 Pac. 227.

*New Jersey*.—*Matter of Wintermute's Will*, 27 N. J. Eq. 447; *Howell v. Taylor*, 50 N. J. Eq. 428, 26 Atl. 566; *Turner v. Cheesman*, 15 N. J. Eq. 243, 263 (insistence on corrections in draft); *Lewis' Case*, 33 N. J. Eq. 219; *White v. Starr*, 47 N. J. Eq. 244, 259, 20 Atl. 875; *In re Gilham's Will*, 64 N. J. Eq. 715, 52 Atl. 690; *Armstrong v. Armstrong*, 69 N. J. Eq. 817, 66 Atl. 399; *VanRiper v. VanRiper*, 69 N. J. Eq. 463, 59 Atl. 244; *Lee's Will*, 46 N. J. Eq. 193, 18 Atl. 525; *Stoutenburgh v. Hopkins*, 43 N. J. Eq. 577, 12 Atl. 689; *Frost v. Wheeler*, 43 N. J. Eq. 573, 12 Atl. 612.

*New York*.—*Clapp v. Fullerton*, 34 N. Y. 190; *In re Brower's Will*, 112 App. Div. 370, 98 N. Y. Supp. 438; *In re Seagrist's Will*, 1 App. Div. 615, 37 N. Y. Supp. 496; *In re Schreiber's Will*, 5 N. Y. Supp. 47, 22 N. Y. St. 892; *In re Peck's Will*, 62 Hun 622, 17 N. Y. Supp. 248; *In re Carver's Estate*, 2 Misc. 567, 23 N. Y. Supp. 753, 75 Hun 612, 28 N. Y. Supp. 1126 (no opinion); *In re Mabie's Will*, 5 Misc. 179, 24 N. Y. Supp. 855; *Pilling v. Pilling*, 45 Barb. 86; *Alston v. Jones*, 17 Barb. 276; *In re Walther's Will*, 7 N. Y. Supp. 417, 26 N. Y. St. 427; *In re Connor's Will*, 55 Hun 606, 7 N. Y. Supp. 855, 124 N. Y. 663, 27 N. E. 413 (no opinion); *In re Mahoney*, 58 Hun 608, 12 N. Y. Supp. 122; *In re Buchan's Will*, 16 Misc. 204, 38 N. Y. Supp. 1124; *In re Iredale's Will*, 53 App. Div. 45, 65 N. Y. Supp. 533; *Kinne v. Johnson*, 60 Barb. 69; *Van Guysling v. Van Kuren*, 35 N. Y. 70; *In re Barbineau's Will*, 27 Misc. 417, 59 N. Y. Supp. 375; *In re Harris' Will*, 19 Misc. 388, 44 N. Y. Supp. 341; *In re Lawrence's Will*, 48 App. Div. 83, 62 N. Y. Supp. 673; *In re M'Kean's*

*Will*, 31 Misc. 703, 66 N. Y. Supp. 44; *In re Atchley's Will*, 108 N. Y. Supp. 877; *In re Winne's Will*, 50 Misc. 113, 100 N. Y. Supp. 376; *In re Feeney's Will*, 55 Misc. 158, 106 N. Y. Supp. 464; *Swenarton v. Hancock*, 9 Abb. N. C. 326, 359.

*Oregon*.—*In re Pickett's Will*, 49 Or. 127, 89 Pac. 377; *In re Buren's Will*, 47 Or. 307, 83 Pac. 530.

*Pennsylvania*.—*Shreiner v. Shreiner*, 178 Pa. St. 57, 35 Atl. 974; *Lenhart's Estate*, 199 Pa. St. 618, 49 Atl. 305; *Mulholland's Estate*, 217 Pa. St. 65, 66 Atl. 150; *Masseth v. Masseth*, 213 Pa. St. 434, 62 Atl. 1076; *Palmer's Estate*, 219 Pa. St. 303, 68 Atl. 710; *Daniel v. Daniel*, 39 Pa. St. 191; *Cox's Estate*, 167 Pa. St. 501, 31 Atl. 747.

*Virginia*.—*Tucker v. Sandridge*, 85 Va. 546, 572, 8 S. E. 650; *Parramore v. Taylor*, 11 Gratt. 220; *Cheatham v. Hatcher*, 30 Gratt. 56, 66; *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314.

*West Virginia*.—*McMechen v. McMechen*, 17 W. Va. 683, 707; *Martin v. Thayer*, 37 W. Va. 38, 55, 16 S. E. 489; *Webb v. Dye*, 18 W. Va. 376.

*Wisconsin*.—*McMaster v. Scriven*, 85 Wis. 162, 55 N. W. 149, 39 Am. St. Rep. 828; *Loughney v. Loughney*, 87 Wis. 92, 58 N. W. 250; *In re Butler's Will*, 110 Wis. 70, 85 N. W. 678; *Gavitt v. Moulton*, 119 Wis. 35, 96 N. W. 395; *In re Downing's Will*, 118 Wis. 581, 95 N. W. 876; *Trieloff v. Muellenschlager*, 128 Wis. 364, 107 N. W. 652.

**Scope of the Res Gestae.**—If the will in issue was executed in lieu of one executed the day before, the testator's condition on that day may be shown under the *res gestae* rule. *Dyer v. Dyer*, 87 Ind. 13.

**All the Circumstances connected with the testamentary act may be shown.** *In re Barbineau's Will*, 27 Misc. 417, 59 N. Y. Supp. 375; *In re Miller's Will*, 36 Misc. 310, 73 N. Y. Supp. 508, 72 App. Div. 615, 76 N. Y. Supp. 351; *Rundell v. Downing*, 5 N. Y. St. 253; *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314; *Smith v. Smith*, 75 Ga. 477.

**Making a Holographic Copy of the Will** is an important circumstance bearing on the issue of capac-

tween the attesting witnesses and testator may be proved,<sup>81</sup> as may the fact that he gave the instructions for drawing the will,<sup>82</sup> though physical disability prevented him from saying all that was in his mind.<sup>83</sup> Declarations of the attorney who drew the will to one who attested it, in order to secure his attestation, though not heard by the testator, are admissible in connection with other circumstances.<sup>84</sup>

a. *Suggestions Concerning Legacies.* — It is competent to show that suggestions were made to the testator concerning the beneficiaries in his will;<sup>85</sup> but the fact that a testator received instruction is not decisive as to his capacity;<sup>86</sup> and the fact that suggestions were made is seemingly not material if they came from disinter-

ity. *In re McKean's Will*, 31 Misc. 703, 66 N. Y. Supp. 44.

**Dictation of Will by Testator** to an attorney unknown to him without the aid of memoranda is significant. *Dickie v. VanVleck*, 5 Redf. Sur. (N. Y.) 284.

**Detecting an Error or Omission** in the paper is significant. *Palmer's Estate*, 219 Pa. St. 303, 68 Atl. 710; *Trieloff v. Muellenschlager*, 128 Wis. 364, 107 N. W. 652.

81. *In re McCarthy's Will*, 55 Hun 7, 8 N. Y. Supp. 578.

82. *McLaughlin v. McLellan*, 26 Can. Sup. 646, 28 Nova Scotia 226; *In re McCarthy's Will*, 55 Hun 7, 8 N. Y. Supp. 578; *In re Raplee's Will*, 66 Hun 558, 21 N. Y. Supp. 801, 141 N. Y. 553, 36 N. E. 343 (no opinion); *In re Iredale's Will*, 53 App. Div. 45, 65 N. Y. Supp. 533.

**Furnishing Written Instructions** in his own handwriting and making corrections in the draft of the will are quite persuasive of the testator's capacity, notwithstanding proof of forgetfulness as to his age, the order of the birth of his children and other like matters. *Mairs v. Freeman*, 3 Redf. Sur. (N. Y.) 181, 212.

**Dictation of Will.** — If the will and a codicil thereto were written by different persons, from the testator's dictation, without aid or interference, a *prima facie* case is made out, which can only be overcome by clear, definite circumstantial and weighty evidence of facts not reconcilable with the possession of testamentary capacity.

Opinions of experts and the usual testimony as to the failings of age, lapses of memory, irritability, etc., are of little weight in such cases. *Morgan's Estate*, 219 Pa. St. 355, 68 Atl. 953.

**Absence of Instructions.** — The fact that the testator gave no instructions and that no explanation was made of the scope of the instrument he executed is significant. *Freeman v. Freeman*, 19 Ont. 141.

83. *Martin v. Martin*, 15 Grant Ch. (U. C.) 586.

84. *Vincent v. McMaster*, 27 Hun (N. Y.) 98.

85. *Spencer v. Terry's Estate*, 133 Mich. 39, 94 N. W. 372; *Thornton v. Thornton*, 39 Vt. 122, 161.

86. "An insane man cannot profit by instruction, nor can he retain knowledge when acquired. So that if he have intellectual capability to acquire knowledge and memory to retain it, and thus instructed, have a competent share of understanding to govern himself and his estate, he is of sound mind and memory." *Ford v. Ford*, 7 Humph. (Tenn.) 92.

**Advice and Delusion.** — It is not material on the issue of the existence of an insane delusion what advice was given the testator concerning the subject-matter of it. "This advice was given to a man either deluded or acting rationally, and the mere giving of it could not possibly have aided the jury in determining what was the condition of his mind." *Safe Deposit & Tr. Co. v. Lange*, 207 Pa. St. 527, 56 Atl. 1081.



ested persons,<sup>87</sup> though they were acted upon by the testator.<sup>88</sup>

b. *Character of Attorney*.—If the *bona fides* of the transaction has been called in question the character of the deceased lawyer who drew the will and superintended its execution may be shown as well on the issue of capacity as of undue influence.<sup>89</sup>

c. *Nature and Extent of Estate*.—It is proper to prove the amount, situation and nature of the testator's property as circumstances bearing on his mental condition, and showing the extent of the task assumed by him in disposing of it.<sup>90</sup> But some cases make the capacity to execute a will (not the will in question) the test.<sup>91</sup>

D. *SUBSEQUENT CONDITION*.—In many cases evidence of acts and conduct and of the mental and physical condition of testator subsequent to the execution of the testamentary paper have been received.<sup>92</sup> If inability is shown at the time the will was executed

87. *McCulloch v. Campbell*, 49 Ark. 367, 5 S. W. 590; *Young v. Barner*, 27 Gratt. (Va.) 96.

88. *Matter of Wintermute's Will*, 27 N. J. Eq. 447.

In *Thornton v. Thornton*, 39 Vt. 122, 161, the court said: "That a legacy is made which would not have been thought of but for the suggestion of another does not necessarily prove incapacity. It might occur with the strongest mind in the vigor of youth and health." The fact that suggestions were made is proper for consideration, but is not entitled to a particular emphasis in the instructions.

**Suggestion by Scrivener**.—Acting upon a suggestion made by the person who drew the will is not evidence of incapacity. *Blake v. Rourke*, 74 Iowa 519, 38 N. W. 392.

89. *Stephenson v. Walker*, 4 Esp. (Eng.) 50 (Lord Kenyon said: "In the great case of Jolliffe's Will persons were examined as to the character of the person by whom the will was prepared, and the legality of admitting such evidence was not doubted"). *Ward v. Brown*, 53 W. Va. 227, 270, 44 S. E. 488.

**The Character of the Scrivener** who drew the will is more frequently the occasion of remark by the court than the subject of testimony. See *Turner v. Cheesman*, 15 N. J. Eq. 243, 260; *In re Mabie's Will*, 5 Misc. 179, 24 N. Y. Supp. 855; *Minor v. Thomas*, 12 B. Mon. (Ky.) 106; *In re Feeney's Will*, 55 Misc. 158, 106

N. Y. Supp. 464; *Clifton v. Clifton*, 47 N. J. Eq. 227, 240, 21 Atl. 333; *Frost v. Wheeler*, 43 N. J. Eq. 573, 12 Atl. 612, as examples.

90. *Illinois*.—*Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837; *Trish v. Newell*, 62 Ill. 196; *Campbell v. Campbell*, 130 Ill. 466, 480, 22 N. E. 620, 6 L. R. A. 167, 138 Ill. 612, 28 N. E. 1080; *Dillman v. McDanel*, 222 Ill. 276, 288, 78 N. E. 591, *disapproving Yoe v. McCord*, 74 Ill. 33, and *Delafield v. Parish*, 25 N. Y. 9.

*Indiana*.—*Kenworthy v. Williams*, 5 Ind. 375.

*New Jersey*.—*Clifton v. Clifton*, 47 N. J. Eq. 227, 242, 21 Atl. 333.

*Vermont*.—*Thornton v. Thornton*, 39 Vt. 122, 158.

**Reason**.—A person may be competent to dispose of a small estate among a few persons and not possess capacity to dispose of a large one among many persons. *Taylor v. Pegram*, 151 Ill. 106, 120, 37 N. E. 837; *Dillman v. McDanel*, 222 Ill. 276, 288, 78 N. E. 591.

91. *In re Chandler's Will*, 102 Me. 72, 89, 66 Atl. 215; *Delafield v. Parish*, 25 N. Y. 9, 97; *Buchanan v. Belsey*, 65 App. Div. 58, 72 N. Y. Supp. 601.

92. *Alabama*.—*Moore v. Spier*, 80 Ala. 129; *Moore v. Heineke*, 119 Ala. 627, 24 So. 374.

*California*.—*In re Wilson's Estate*, 117 Cal. 262, 49 Pac. 172; *Estate of Dole*, 147 Cal. 188, 81 Pac.

or instructions for it given, the testimony may cover the whole period of the testator's subsequent life.<sup>93</sup>

a. *Extent of Inquiry.* — Because less value is attached to the subsequent condition of a testator<sup>94</sup> than to his prior state less scope is usually allowed to the inquiry,<sup>95</sup> unless it is shown that the dis-

534; *Estate of Toomes*, 54 Cal. 509; *Estate of McKenna*, 143 Cal. 580, 77 Pac. 461.

*Connecticut.* — *In re Dale's Appeal*, 57 Conn. 127, 17 Atl. 757.

*Illinois.* — *Petefish v. Becker*, 176 Ill. 448, 52 N. E. 71; *Trubey v. Richardson*, 224 Ill. 136, 79 N. E. 592.

*Indiana.* — *Bower v. Bower*, 142 Ind. 194, 41 N. E. 523.

*Maryland.* — *Colvin v. Warford*, 20 Md. 357, 389; *Davis v. Calvert*, 5 Gill & J. 269, 300.

*Massachusetts.* — *Shailer v. Bumstead*, 99 Mass. 112.

*Michigan.* — *Spencer v. Terry's Estate*, 133 Mich. 39, 94 N. W. 372.

*New York.* — *Marx v. McGlynn*, 88 N. Y. 357, 374.

*North Carolina.* — *Wood v. Sawyer*, 61 N. C. (Phil. L.) 251, 276.

*Tennessee.* — *Gass v. Gass*, 3 Humph. 278.

*West Virginia.* — *Kerr v. Lunsford*, 31 W. Va. 659, 681, 8 S. E. 493, 2 L. R. A. 668.

**Deliberate Republication of a Will** is a most significant fact to show freedom from delusion. *Will of Cole*, 49 Wis. 179, 5 N. W. 346.

93. *Pidcock v. Potter*, 68 Pa. St. 342. The court gave no reason for so holding; the only objection to such testimony would probably be on the ground that it was cumulative.

94. *Kinne v. Kinne*, 9 Conn. 102. *Contra.* *Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144. In this case the claim of incompetency was based on the decay of testator's faculties from age. The court said: "Such decay, when it begins, is progressive and permanent; and if at one time it has reached such a stage that the man has become incapable of doing business, it would be contrary to all experience that he should recover. So, if in such a case it is shown that

at any time subsequent to that in question the man's faculties are so far unimpaired that he is capable of transacting business, it is evidence that they were so unimpaired at the time in question. To the same effect, arguendo, is *Gass v. Gass*, 3 Humph. (Tenn.) 278.

95. *Terry v. Buffington*, 11 Ga. 337 (as an independent fact proof of imbecility five years after the will is too remote); *Shailer v. Bumstead*, 99 Mass. 112, 130; *Von De Veld v. Judy*, 143 Mo. 348, 44 S. W. 1117; *Mitchell v. Corpening*, 124 N. C. 472, 32 S. E. 798 (condition a few days after).

**Discretion of Court.** — The question as to the scope of inquiry subsequent to the date of the will is largely for the trial judge, notwithstanding the testimony sought to be admitted relates to the cause of testator's death and might be the foundation for expert testimony to show that he was subject to a progressive mental ailment when the will was executed. *McCoy v. Jordan*, 184 Mass. 575, 69 N. E. 358.

**Declarations made concerning testator's condition four months after will was executed are too remote.** *Naul v. Naul*, 75 App. Div. 292, 78 N. Y. Supp. 101.

**The Appointment of a Conservator two or three years after the will was made is so remote that evidence of it may be excluded.** *Entwistle v. Meikle*, 180 Ill. 9, 25, 54 N. E. 217. And so of an inquisition five years thereafter. *Terry v. Buffington*, 11 Ga. 337.

**Verdict Finding Insanity.** — A verdict in a previous case between the same parties finding that testator was insane three weeks after the date in question is not binding on a subsequent trial though the jury found that his condition did not materially change in the interim and the evidence was the same in

eased state has continued unchanged since the making of the will.<sup>96</sup>

**E. VALUE.**—The importance of testimony relating to either the prior or subsequent condition of a testator depends upon its tendency to show his state of mind at the time the will was made.<sup>97</sup>

**a. May Be Decisive.**—Lack of capacity may be shown by proof of testator's condition before and after the execution of the will if that prior and subsequent condition may be presumed to exist at the time in question.<sup>98</sup>

**b. Recognition of Will.**—Recognizing, after recovery, a will made during illness is a fact "imposing and weighty as showing the testator's consciousness that he had made and still acknowledged this to be his will."<sup>99</sup>

both cases. *Sewall v. Robbins*, 139 Mass. 164, 29 N. E. 650.

**96.** *Terry v. Buffington*, 11 Ga. 337; *Bever v. Spangler*, 93 Iowa 576, 61 N. W. 1072 (six years after not too remote in a case of senile dementia); *In re Wharton's Will*, 132 Iowa 714, 109 N. W. 492; *Irish v. Smith*, 8 Serg. & R. (Pa.) 573.

**97.** *United States*.—*Stevens v. Vancleve*, 4 Wash. C. C. 262, 23 Fed. Cas. No. 13,412.

*California*.—*In re Wilson's Estate*, 117 Cal. 262, 49 Pac. 172, 711; *Estate of Dole*, 147 Cal. 188, 81 Pac. 534.

*Connecticut*.—*Kinne v. Kinne*, 9 Conn. 102.

*Illinois*.—*Craig v. Southard*, 148 Ill. 37, 35 N. E. 361; *Taylor v. Cox*, 153 Ill. 220, 38 N. E. 656; *Ring v. Lawless*, 190 Ill. 520, 60 N. E. 881; *Trubey v. Richardson*, 224 Ill. 136, 79 N. E. 592.

*Maryland*.—*Baugh v. Gesell*, 103 Md. 450, 63 Atl. 1078.

*Massachusetts*.—*White v. Graves*, 107 Mass. 325, 9 Am. Rep. 38; *Shailer v. Bumstead*, 99 Mass. 112, 130; *Hardy v. Martin*, 200 Mass. 548, 86 N. E. 939.

*Oregon*.—*Chrisman v. Chrisman*, 16 Or. 127, 18 Pac. 6; *In re Pickett's Will*, 49 Or. 127, 89 Pac. 377.

**98.** *Waring v. Waring*, 6 Moore P. C. 341, 357, 13 Eng. Reprint 715 (Lord Brougham said: "No one who finds a person laboring under the same kind of delusions before and after a given period can be justified in refusing his belief to their continuance during the interval unless clear evidence be produced of

their having ceased for a time and then returned. The very great probability is that they existed all the while and were only not apparent because the subject with which they were connected did not happen to be openly mentioned before others who might give evidence"); *Spencer v. Terry's Estate*, 133 Mich. 39, 94 N. W. 372, *distinguishing* *Lange v. Wiegand*, 125 Mich. 647, 85 N. W. 109. (In the latter case the court observed of the condition of a testator failing rapidly several hours after the will was made, "what his condition was at that time could not be weighed against the testimony of witnesses who stood unimpeached as to the condition when the will was made"); *Irish v. Smith*, 8 Serg. & R. (Pa.) 573; *Mason v. Rodriguez* (Tex. Civ. App.), 115 S. W. 868 (aged persons afflicted with senile dementia).

**99.** *Lamb v. Lynch*, 56 Neb. 135, 76 N. W. 428; *Jones v. Harris*, 3 Rich. L. (S. C.) 14, 26.

**Acquiescence in Will.**—It has been said that it is a powerful circumstance that the testator during the years after the execution of the will, during periods when he was free from the mental effects of disease, failed to express dissatisfaction with what had been done. *Brown v. Riffin*, 94 Ill. 560.

**Retention of Will.**—The retention of a will placed among the papers of a testator when he was insane, if he subsequently became conscious under circumstances indicating possession of knowledge of

c. *Dissatisfaction With Will*. — Causing a second will to be prepared after repeatedly examining the first and expressing dissatisfaction with it is strong evidence of capacity.<sup>1</sup>

F. *EQUAL PRIVILEGES*. — The defendant must be allowed the same scope of inquiry as to time as the plaintiff.<sup>2</sup>

**11. Declarations, Admissions, Acts, Habits and Condition of Other Persons.** — A. *DECLARATIONS*. — a. *Of Executor*. — Declarations of the person who subsequently became executor are not admissible against him in his representative capacity,<sup>3</sup> if made prior to the existence of the will, though his interest under it would be less than he would be entitled to as heir.<sup>4</sup> They are incompetent if he has no interest under the will.<sup>5</sup>

b. *Of Strangers*. — Declarations made by the husband of testatrix, from whom she derived the estate, in her absence and prior to her will, as to what disposition he would make of his property and do for the contestant are inadmissible.<sup>6</sup> Declarations of strangers to the record are generally inadmissible if made before the will.<sup>7</sup>

c. *Favorable to Declarant*. — If, because of the position a party occupies on the record, his declarations are received on the theory that they are against his interest, the court may direct that they be disregarded on it appearing that they were in his interest.<sup>8</sup>

B. *ADMISSIONS*. — a. *Sole Beneficiary*. — Admissions of the sole beneficiary under the will are competent against him if aptly made.<sup>9</sup>

b. *Of Joint Beneficiary*. — Where the interest of devisees is joint an admission or declaration by one is competent against all.<sup>10</sup>

c. *Of Co-Legatee*. — The admissions or declarations of one of several legatees (not joint) concerning the unsoundness of the testator's mind are incompetent as against co-legatees.<sup>11</sup> The rule is

its contents, is but *prima facie* evidence in favor of its validity. *Porter v. Campbell*, 2 Baxt. (Tenn.) 81.

1. *Garrison v. Garrison's Exrs.*, 15 N. J. Eq. 266, 279.

2. *Petefish v. Becker*, 176 Ill. 448, 52 N. E. 71.

3. *Berry v. Safe Deposit & Tr. Co.*, 96 Md. 45, 65, 53 Atl. 720.

4. *Titlow v. Titlow*, 54 Pa. St. 216.

5. *Roberts v. Trawick*, 13 Ala. 68.

6. *Bootle v. Blundell*, 19 Ves. 494, 34 Eng. Reprint 600 (in this case the evidence was received to sustain the will of an inmate of a madhouse, it being claimed that it was written during a lucid interval); *In re Jones' Estate*, 130 Iowa 177, 106 N. W. 610.

7. *In re Goldthorp's Estate*, 94

Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400; *Wise v. Foote*, 81 Ky. 10.

8. *Love v. Johnston*, 34 N. C. (12 Ired. L.) 355.

9. *Seale v. Chambliss*, 36 Ala. 19; *Harvey v. Anderson*, 12 Ga. 69; *Williamson v. Nabers*, 14 Ga. 286, 308; *Egbers v. Egbers*, 177 Ill. 82, 52 N. E. 285; *Ware v. Ware*, 8 Me. 42.

10. *Smith v. Henline*, 174 Ill. 184, 199, 51 N. E. 227.

11. *United States*. — *Ormsby v. Webb*, 134 U. S. 47, 65.

*Alabama*. — *Roberts v. Trawick*, 13 Ala. 68, 80; *Walker v. Jones*, 23 Ala. 448 (the husband of a legatee).

*California*. — *In re Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695.

*Connecticut*. — *Appeal of Dale*, 57 Conn. 127, 17 Atl. 737.

*Illinois*. — *Campbell v. Campbell*,

apparently the other way in Maryland,<sup>12</sup> and in Kentucky, the admission may be proved, not as such, but as a circumstance for the consideration of the jury.<sup>13</sup> In Vermont, if the declarant is volun-

138 Ill. 612, 28 N. E. 1080; McMillan v. McDill, 110 Ill. 47.

*Indiana.*—Hayes v. Burkam, 67 Ind. 359; Shorb v. Brubaker, 94 Ind. 165; Ryman v. Crawford, 86 Ind. 262.

*Iowa.*—Fothergill v. Fothergill, 129 Iowa 93, 105 N. W. 377; *In re Ames' Will*, 51 Iowa 596, 2 N. W. 408; Hertrich v. Hertrich, 114 Iowa 643, 87 N. W. 689, 89 Am. St. Rep. 389; Parsons v. Parsons, 66 Iowa 754, 21 N. W. 570, 24 N. W. 564.

*Massachusetts.*—Phelps v. Hartwell, 1 Mass. 71; McConnell v. Wildes, 153 Mass. 487, 26 N. E. 1114; Shailer v. Bumstead, 99 Mass. 112 (In the latter case Atkins v. Sanger, 1 Pick. 192, was distinguished. There the declarations of one of the executors, who was also a principal legatee, were offered to show that testator was of unsound mind. The court, trying the facts, received them. It is suggested, in the later case, that this was done because the parties were disqualified as witnesses, and because the case was heard without a jury).

*Michigan.*—O'Connor v. Madison, 98 Mich. 183, 57 N. W. 105; *In re Lefevre's Estate*, 102 Mich. 568, 61 N. W. 3; Roberts v. Bidwell, 136 Mich. 191, 98 N. W. 1000.

*Mississippi.*—Prewett v. Coopwood, 30 Miss. 369.

*Missouri.*—King v. Gilson, 191 Mo. 307, 332, 90 S. W. 367; Schierbaum v. Schemme, 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604, (overruling *Armstrong v. Farrar*, 8 Mo. 627); Wood v. Carpenter, 166 Mo. 465, 66 S. W. 172.

*Nebraska.*—Stull v. Stull, 1 Neb. (Unof.) 380, 389, 96 N. W. 196.

*New Hampshire.*—Carpenter v. Hatch, 64 N. H. 573, 15 Atl. 219.

*New York.*—*In re Van Dawalker's Will*, 63 App. Div. 550, 71 N. Y. Supp. 705; Matter of Baird, 47 Hun 77; Matter of Kennedy, 167 N. Y. 163, 177, 60 N. E. 442; Matter of Meyer, 184 N. Y. 54, 76 N. E. 920; Naul v. Naul, 75 App. Div. 292, 78 N. Y. Supp. 101; LaBau v. Vanderbilt, 3 Redf. Sur.

384; *In re Campbell's Will*, 67 App. Div. 418, 73 N. Y. Supp. 753.

*Ohio.*—Thompson v. Thompson, 13 Ohio St. 356; Roush v. Wensel, 15 Ohio C. C. 133; Moore v. Caldwell, 6 Ohio C. C. (N. S.) 484, 495.

*Pennsylvania.*—Nussear v. Arnold, 13 Serg. & R. 323; Clark v. Morrison, 25 Pa. St. 453; Irwin v. West, 81\* Pa. St. 157; Miller v. Miller, 3 Serg. & R. 267; Bovard v. Wallace, 4 Serg. & R. 499; Boyd v. Eby, 8 Watts 66; Yorke's Estate, 6 Pa. Dist. 321; Dietrich v. Dietrich, 4 Watts 167, note.

*Tennessee.*—Mullins v. Lyles, 1 Swan 337.

*Texas.*—Prather v. McClelland, 76 Tex. 574, 13 S. W. 543 (Tex. Civ. App.), 26 S. W. 657.

*Virginia.*—Whitelaw's Admr. v. Whitelaw, 96 Va. 712, 32 S. E. 458.

*West Virginia.*—Forney v. Ferrell, 4 W. Va. 729.

**Reason.**—The admissions of one legatee cannot be received as against him and not against the others because the will, if set aside at all, must be set aside in toto. Wood v. Carpenter, 166 Mo. 465, 66 S. W. 172; King v. Gilson, 191 Mo. 307, 332, 90 S. W. 367; *In re Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695; Dale's Appeal, 57 Conn. 127, 140, 17 Atl. 757; Matter of Myer, 184 N. Y. 54, 76 N. E. 920.

12. Gessell v. Baugher, 100 Md. 677, 60 Atl. 481; Davis v. Calvert, 5 Gill & J. (Md.) 270.

13. Rogers v. Rogers, 2 B. Mon. (Ky.) 324; Gibson v. Sutton, 24 Ky. L. Rep. 868, 70 S. W. 188; Milton v. Hunter, 13 Bush (Ky.) 163.

**Argument.**—The admissions of one legatee or devisee against his interest should be evidence against himself, and it would seem to be unreasonable that he should escape the effect of them altogether merely because they might not be equally conclusive as to the interest of his co-legatees or devisees. Any rule of evidence that would entitle him to such an escape would equally apply to the admissions of nineteen

tarily a party of record and in interest,<sup>14</sup> his admission may be proved, and so in England.<sup>15</sup>

(1.) **Circumstances Affecting Admissibility.** — To be competent declarations must be explicit and relate to the matter in controversy; if they concern testator's capacity to make a contract they are immaterial.<sup>16</sup> They must be made under circumstances indicating that they are the deliberate opinion of the declarant.<sup>17</sup>

(2.) **Conspiracy.** — If a conspiracy between the legatees is alleged, proof of it must precede proof of declarations by any of them.<sup>18</sup>

**C. REPUTATION AS TO SANITY.** — General local rumors concerning a testator's mental condition may not be proved.<sup>19</sup> Nor can a witness give conversations between himself and others concerning the cause of testator's condition.<sup>20</sup>

**D. TREATMENT OF TESTATOR BY FAMILY.** — The treatment of the testator by his family may be proved, but not the opinions of its members as to his mental state.<sup>21</sup> But it has been held that a formal document signed by the testator's heirs before the execution of the will expressing that he was incapable of caring for his estate is entitled to consideration in connection with other testimony.<sup>22</sup> Such instrument is not conclusive.<sup>23</sup>

out of twenty co-legatees, even when the interest of the twentieth legatee, who had made no admission, may not be equal to one-thousandth part of the aggregate interests of the nineteen who had made admissions against the validity of the common document. This would, in our judgment, be unreasonable and unjust. It would, in our opinion, be more consistent with principle and analogy, to allow the admission of a fact by one of several legatees or devisees, evidently against his own interest, to be evidence, entitled to the effect, not of an admission by all his associates in interest, but of the simple circumstance that a party interested admitted what he probably would not have done had he not believed it to be true. And this fact, though not entitled to the effect of an admission by all concerned in a common interest under the will may nevertheless tend legitimately to a presumption against all of them (in a degree corresponding with all the circumstances) that the thing admitted may be true. *Beall v. Cunningham*, 1 B. Mon. (Ky.) 399; *Wall v. Dimmitt*, 114 Ky. 923, 72 S. W. 300.

14. *Robinson v. Hutchinson*, 31 Vt. 443.

15. See *Bauerman v. Radenius*, 7 Durnf. & E. (Eng.) 663.

16. *Von De Veld v. Judy*, 143 Mo. 348, 44 S. W. 1117.

17. *Sellers v. Sellers*, 2 Heisk. (Tenn.) 430.

18. *Hertrich v. Hertrich*, 114 Iowa 643, 87 N. W. 689, 89 Am. St. Rep. 389; *Wood v. Carpenter*, 166 Mo. 465, 485, 66 S. W. 172.

19. *Brinkman v. Rueggessick*, 71 Mo. 553; *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; *Pidcock v. Potter*, 68 Pa. St. 342; *Hopkins v. Wampler*, 108 Va. 705, 62 S. E. 926.

20. *Hughes v. Hughes*, 31 Ala. 510.

**Conduct of Others Toward Testator.** — It is wholly irrelevant why testator was made fun of by others. Their opinions of his mental state cannot be shown by testimony of their conduct toward him. *Hine's Appeal*, 68 Conn. 551, 37 Atl. 384.

21. *White v. Wilson*, 13 Ves. 87, 33 Eng. Reprint 227; *Hopkins v. Wampler*, 108 Va. 705, 62 S. E. 926.

22. *Dale's Appeal*, 57 Conn. 127, 17 Atl. 757.

23. *Arnold v. Arnold* (Ky. L. Rep.), 17 S. W. 203.

The failure of a contestant to have the sanity of the testator tested by a commission is not convincing that a belief of the latter's insanity did not exist, and does not overcome the idea that practical considerations may have dictated that it was wiser to let things take their course.<sup>24</sup> Non-action in that respect may be shown;<sup>25</sup> but if the testator was neither an idiot nor lunatic and his condition did not become serious until shortly before his death, such testimony is unimportant.<sup>26</sup>

**E. ACTS DONE BY INSANE PERSONS.** — Testimony showing that insane persons had done an act similar to that shown to have been done by decedent during the time he is alleged to have been insane is not admissible.<sup>27</sup>

**F. REASONS FOR PHYSICIAN'S ACTION.** — The reasons which led decedent's physician to permit him to go to a sanitarium are not material on direct examination.<sup>28</sup>

**G. HABITS. — INTEMPERANCE OF PARENT.** — Inquiry concerning the drinking habits of testator's father in his early life, no connection between them and testator being shown, concerns a matter altogether too remote.<sup>29</sup>

**H. CONDITION. — a. Hereditary Disease.** — The fact that the ancestors of a testator suffered from paralysis, as did he, does not tend to show the effect of the disease on his mind,<sup>30</sup> at least where testator was not afflicted therewith until after the will was made, notwithstanding previous physical weakness and mental inactivity.<sup>31</sup>

**b. Insanity of Ancestors.** — The insanity of relations in the ancestral line may be shown as tending to establish the condition of testator.<sup>32</sup>

**(1.) Predicate Must Be Laid.** — Before proof of indiscriminate and unexplained diseases affecting the mental condition of testator's relatives may be received, it must be shown that such diseases are hereditary or transmissible.<sup>33</sup> There is, however, disagreement on this point, though the insanity is that of collateral relatives.<sup>34</sup>

24. *Smith v. Tebbitt*, 36 L. J., P. 97, L. R. 1 P. 398, 424, 16 L. T. 841.

25. *Irwin v. West*, 81\* Pa. St. 157.

26. *Reichenbach v. Ruddach*, 127 Pa. St. 564, 600, 18 Atl. 432.

27. *Foster's Exrs. v. Dickerson*, 64 Vt. 233, 248, 24 Atl. 253.

28. *Roche v. Nason*, 185 N. Y. 128, 77 N. E. 1077.

29. *Titus v. Gage*, 70 Vt. 13, 39 Atl. 246.

30. *Meeker v. Meeker*, 75 Ill. 260.

31. *Shailer v. Bumstead*, 99 Mass. 112.

32. *Tyrell v. Jenner*, 2 Hagg. Ecc. (Eng.) 72; *Frere v. Peacocke*, 3 Curt. Ecc. (Eng.) 664; *Coughlin*

*v. Poulson*, 2 MacArthur (D. C.) 308; *Shailer v. Bumstead*, 99 Mass. 112, 131; *Baxter v. Abbott*, 7 Gray (Mass.) 71; *Matter of Myer*, 184 N. Y. 54, 76 N. E. 920, reversing 100 App. Div. 512, 91 N. Y. Supp. 1104.

33. *Dillman v. McDanel*, 222 Ill. 276, 78 N. E. 591; *Berry v. Safe Deposit & Tr. Co.*, 96 Md. 45, 63, 53 Atl. 720; *Shailer v. Bumstead*, 99 Mass. 112; *Matter of Myer*, 184 N. Y. 54, 76 N. E. 920, reversing 100 App. Div. 512, 91 N. Y. Supp. 1104; *Pringle v. Burroughs*, 100 App. Div. 366, 91 N. Y. Supp. 750; *Reichenbach v. Ruddach*, 127 Pa. St. 564, 18 Atl. 432.

34. *Dillman v. McDanel*, 222 Ill.

Mere feebleness, resulting from disease, is not a sufficient basis for such testimony.<sup>35</sup>

(2.) **Evidence in Rebuttal.**—To meet the contention of hereditary insanity it may be shown that testator's father was a man of exceptional mental power, and had borne a prominent part in the active affairs of business life. Such testimony is relevant though it has not been attempted to show that he was insane.<sup>36</sup>

(3.) **How Proved.**—Hereditary insanity may be shown by testimony based on personal knowledge and observation, but not by tradition or hearsay.<sup>37</sup>

(4.) **Weight of Testimony.**—Proof of ancestral insanity is not cogent as to testator's condition unless it is shown that he has manifested mental derangement at some time during his life.<sup>38</sup>

c. **Collateral Insanity.**—In some courts if there is testimony tending to show mental unsoundness in the testator it may be supplemented by showing insanity in his collateral blood relatives, not further removed than uncles and aunts.<sup>39</sup> The nature of the insanity of collaterals must be shown.<sup>40</sup>

12. **Opinions.**—A. OF EXPERTS. — a. *Attending Physicians.* The opinions of qualified physicians who have attended or examined the testator, though they are not experts in mental diseases, are everywhere received to show his mental condition, subject to the statutes governing privileged communications between physician and patient. Such opinions are generally received without a statement of the facts on which they are based.<sup>41</sup>

276, 78 N. E. 591, citing *People v. Garbutt*, 17 Mich. 9; *Prentiss v. Bates*, 93 Mich. 234, 53 N. W. 153; *State v. Simms*, 68 Mo. 305; *Baxter v. Abbott*, 7 Gray (Mass.) 71; *Hagan v. State*, 5 Baxt. (Tenn.) 615.

35. *Shailer v. Bumstead*, 99 Mass. 112, 131; *Pringle v. Burroughs*, 100 App. Div. 366, 91 N. Y. Supp. 750.

36. *In re Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695.

37. *Coughlin v. Poulson*, 2 MacArthur (D. C.) 308.

38. *Roche v. Nason*, 185 N. Y. 128, 77 N. E. 1007.

39. *Dillman v. McDanel*, 222 Ill. 276, 78 N. E. 591; *Prentiss v. Bates*, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494, reversing a ruling in the same case, 88 Mich. 567, 50 N. W. 637 (of sister and niece). Compare remarks by Judge Cooley in *Fraser v. Jennison*, 42 Mich. 206, 228, 3 N. W. 882. See *Sayre v. Trustees*, 192 Mo. 95, 125, 90 S. W. 787.

**Insanity Among Collateral Relatives** does not elucidate the time at which the testator became insane. *Bristed v. Weeks*, 5 Redf. Sur. (N. Y.) 529, 541.

40. *Sayre v. Trustees*, 192 Mo. 95, 125, 90 S. W. 787.

41. *United States*.—*Harrison v. Rowan*, 3 Wash. C. C. 580, 11 Fed. Cas. No. 6,141.

*Alabama*.—*Bulger v. Ross*, 98 Ala. 267, 12 So. 803.

*Delaware*.—*Jamison v. Jamison*, 3 Houst. 108, 119; *Steele v. Helm*, 2 Marv. 237, 43 Atl. 153; *Lodge v. Lodge's Will*, 2 Houst. 418.

*Georgia*.—*Potts v. House*, 6 Ga. 324 (from the symptoms and circumstances which come within their own observation, or as testified to by others).

*Indiana*.—*Bower v. Bower*, 142 Ind. 194, 41 N. E. 523; *Stevens v. Leonard*, 154 Ind. 67, 56 N. E. 27, 77 Am. St. Rep. 446.

*Iowa*.—*In re Jones' Estate*, 130 Iowa 177, 106 N. W. 610; *Denning*



**Basis for Opinions.** — Their opinions may be based on observations made shortly before or soon after the will was executed if it is not shown that any material change occurred in the patient's condition in the interim.<sup>42</sup> In one case a wider scope has been permitted.<sup>43</sup> The extent of a witness' observations affects only the weight of his

*v. Butcher*, 91 Iowa 425, 59 N. W. 69; *Meeker v. Meeker*, 74 Iowa 352, 37 N. W. 773, 7 Am. St. Rep. 489.

*Louisiana.* — *Godden v. Burke*, 35 La. Ann. 160.

*Maine.* — *Hall v. Perry*, 87 Me. 569, 33 Atl. 160, 47 Am. St. Rep. 352.

*Maryland.* — *Crockett v. Davis*, 81 Md. 134, 31 Atl. 710; *Jones v. Collins*, 94 Md. 403, 413, 51 Atl. 398.

*Massachusetts.* — *May v. Bradlee*, 127 Mass. 414; *Baxter v. Abbott*, 7 Gray 71; *Gorham v. Moor*, 197 Mass. 522, 84 N. E. 436; *Lewis v. Mason*, 109 Mass. 169; *Hathorn v. King*, 8 Mass. 371; *Hastings v. Rider*, 99 Mass. 622.

*Michigan.* — *Lange v. Wiegand*, 125 Mich. 647, 85 N. W. 109; *Fraser v. Jennison*, 42 Mich. 206, 224, 3 N. W. 882; *McGinnis v. Kempsey*, 27 Mich. 363; *McHugh v. Fitzgerald*, 103 Mich. 21, 61 N. W. 354; *Kempsey v. McGinniss*, 21 Mich. 123, 137.

*New Hampshire.* — *Boardman v. Woodman*, 47 N. H. 120, 135.

*New Jersey.* — *Sutton v. Morgan*, 30 N. J. Eq. 629 (failure to call attending physician as a witness remarked upon).

*North Carolina.* — *Cornelius v. Cornelius*, 52 N. C. (7 Jones' L.) 593; *Wood v. Sawyer*, 61 N. C. (Phil. L.) 251, 276.

*Ohio.* — *Windisch & M. Brew. Co. v. Opp*, 17 Ohio C. C. 465.

*Pennsylvania.* — *Bitner v. Bitner*, 65 Pa. St. 347, 362.

*Tennessee.* — *Gibson v. Gibson*, 9 Yerg. 329.

*Texas.* — *Trezevant v. Rains* (Tex. Civ. App.), 25 S. W. 1092; *Brown v. Mitchell*, 75 Tex. 9, 12 S. W. 606.

*Vermont.* — *Frary v. Gusha*, 59 Vt. 257, 9 Atl. 549.

*West Virginia.* — *Kerr v. Lunsford*, 31 W. Va. 659, 681, 8 S. E. 493, 2 L. R. A. 668 (their testi-

mony is entitled to great weight).

*Wisconsin.* — *Will of Jenkins*, 43 Wis. 610 (they are very desirable if there is a conflict in the testimony of the non-expert witnesses).

"A General Practitioner who has had experience in the various kinds of mental cases is as competent to testify to the sanity or insanity of a person as the skilled expert who devotes his entire time to the study of mental diseases." *In re Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695.

**Value of Opinion.** — It is not competent to ask an expert as to the value of the opinion of the physician who attended the testator. *Lancaster v. Lancaster*, 27 Ky. L. Rep. 1127, 87 S. W. 1137.

**Certificates of Physicians** who examined testator for the purpose of his commitment to an asylum are but hearsay and inadmissible in the absence of any showing why their testimony was not taken. *Kelly v. Moore*, 22 App. Cas. (D. C.) 9, 27.

**Witness' Condition** at the time he attended the testator may be shown to establish his incompetency to judge of the latter's condition. *Sisson v. Conger*, 1 Thomp. & C. (N. Y.) 564.

**Proof of Skill.** — A physician who has no diploma and was not graduated may prove his qualifications by another physician. *Thompson v. Ish*, 99 Mo. 160, 179, 12 S. W. 510, 17 Am. St. Rep. 552.

**Form of Answer.** — An answer is not objectionable because it states that the testator was not laboring under a delusion. *Stevens v. Leonard*, 154 Ind. 67, 82, 56 N. E. 27, 77 Am. St. Rep. 446.

<sup>42.</sup> *Hastings v. Rider*, 99 Mass. 622; *Lange v. Wiegand*, 125 Mich. 647, 85 N. W. 109.

<sup>43.</sup> *Lewis v. Mason*, 109 Mass. 169.

testimony,<sup>44</sup> if they were made within a time reasonably near to the execution of the will.<sup>45</sup>

b. *Alienists*. — The opinions of alienists are also competent,<sup>46</sup> under some circumstances.<sup>47</sup> To qualify an expert to testify as to mental competency it is necessary that the subject-matter of the inquiry should be within the range and peculiar skill of the witness, and that it should be one of which the ordinary knowledge and experience of mankind does not enable them to see what inferences should be drawn from the facts.<sup>48</sup>

c. *Priests*. — A regularly educated priest, whose preparatory education qualified him to pass upon the mental condition of communicants and whose duty required him to do so in the administration of his office, may give expert testimony as to the condition of a parishioner whom he attended, his information being obtained from a preliminary examination made to ascertain the testator's mental condition.<sup>49</sup> But "the fact that a priest administered the consolations of religion prove nothing, as they are given in cases of doubtful consciousness and even *in extremis*."<sup>50</sup>

d. *Nurses*. — A nurse experienced in caring for the insane may testify as an expert.<sup>51</sup>

e. *Medical Books*. — Works on insanity may not be read from to the jury.<sup>52</sup>

f. *Ability To Detect Insanity*. — An expert who has conversed with the testator at different times and testified that his manner

44. *Jones v. Collins*, 94 Md. 403, 413, 51 Atl. 398 (three office prescriptions); *Safe Deposit & Tr. Co. v. Berry*, 93 Md. 560, 49 Atl. 401; *Hastings v. Rider*, 99 Mass. 622.

45. *Remoteness*. — Cross-examination concerning treatment for physical ailments eight and eleven years before the will and codicil were executed relates to a period too remote. *In re Morse's Estate*, 146 Mich. 463, 109 N. W. 858.

46. *Garrus v. Davis*, 234 Ill. 236, 84 N. E. 924; *Bever v. Spangler*, 93 Iowa 576, 605, 61 N. W. 1072; *Ray v. Ray*, 98 N. C. 566, 4 S. E. 526; *Fairchild v. Bascom*, 35 Vt. 398.

47. *Contingencies Affecting Expert Testimony*. — First. If the facts are such, in the opinion of the court, as to fully warrant an inference of capacity, experts will not be heard to testify to an opposite inference. Second. If the facts fully warrant the inference of incapacity an expert is not needed. Third. If the

case is so obscure or so manifestly depending on scientific phenomena that neither judge nor jury can, without technical aid, draw an accurate conclusion from them, expert testimony may be received. *Berry v. Safe Deposit & Tr. Co.*, 96 Md. 45, 62, 53 Atl. 720.

48. *Berry v. Safe Deposit Co.*, 96 Md. 45, 60, 53 Atl. 720.

49. *Estate of Toomes*, 54 Cal. 509.

50. *Godden v. Burke*, 35 La. Ann. 160.

A chaplain who has regularly visited institutions for the insane is not necessarily an expert. *Ledwith v. Claffey*, 18 App. Div. 115, 45 N. Y. Supp. 612.

51. *In re Goodwin*, 95 App. Div. 183, 88 N. Y. Supp. 734; *Foster v. Dickerson*, 64 Vt. 233, 246, 24 Atl. 253.

52. *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 882.

did not indicate impairment of mind, may testify as to his ability to have discovered insanity if it existed.<sup>53</sup>

*g. Basis for Opinions.* — (1.) **Hypothetical Case.** — If the witness has not seen the testator his opinion may be based on a hypothetical case embodying, as near as may be, the facts in the instant case.<sup>54</sup>

(2.) **The Will.** — After a full statement of the symptoms of arteriosclerosis of the brain and of its effect upon testable capacity, the court may, in its discretion, decline to allow medical experts to take the will and explain therefrom the evidences that testator was suffering from that disease.<sup>55</sup>

(3.) **Handwriting.** — An expert may show that handwriting is a test known to the profession in cases of insanity.<sup>56</sup>

(4.) **Change of Purpose.** — Change of testamentary purpose by a testator is not a basis upon which experts may rest an opinion as to his competency.<sup>57</sup>

*h. Scope of Testimony.* — (1.) **Effect of Disease.** — The attending physician may testify to the effect of disease upon the mind of his patient<sup>58</sup> at a certain time before death if he is shown to have special knowledge and skill of the effect of the disease with which testator was afflicted,<sup>59</sup> and as to the duration of a nervous shock sustained by a fall.<sup>60</sup> And if unconsciousness at a particular time has been shown may say whether or not persons similarly diseased ever rally and regain consciousness and intelligence.<sup>61</sup>

(2.) **Addiction to Habit.** — Experts may testify whether the symptoms exhibited by a person addicted to a secret habit are such as to enable a physician to judge of the fact, in which event opinions as to the effect of indulgence in the habit are competent.<sup>62</sup>

(3.) **Nature of Malady.** — The distinctive peculiarities of a diseased mind as affected by different ailments may be shown, and the nature of the affection in question testified to.<sup>63</sup>

53. *Foster v. Dickerson*, 64 Vt. 233, 246, 24 Atl. 253.

54. *Schneider v. Manning*, 121 Ill. 376, 387, 12 N. E. 267; *Fairchild v. Bascom*, 35 Vt. 398.

55. *Henning v. Stevenson*, 26 Ky. L. Rep. 159, 80 S. W. 1135. "Bad punctuation or the omission of a letter here and there, or badly constructed sentences are not confined to people who are suffering with sclerosis of the brain, and, therefore, what the writing really indicated was to be determined, not alone from expert testimony, but from common experience."

56. *Entwistle v. Meikle*, 180 Ill. 9, 25, 54 N. E. 217.

57. *Nelson's Will*, 39 Minn. 204, 39 N. W. 143.

58. *In re Jones' Estate*, 130 Iowa 177, 106 N. W. 610; *In re Estate of Burrows*, 11 Ohio Dec. 229.

59. *Fairchild v. Bascomb*, 35 Vt. 398.

60. *Berry v. Safe Deposit Co.*, 96 Md. 45, 64, 53 Atl. 720.

61. *Struth v. Decker*, 100 Md. 368, 59 Atl. 727.

62. *Buxton v. Emery*, 139 Mich. 341, 102 N. W. 948.

63. *Swygart v. Willard*, 166 Ind. 25, 76 N. E. 755.

(4.) **Cause of Suicide.**—An expert may give an opinion as to what the commission of suicide would indicate as to sanity.<sup>64</sup>

(5.) **Insanity of Relatives.**—An expert may properly consider the mental condition of near relatives of the testator.<sup>65</sup>

i. **Hypothetical Questions.**—(1.) **Necessity and Form.**—Such questions are necessary. It is improper to ask the witness to assume the function of the jury and, in view of the whole evidence, pass upon the issue or the *crédibility* of the testimony,<sup>66</sup> or the preponderance of that which is sharply conflicting.<sup>67</sup>

(2.) **Must Rest on the Evidence.**—The hypothesis on which a question rests must be derived from the evidence.<sup>68</sup>

(3.) **Assumption That Testimony Is True.**—A question may be based on the hypothesis that all the facts testified to by a witness or witnesses named are true, if the witness heard the whole of his or their testimony; but not otherwise.<sup>69</sup>

**This Is Not the Rule** if the witness is an expert, at least if the question contains a very great number of particulars. The facts must be stated in it.<sup>70</sup>

(4.) **Assumption That Part of Testimony Is True and Part False.** A question must not be framed on the theory that some of the testimony offered by the questioner is true and some false.<sup>71</sup>

64. *Frary v. Gusha*, 59 Vt. 257, 9 Atl. 549.

65. *Fraser v. Jennison*, 42 Mich. 206, 228, 3 N. W. 882; *Holton v. Cochran*, 208 Mo. 314, 425, 106 S. W. 1035.

66. *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999; *In re Chandler's Will*, 102 Me. 72, 107, 66 Atl. 215; *Woodbury v. Obear*, 7 Gray (Mass.) 467; *King v. Gilson*, 206 Mo. 264, 276, 104 S. W. 52; *Kerr v. Lunsford*, 31 W. Va. 659, 673, 8 S. E. 493, 2 L. R. A. 668; *McMechen v. McMechen*, 17 W. Va. 683, 694.

67. *Fairchild v. Bascomb*, 35 Vt. 398.

68. *Prather v. McClelland* (Tex. Civ. App.), 26 S. W. 657, 76 Tex. 574, 13 S. W. 543.

**Facts Not Established.**—Questions which state facts not established should be rejected rather than submit to the jury the question what facts were material in securing the witness' testimony. *Stutsman v. Sharpless*, 125 Iowa 335, 101 N. W. 105.

69. *Schneider v. Manning*, 121 Ill. 376, 387, 12 N. E. 267; *Kempsey v. McGinnis*, 21 Mich. 123, 138; *Yard-*

*ley v. Cuthbertson*, 108 Pa. St. 395, 450, 1 Atl. 765, 56 Am. Rep. 218; *Foster v. Dickerson*, 64 Vt. 233, 256, 24 Atl. 253.

70. *Barber's Appeal*, 63 Conn. 393, 408, 27 Atl. 973, 22 L. R. A. 90; *Will of Snelling*, 136 N. Y. 515, 32 N. E. 1006.

**Reason.**—Where a very great number of particulars are enunciated, many more than any witness of normal capacity could be presumed to remember and keep distinctly in mind, the putting into such a question, bodily, the evidence of another witness, to be considered in connection with other facts and propositions, is objectionable and unnecessary. It is impossible for those interested in the answer to know the result of the mental process by which the witness made the required connection, what portions of the evidence of the other witness he thus used, and in what way and to what extent it contributed to the answer given. *Barber's Appeal*, 63 Conn. 393, 408, 27 Atl. 973, 22 L. R. A. 90.

71. *Prentiss v. Bates*, 88 Mich. 567, 589, 50 N. W. 637.

(5.) **Fact in Issue Must Not Be Assumed.** — A question must not assume as proved the very fact in issue.<sup>72</sup>

(6.) **Records of Asylum.** — A hypothetical question may not be based on the records of an asylum unless the witness knows the methods employed in keeping them at the time in question,<sup>73</sup> nor on the evidence of the record thereof on the theory that if certain things were true they would have been entered therein.<sup>74</sup>

(7.) **Nature of Assumed Facts.** — If the purpose is to show incompetency the assumed facts must be such as to tend to show, in connection with other facts, that testator was incompetent.<sup>75</sup> Facts may be assumed in accordance with the theory of counsel if based on testimony which tends to prove them, though the facts may not have had a direct tendency to show insanity, they being a part of the testator's history.<sup>76</sup> And the evidence of the facts assumed must be legally sufficient to be submitted to the jury.<sup>77</sup>

(8.) **Scope of Question.** — The question may cover the whole evidence or any part of it, though the facts are controverted, if there is any evidence tending to sustain them.<sup>78</sup> It may direct attention to facts claimed to show sanity and call for an opinion as to whether they, in connection with contrary testimony, are inconsistent with the claim of insanity.<sup>79</sup> All the evidence need not be embodied,<sup>80</sup>

72. *Safe Deposit & Tr. Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

73. *Prentiss v. Bates*, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494.

74. *Prentiss v. Bates*, 88 Mich. 567, 585, 50 N. W. 637.

75. *Prentiss v. Bates*, 88 Mich. 567, 588, 50 N. W. 637.

76. *Bever v. Spangler*, 93 Iowa 576, 61 N. W. 1072; *Meeker v. Meeker*, 74 Iowa 352, 37 N. W. 773, 7 Am. St. Rep. 489; *In re Will of Norman*, 72 Iowa 84, 33 N. W. 374; *Medill v. Snyder*, 61 Kan. 15, 58 Pac. 962, 78 Am. St. Rep. 306; *Holton v. Cochran*, 208 Mo. 314, 424, 106 S. W. 1035; *Kerr v. Lunsford*, 31 W. Va. 659, 672, 8 S. E. 493, 2 L. R. A. 668; *McMechen v. McMechen*, 17 W. Va. 683, 696.

Such Questions Are To Be Construed according to the usual meaning of the testimony embodied in them. *In re Will of Fenton*, 97 Iowa 192, 66 N. W. 99.

77. *Baughner v. Gesell*, 103 Md. 450, 462, 63 Atl. 1078.

78. *Taylor v. McClintock* (Ark.), 112 S. W. 405. The court said: The party desiring opinion evidence from experts may elicit such opinion

upon the whole evidence, or any part thereof. When a party seeks to do so it is the duty of the court to so control the form of the hypothetical question that there may be no abuse of his right to take the opinions of experts.

79. *Prentiss v. Bates*, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494.

80. *Kirsher v. Kirsher*, 120 Iowa 337, 94 N. W. 846; *In re Seagrists' Will*, 1 App. Div. 615, 37 N. Y. Supp. 496.

**Facts Which May Be Fairly Regarded** as irrelevant or which are in dispute need not be embodied. *In re Miller's Estate*, 179 Pa. St. 645, 36 Atl. 139, 39 L. R. A. 220.

Questions which embody facts disclosed by incompetent testimony are improper. *In re Chandler's Will*, 102 Me. 72, 107, 66 Atl. 215; *Kelly v. Kelly*, 103 Md. 548, 63 Atl. 1082; *Safe Deposit & Tr. Co. v. Berry*, 93 Md. 560, 49 Atl. 401; *King v. Gilson*, 191 Mo. 307, 333, 90 S. W. 367. As facts disclosed out of court by the attending physician to the consulting physician though the disclosure was made as part of the consultation. *Wetherbee v. Wetherbee*, 38 Vt. 454.

if the pertinent facts are stated,<sup>81</sup> unless, by reason of the omission, the question manifestly fails to present the facts stated in their just and true relation and causes them to appear in one untrue and unjust.<sup>82</sup>

(9.) **Must Be Clear.**—The hypothesis must be clearly stated so that the jury may certainly know upon what assumed facts the opinion is based.<sup>83</sup>

(10.) **Knowledge of Witness.**—A question is not to be excluded because it embodies a fact concerning which the expert had no knowledge on which to draw an inference.<sup>84</sup>

(11.) **Questions May Be Varied.**—Both parties are not required to use the same form of questions.<sup>85</sup>

j. **Argumentative Testimony.**—Expert testimony argumentative in form on the moral phases of the testator's conduct toward contestant is highly improper and prejudicial.<sup>86</sup>

k. **Cross-Examination.**—A physician who testifies that at a certain time testator was competent may not be asked whether he would have been willing at that time to make a contract with decedent involving the amount of his estate.<sup>87</sup> An expert may be cross-examined on imaginary and abstract questions which assume facts and theories not based on the evidence.<sup>88</sup>

l. **Number of Witnesses.**—The court may limit the number of expert witnesses.<sup>89</sup>

m. **Facts and Circumstances.**—In the great majority of the states a medical witness need not state on direct examination the facts and circumstances on which his opinion rests. In a few states he may or must do so.<sup>90</sup>

n. **Weight of Testimony.**—(1.) **Alienists.**—The testimony of skilled alienists who have never seen the testator and whose opin-

81. *Kosteletzky v. Scherhart*, 99 Iowa 120, 68 N. W. 591.

82. *Taylor v. McClintock* (Ark.), 112 S. W. 405 (the hypothetical case must embrace undisputed facts essential to the issue); *Barber's Appeal*, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90; *Safe Deposit & Tr. Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

83. *McMechen v. McMechen*, 17 W. Va. 683, 697.

84. *Nash v. Hunt*, 116 Mass. 237, 252.

85. *Foster v. Dickerson*, 64 Vt. 233, 254, 24 Atl. 253.

86. *Taylor v. McClintock* (Ark.), 112 S. W. 405.

87. *Struth v. Decker*, 100 Md. 368, 59 Atl. 727.

88. *Bever v. Spangler*, 93 Iowa 576, 608, 61 N. W. 1072.

89. *Fraser v. Jennison*, 42 Mich.

206, 223, 3 N. W. 882 (it is suggested that two on each side are sufficient).

90. *Louisiana.*—*Godden v. Burke*, 35 La. Ann. 160; *Chandler v. Barrett*, 21 La. Ann. 58 (must state whether the facts are within his personal knowledge).

*Maryland.*—*Jones v. Collins*, 94 Md. 403, 51 Atl. 398.

*Massachusetts.*—*Dickinson v. Barber*, 9 Mass. 225; *Hathorn v. King*, 8 Mass. 371; *Hastings v. Rider*, 99 Mass. 622.

*Michigan.*—*Kempsey v. McGinniss*, 21 Mich. 123, 138; *Rice v. Rice*, 50 Mich. 448, 15 N. W. 545.

*North Carolina.*—*Wood v. Sawyer*, 61 N. C. (Phil. L.) 251, 276 (if the reasons are not good the opinion is valueless).

*Tennessee.*—*Puryear v. Reese*, 6

ions rest upon the recitals in hypothetical questions is of the weakest and most unsatisfactory character.<sup>91</sup>

(2.) **Speculative Opinions.**—Speculative opinions are valueless where the condition of the testator is established by other testimony.<sup>92</sup>

(3.) **Character of Mental Disease.**—Expert testimony based solely on the medical state of a testator's mind, and ignoring the question of its soundness from a legal point of view is of but little value unless the other evidence shows that it applies to the latter, because a mind legally sound may be medically unsound. On the other hand, a medically sound mind includes a legally sound mind.<sup>93</sup>

(4.) **Contrast Between the Facts and the Hypothetical Case.**—Marked divergence between the hypothetical case and the condition of the testator is cause for distrusting expert testimony.<sup>94</sup> If the facts

Coldw. 21; *Gibson v. Gibson*, 9 Yerg. 329.

*Vermont.*—*Fairchild v. Bascomb*, 35 Vt. 398 (may and ought to do so).

91. *In re Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695.

*In Trials Before the Court* the testimony of experts is sometimes disregarded because unsafe. *Grant v. Stampler*, 68 N. J. Eq. 555, 59 Atl. 890; *Phillips v. Chater*, 1 Dem. (N. Y.) 533, 546. See article "EXPERT AND OPINION EVIDENCE," Vol. V, p. 639.

92. *Rankin v. Rankin*, 61 Mo. 295.

93. *In re Chandler's Will*, 102 Me. 72, 106, 66 Atl. 215.

94. *Arkansas.*—*Taylor v. McClintock*, 112 S. W. 405.

*California.*—*In re Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695 (such evidence, though given by skilled alienists, "is the weakest and most unsatisfactory").

*Illinois.*—*Bradley v. Palmer*, 193 Ill. 15, 85, 61 N. E. 856.

*Maine.*—*In re Chandler's Will*, 102 Me. 72, 110, 66 Atl. 215.

*Missouri.*—*Hamon v. Hamon*, 180 Mo. 685, 700, 79 S. W. 422; *Sayre v. Trustees*, 192 Mo. 95, 90 S. W. 787; *Winn v. Grier*, 117 S. W. 48.

*New Jersey.*—*In re Wheaton's Will*, 68 N. J. Eq. 562, 59 Atl. 886.

*New York.*—*Dickie v. VanVleck*, 5 Redf. Sur. 284; *In re Lyddy's Will*, 53 Hun. 629, 5 N. Y. Supp. 636, 24 N. Y. St. 607, affirming 4 N. Y. Supp. 468; *In re Seagrists Will*, 1 App. Div. 615, 37 N. Y. Supp. 496;

*Bristed v. Weeks*, 5 Redf. Sur. 529 (The court said: "The opinion of a distinguished alienist upon the probable mental condition of a patient, years before such patient had come under his observation, should be carefully scrutinized where it is avowedly contingent upon the correctness of hypotheses which have not been established by the evidence"); *In re Wilmurt's Will*, 51 Hun. 644, 4 N. Y. Supp. 821 (testimony in answer to hypothetical questions is entitled to little or no consideration); *In re Connor's Will*, 29 Misc. 391, 61 N. Y. Supp. 910; *In re Nelson's Will*, 97 App. Div. 212, 89 N. Y. Supp. 865; *Heyzer v. Morris*, 110 App. Div. 313, 97 N. Y. Supp. 131; *In re Tift's Will*, 55 Misc. 151, 106 N. Y. Supp. 362; *Scott v. Barker* (App. Div.), 113 N. Y. Supp. 695.

*Ohio.*—*Beresford v. Stanley*, 6 Ohio N. P. 38; *West v. Knoppenberger*, 4 Ohio C. C. (N. S.) 305; *General Convention v. Crocker*, 7 Ohio C. C. 327 (in so far as the confidence of the opinion is affected by an unproved fact).

*Pennsylvania.*—*Wilson v. Mitchell*, 101 Pa. St. 495; *Voglesong's Estate*, 196 Pa. St. 194, 46 Atl. 424; *In re Wright's Estate*, 202 Pa. St. 395, 51 Atl. 1031.

*Wisconsin.*—*Trieloff v. Muellenschlader*, 128 Wis. 364, 107 N. W. 652; *Mueller v. Pew*, 127 Wis. 288, 106 N. W. 840. See article "EXPERT AND OPINION EVIDENCE," Vol. V, pp. 643, 645.

If the Hypothetical Questions are

are not fairly presented the testimony may not carry the question of competency to the jury.<sup>95</sup>

(5.) **Knowledge of Testator.**—The opinions of experts may be given on such slight data that they are without force unless strengthened by their knowledge of the testator,<sup>96</sup> as where based on slight knowledge if the witness is unable to say that he heard an incoherent, foolish or insane remark,<sup>97</sup> or if he had never seen the testator in his normal condition,<sup>98</sup> or based his opinion upon an autopsy,<sup>99</sup> or on a chart showing the testator's temperature, respiration, etc., on the day the will was made.<sup>1</sup>

Where **Delusion** is involved the testimony of experts who have examined the testator is persuasive.<sup>2</sup>

(6.) **Comparative Value.**—Testimony based on hypothetical questions does not outweigh that of lay witnesses familiar with the decedent,<sup>3</sup> nor proof of his business ability,<sup>4</sup> unless a lucid interval is involved,<sup>5</sup> especially if deduced from the fact of subsequent insanity,<sup>6</sup> the habits of the testator in the use of intoxicants,<sup>7</sup> or his

based on a condition existing at a time considerably subsequent to the will the weight of the testimony is thereby lessened, the testator's disease being of a progressive nature. *Dickie v. VanVleck*, 5 Redf. Sur. (N. Y.) 284.

Much depends upon the extent to which isolated incidents in the life of the testator are supplemented in the hypothetical questions by a statement of his general character, conduct and habits. *Dickie v. VanVleck*, 5 Redf. Sur. (N. Y.) 284; *Potter v. M'Alpine*, 3 Dem. (N. Y.) 108, 121.

95. *Dobie v. Armstrong*, 27 App. Div. 520, 50 N. Y. Supp. 801, 160 N. Y. 584, 55 N. E. 302; *Hawke v. Hawke*, 82 Hun 439, 31 N. Y. Supp. 968, 146 N. Y. 366, 41 N. E. 89.

96. *In re Kearney's Will*, 69 App. Div. 481, 74 N. Y. Supp. 1045 (on the signature to the will which testator was assisted in making); *Richmond's Estate*, 206 Pa. St. 219, 55 Atl. 970 (hypothetical case based on disputed facts); *Draper's Estate*, 215 Pa. St. 314, 64 Atl. 520 (facts stated in asylum records, the unnatural character of the will and alleged forgetfulness).

97. *In re Cox's Estate*, 167 Pa. St. 501, 31 Atl. 747.

98. *In re Hewitt's Will*, 31 Misc. 81, 64 N. Y. Supp. 571.

99. *In re Hewitt's Will*, 31 Misc. 81, 64 N. Y. Supp. 571.

1. *In re Nelson's Will*, 97 App. Div. 212, 89 N. Y. Supp. 865.

2. *In re Long's Will*, 43 Misc. 560, 89 N. Y. Supp. 555.

3. *Rutherford v. Morris*, 77 Ill. 397 (upon the question whether a disease at a given time had reached such a stage that the subject of it was incompetent, the opinion of his neighbors, if men of good common sense, would be worth more than that of all the experts in the country); *Heyzer v. Morris*, 110 App. Div. 313, 97 N. Y. Supp. 131; *Moore v. Caldwell*, 6 Ohio C. C. (N. S.) 484. See article "EXPERT AND OPINION EVIDENCE," Vol. V, p. 643.

4. *In re Wheaton's Will*, 68 N. J. Eq. 562, 59 Atl. 886; *Iverson v. Iverson*, 80 App. Div. 599, 80 N. Y. Supp. 1011; *Scott v. Barker* (App. Div.), 113 N. Y. Supp. 695; *In re Wright's Estate*, 202 Pa. St. 395, 51 Atl. 1031.

5. If no question of a lucid interval is involved and experts have examined the testator their testimony will outweigh that of lay witnesses based on discussions of small business matters with him. *Hartley v. Lord*, 38 Wash. 221, 80 Pac. 433.

6. *In re Lawrence's Will*, 27 Misc. 473, 59 N. Y. Supp. 174, 48 App. Div. 83, 62 N. Y. Supp. 673.

7. *Hagan v. Sone*, 68 App. Div. 60, 74 N. Y. Supp. 109.



religious belief.<sup>8</sup> An opinion as to testator's condition at a time previous to a personal examination is not convincing as against the knowledge of lay witnesses.<sup>9</sup> The testimony of the attesting witnesses is more convincing than that given in answer to hypothetical questions,<sup>10</sup> or that based on an examination of the testator three days before the will was made, the case being one of mere feebleness of mind, with a gradual tendency to grow worse.<sup>11</sup>

(7.) **Attending Physicians.** — The testimony of attending physicians is entitled to great and peculiar weight.<sup>12</sup> It may overcome testimony of lay witnesses if based on personal observation and knowl-

8. *Owen v. Crumbaugh*, 228 Ill. 380, 81 N. E. 1044, 119 Am. St. Rep. 442.

9. *Buchanan v. Belsey*, 65 App. Div. 58, 72 N. Y. Supp. 60r.

10. *Bradley v. Palmer*, 193 Ill. 15, 84, 61 N. E. 856; *In re Connor's Will*, 29 Misc. 391, 61 N. Y. Supp. 910.

**Weight as Compared With Testimony of Alienist.** — Where there is a conflict between expert testimony and the testimony of subscribing witnesses, especially where one of them is a practicing physician with unusual opportunities for diagnosis, examination and observation, their evidence should prevail over that of the alienist. *In re Tiff's Will*, 55 Misc. 151, 106 N. Y. Supp. 362, citing *Matter of Connor's Will*, 29 Misc. 391, 61 N. Y. Supp. 910; *Philips v. Philips*, 77 App. Div. 113, 78 N. Y. Supp. 1001.

11. *Swinfen v. Swinfen*, 27 Beav. (Eng.) 148, 160 (the greater weight was given to the testimony of the greater number who had more frequent opportunities of seeing the testator).

12. *Mullen v. Johnson* (Ala.), 47 So. 584 (especially if incompetency is alleged to have resulted from the use of medicine); *Cornelius v. Cornelius*, 52 N. C. (7 Jones' L.) 593; *Cardwell's Estate*, 10 Pa. Co. Ct. 318; *Parramore v. Taylor*, 11 Gratt. (Va.) 220; *Cheatham v. Hatcher*, 30 Gratt. (Va.) 56, 23 Am. Rep. 650; *Burton v. Scott*, 3 Rand. (Va.) 399; *Richardson v. Moore*, 30 Wash. 406, 71 Pac. 18.

**Relative Weight of General Practitioners' and Specialists' Opinions.** Those who have been accustomed to

try issues involving the sanity of testators, their capacity to make wills, will have observed that in a large proportion of the cases the alleged want of capacity is in the infirmity and decay of the faculties, resulting from old age, or the weakness and prostration of disease, or from the two combined. The cases of distinct delusion are quite rare and exceptional. The far greater number of issues as to sanity therefore fall within the ordinary range of a physician's practice. A physician of large experience could scarcely be found who had not been often called to consider and form an opinion upon the capacity of his patients to make wills. Supposing the question was as to the gradual decay of the faculties from disease or old age, one cannot but see that the opinion of an intelligent family physician, familiar with his patient's infirmities, and watching them at every stage of their progress, would and should have far greater weight with a jury than that of any number of physicians who had made insanity a special study, but who were called to give an opinion upon what is always, and necessarily, an imperfect statement of the facts and symptoms. Or, if the case were one of an original defective capacity, the judgment and opinion of the old family physician would be worth more than that of the masters of the science of insanity, who can have but a fragment of his history. *Baxter v. Abbott*, 7 Gray (Mass.) 71, and see *In re Blakely's Will*, 48 Wis. 294, 4 N. W. 337; *Harrison v. Rowan*, 3 Wash. C. C. 580, 11 Fed.

edge,<sup>18</sup> or that of experts based on hypothetical questions;<sup>14</sup> but not that of an uncontradicted witness as to what testator actually did in connection with the preparation of the will,<sup>15</sup> or that afforded by proof of success in business matters.<sup>16</sup> It has been held to be more convincing than the testimony of the attesting witness,<sup>17</sup> though there is disagreement on this point.<sup>18</sup> It may be affected by the opportunities of the witness to observe the testator within a reasonable time prior to the making of the will.<sup>19</sup> It is valueless if based exclusively on the fact that the estate was disposed of otherwise than in accordance with the testator's recently expressed intentions.<sup>20</sup> The nature of the disease may materially affect the weight of medical testimony.<sup>21</sup> If it is based solely upon the nature

Cas. No. 6,141, and *Kirkwood v. Gordon*, 7 Rich. L. (S. C.) 474.

13. *Meeker v. Meeker*, 74 Iowa 352, 37 N. W. 773, 7 Am. St. Rep. 489; *Blake v. Rourke*, 74 Iowa 519, 38 N. W. 392; *Ward v. Brown*, 53 W. Va. 227, 256, 44 S. E. 488.

**Relative Weight of Expert and Non-Expert Opinions.**—The testimony of experienced medical men is entitled to more weight than that of unprofessional witnesses where the former have made a personal examination of the decedent. *Meeker v. Meeker*, 74 Iowa 352, 37 N. W. 773, 7 Am. St. Rep. 489; *Blake v. Rourke*, 74 Iowa 519, 38 N. W. 392. But only where the testimony is based upon such examination. *Ward v. Brown*, 53 W. Va. 227, 256, 44 S. E. 488, explaining *Jarrett v. Jarrett*, 11 W. Va. 584; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668, and *Nicholas v. Kershner*, 20 W. Va. 255.

14. *Heyzer v. Morris*, 110 App. Div. 313, 97 N. Y. Supp. 131.

15. *Brock v. Luckett*, 4 How. (Miss.) 459; *In re Pickett's Will*, 49 Or. 127, 89 Pac. 377.

16. *Aitken v. McMeckan*, L. R. (1895) App. Cas. 310; *Home of the Aged v. Bantz*, 107 Md. 543, 69 Atl. 376; *VanRiper v. VanRiper*, 69 N. J. Eq. 463, 59 Atl. 244; *Mueller v. Pew*, 127 Wis. 288, 106 N. W. 840.

17. *Gray v. Rumrill*, 101 Va. 507, 44 S. E. 697.

18. *VanRiper v. VanRiper*, 69 N. J. Eq. 463, 59 Atl. 244; *Palmer's Estate*, 219 Pa. St. 303, 68 Atl. 710.

**It Cannot Prevail** against that of witnesses present when the will was

executed, if based upon anterior observations. *In re Connor's Will*, 55 Hun 606, 7 N. Y. Supp. 855, 124 N. Y. 663, 27 N. E. 413 (no opinion); *In re Seagrist's Will*, 37 N. Y. Supp. 496, 1 App. Div. 615.

19. *Hall v. Perry*, 87 Me. 569, 33 Atl. 160, 47 Am. St. Rep. 352.

20. *Masseth v. Masseth*, 213 Pa. St. 434, 62 Atl. 1076.

21. **Rule Affected by Nature of Disease.**—In cases of senile dementia the testimony of those surrounding the testator may outweigh that of the attending physician. *In re Wendel's Will*, 43 Misc. 571, 89 N. Y. Supp. 543.

**As to Competency**, there being no issue as to sanity, the opinion of a medical man is no weightier than that of a layman, their opportunities for observation being equal. The former should not be permitted to testify that it was the duty of a physician to examine into the mental condition of a patient. *Maynard v. Vinton*, 59 Mich. 139, 154, 26 N. W. 401.

Sir John Romilly, Master of the Rolls, said: "I know not that, in a mere question of testing the capacity of a decaying intellect to do any particular act, a medical man would much more than any other man be competent to form a correct opinion. Some previous acquaintance with the person examined would seem to be a very necessary ingredient in coming to an accurate conclusion in such a matter; where any doubt about it exists, it may well be that the habits and dispositions of a man may tend to produce a belief that he is in a

of the disease with which the testator was afflicted, and without regard to his conduct or speech, it is not convincing.<sup>22</sup>

(8.) **Trained Nurse.** — The testimony of the trained nurse who cared for the testator is entitled to weight.<sup>23</sup>

(9.) **Testimony Must Be Unequivocal.** — Equivocal and ambiguous testimony is not convincing.<sup>24</sup>

(10.) **Question for the Jury.** — The jury must determine the weight of expert testimony in its relation to all the evidence and circumstances.<sup>25</sup> It is not conclusive.<sup>26</sup>

state of fatuity when, in truth, he is not so. If a man remain perfectly silent to all questions put to him it may be very difficult to ascertain whether this arises from an incapacity to understand the questions or to a sulky determination to answer nothing. Even the answers given may be tinged with the same disposition, and bear the appearance of foolish or senseless words when intended only to signify a surly dislike to be questioned. . . . The nature of the subject necessarily makes the evidence as to incapacity much less trustworthy than the evidence as to capacity. A physician who visits a patient several times may say with perfect truth, I never saw a sign of intellect about him, and therefore I infer that he had none; still, he may be mistaken, though he speaks perfect truth; but, on the other hand, if a person visits a patient and swears that he made rational answers to questions and gave clear and distinct marks of his capacity, he cannot be mistaken. It is the distinction of proving a negative in opposition to an affirmative." *Swinfen v. Swinfen*, 27 Beav. (Eng.) 148, 162.

**The Facts and Circumstances** detailed by the physician as a subscribing witness may impeach his professional opinion. *Trieloff v. Muellenschlader*, 128 Wis. 364, 107 N. W. 652.

22. *Horner v. Buckingham*, 103 Md. 556, 64 Atl. 41. The court said: "The tendency to mental infirmity cannot *per se* prove the infirmity. It must be shown by facts. If a person has always shown through many years a high degree of mental soundness, in fact through his entire life, a jury ought not to

be permitted to pronounce him insane merely because a medical expert can be found who will testify that he is affected with a disease that will eventually produce insanity, without other facts being shown that tend to prove that his speech or conduct is such as reasonably warrant the conclusion that such point has actually been reached." See *In re Wendel's Will*, 43 Misc. 571, 89 N. Y. Supp. 543.

The same consideration applies to medical men sent to examine the testator for the purpose of qualifying them to testify. *Englert v. Englert*, 193 Pa. St. 326, 47 Atl. 940, 82 Am. St. Rep. 808.

It has been made the occasion of judicial observation that the conversation between the witness and his patient had no relation to business matters. *In re Lenhart's Estate*, 199 Pa. St. 618, 49 Atl. 305. See *Horner v. Buckingham*, 103 Md. 556, 64 Atl. 41.

23. *Mullen v. Johnson* (Ala.), 47 So. 584; *In re Goodwin's Will*, 95 App. Div. 183, 88 N. Y. Supp. 734.

24. *Gesell v. Baugher*, 100 Md. 677, 60 Atl. 481; *In re Palmer's Estate*, 219 Pa. St. 303, 68 Atl. 710.

**Inconsistency and Doubt** in giving testimony and the facts stated may be more convincing than the opinion. *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314.

**Mere Hesitancy in Testifying** is not to be regarded as evidence of the falsity of the answer. *In re Donohue's Will*, 97 App. Div. 205, 89 N. Y. Supp. 871.

25. *Maynard v. Vinton*, 59 Mich. 139, 154, 26 N. W. 401, 60 Am. Rep. 276; *Ward v. Brown*, 53 W. Va. 227, 257, 44 S. E. 488.

26. *Chandler v. Barrett*, 21 La. Ann. 58.

**B. OF NON-EXPERTS. — FACTS AND CIRCUMSTANCES MUST BE GIVEN.** — The opinions of lay witnesses who have not attested the will, as to the mental condition of a testator, if competent are so only when preceded by a statement of the facts and circumstances on which they are based, "and should only be given by those whose long intimacy and familiar and frequent intercourse with the deceased peculiarly enable them to observe any mental aberration on his part."<sup>27</sup> Objections to such testimony because the facts are not

**27. England.** — *Lowe v. Jolliffe*, 1 W. Black. 365; *Dow v. Clark*, 3 Addams Ecc. 79; *Wheeler v. Alner-son*, 3 Hagg. Ecc. 574; *Tatham v. Wright*, 2 Russ. & M. 1 (testimony received without objection).

*United States.* — *Harrison v. Rowan*, 3 Wash. C. C. 580, 11 Fed. Cas. No. 6,141.

*Alabama.* — *Roberts v. Trawick*, 13 Ala. 68, 85; *Murphree v. Senn*, 107 Ala. 424, 18 So. 264; *Hodge v. Rainbow*, 45 So. 678; *Moore v. Spier*, 80 Ala. 129; *Florey v. Florey*, 24 Ala. 241; *Fountain v. Brown*, 38 Ala. 72; *Bulger v. Ross*, 98 Ala. 267, 12 So. 803; *Stubbs v. Houston*, 33 Ala. 555 (disapproving contrary expressions in *McCurry v. Hooper*, 12 Ala. 823); *Johnson v. Arm-strong*, 97 Ala. 731, 12 So. 72; *Bow-ling v. Bowling*, 8 Ala. 538; *Bur-ney v. Torrey*, 100 Ala. 157, 14 So. 685, 46 Am. St. Rep. 33.

*Arkansas.* — *Kelly v. McGuire*, 15 Ark. 555, 60r; *Abraham v. Wilkins*, 17 Ark. 292, 322.

*California.* — *In re Dolbeer's Es-tate*, 149 Cal. 227, 86 Pac. 695; *Huyck v. Rennie*, 151 Cal. 411, 90 Pac. 929; *In re Carpenter*, 79 Cal. 382, 21 Pac. 835; *Estate of Toomes*, 54 Cal. 509; *Estate of Brooks*, 54 Cal. 471; *Estate of Keegan*, 139 Cal. 123, 72 Pac. 828; *Estate of Dougherty*, 139 Cal. 10, 72 Pac. 358.

*Connecticut.* — *Dunham's Appeal*, 27 Conn. 192; *Shanley's Appeal*, 62 Conn. 325, 25 Atl. 245; *Richmond's Appeal*, 59 Conn. 226, 22 Atl. 82, 21 Am. St. Rep. 85; *Kimberly's Ap-peal*, 68 Conn. 428, 36 Atl. 847, 57 Am. St. Rep. 101, 37 L. R. A. 261.

*Delaware.* — *Lodge v. Lodge's Will*, 2 Houst. 418; *Jamison v. Jamis-on's Will*, 3 Houst. 108, 121; *Steele v. Helm*, 2 Marv. 237, 43 Atl. 153; *Pritchard v. Henderson*, 3 Penne. 128, 50 Atl. 217; *Duffield v. Morris*,

2 Har. 375; *Ethridge v. Bennett*, 9 Houst. 295, 31 Atl. 813.

*District of Columbia.* — *Turner v. American Security & T. Co.*, 29 App. Cas. 460.

*Georgia.* — *Slaughter v. Heath*, 127 Ga. 747, 57 S. E. 69; *Brown v. McBride*, 129 Ga. 92, 58 S. E. 702; *Credille v. Credille*, 131 Ga. 40, 61 S. E. 1042.

*Illinois.* — *Trubey v. Richardson*, 224 Ill. 136, 79 S. E. 592; *Baker v. Baker*, 202 Ill. 595, 67 S. E. 410; *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837; *Roe v. Taylor*, 45 Ill. 485; *Craig v. Southard*, 148 Ill. 37, 35 N. E. 361; *Ring v. Lawless*, 190 Ill. 520, 60 N. E. 881; *Keithley v. Stafford*, 126 Ill. 507, 18 N. E. 740; *Snell v. Weldon*, 239 Ill. 279, 87 N. E. 1022.

*Indiana.* — *Brackney v. Fogle*, 156 Ind. 535, 60 N. E. 303; *Swygart v. Willard*, 166 Ind. 25, 76 N. E. 755; *Burkhart v. Gladish*, 123 Ind. 337, 24 N. E. 118; *Bower v. Bower*, 142 Ind. 194, 41 N. E. 523; *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; *Ryman v. Crawford*, 86 Ind. 262; *Rarick v. Ulmer*, 144 Ind. 25, 42 N. E. 1099; *McReynolds v. Smith*, 86 N. E. 1009; *Turner v. Cook*, 36 Ind. 129; *Mull v. Carr*, 4 Ind. App. 491, 32 N. E. 591.

*Iowa.* — *In re Estate of Gold-thorp*, 94 Iowa 336, 62 N. W. 845; *In re Knox's Will*, 123 Iowa 24, 98 N. W. 468; *Pelamourges v. Clark*, 9 Iowa 1; *Meeker v. Meeker*, 74 Iowa 352, 37 N. W. 773, 7 Am. St. Rep. 489; *Parsons v. Parsons*, 66 Iowa 754, 21 N. W. 570, 24 N. W. 564; *Severin v. Zack*, 55 Iowa 28, 7 N. W. 404; *In re Norman's Will*, 72 Iowa 84, 33 N. W. 374; *Hertrich v. Hertrich*, 114 Iowa 643, 87 N. W. 689, 89 Am. St. Rep. 389; *Kirsher v. Kirsher*, 120 Iowa 337, 94 N. W. 846; *Vannest v. Murphy*, 135 Iowa

123, 112 N. W. 236; *Denning v. Butcher*, 91 Iowa 425, 59 N. W. 69; *Manatt v. Scott*, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293; *Smith v. Ryan*, 136 Iowa 335, 112 N. W. 8. *Compare In re Wharton's Will*, 132 Iowa 714, 109 N. W. 492, where it is said that witnesses may give opinions without reciting facts and circumstances if they were acquainted with testator and in a situation to observe his conduct.

*Kentucky*.—*Newcomb v. Newcomb*, 96 Ky. 120, 27 S. W. 997; *Wise v. Foote*, 81 Ky. 10.

*Louisiana*.—*Godden v. Burke*, 35 La. Ann. 160.

*Maine*.—*In re Well's Appeal*, 96 Me. 161, 51 Atl. 868.

*Maryland*.—*Brashears v. Orme*, 93 Md. 442, 49 Atl. 620; *Jones v. Collins*, 94 Md. 403, 51 Atl. 398; *Townshend v. Townshend*, 7 Gill 10, 28; *Packham v. Glendmeyer*, 103 Md. 416, 63 Atl. 1048; *Dorsey v. Warfield*, 7 Md. 65; *Safe Deposit & Tr. Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

*Michigan*.—*In re Morse's Estate*, 146 Mich. 463, 109 N. W. 858 (if it relates to the degree of testator's intelligence as bearing upon his understanding, recollection and will power); *O'Dell v. Goff*, 153 Mich. 463, 117 N. W. 59; *Prentiss v. Bates*, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494, 88 Mich. 567, 581, 50 N. W. 637; *Roberts v. Bidwell*, 136 Mich. 191, 98 N. W. 1000; *McHugh v. Fitzgerald*, 103 Mich. 21, 61 N. W. 354; *Sullivan v. Foley*, 112 Mich. 1, 70 N. W. 322; *In re Dowell's Estate*, 152 Mich. 194, 115 N. W. 972; *Page v. Beach*, 134 Mich. 51, 95 N. W. 981; *Rice v. Rice*, 50 Mich. 448, 15 N. W. 545; *Beaubien v. Cicotte*, 12 Mich. 459, 489.

*Minnesota*.—*Pinney's Will*, 27 Minn. 280, 7 N. W. 144, 6 N. W. 791.

*Mississippi*.—*Sheehan v. Kearney*, 21 So. 41, 35 L. R. A. 102.

*Missouri*.—*Crowson v. Crowson*, 172 Mo. 691, 702, 72 S. W. 1065; *Holton v. Cochran*, 208 Mo. 314, 417, 106 S. W. 1035; *Farrell v. Brennan*, 32 Mo. 328; *Appleby v. Brock*, 76 Mo. 314.

*Nebraska*.—*Lamb v. Lynch*, 56 Neb. 135, 76 N. W. 428; *In re Isaac's Estate*, 107 N. W. 1016.

*New Hampshire*.—*Carpenter v. Hatch*, 64 N. H. 573, 15 Atl. 219; *Pattee v. Whitcomb*, 72 N. H. 249, 56 Atl. 459; *Hardy v. Merrill*, 56 N. H. 227, overruling three opposing cases.

*North Carolina*.—*Bost v. Bost*, 87 N. C. 477; *Clary v. Clary*, 24 N. C. (2 Ired. L.) 78, 84.

*Pennsylvania*.—*Titlow v. Titlow*, 54 Pa. St. 216; *Swails v. White*, 149 Pa. St. 261, 24 Atl. 292; *Irish v. Smith*, 8 Serg. & R. 573; *Pidcock v. Potter*, 68 Pa. St. 342; *Rambler v. Tryon*, 7 Serg. & R. 90; *Commonwealth Title Ins. & Tr. Co. v. Gray*, 150 Pa. St. 255, 24 Atl. 640; *Wilson v. Mitchell*, 101 Pa. St. 495; *Dickinson v. Dickinson*, 61 Pa. St. 401.

*South Carolina*.—*Scarborough v. Baskin*, 65 S. C. 558, 44 S. E. 63.

*Tennessee*.—*Gibson v. Gibson*, 9 Yerg. 329; *Wisener v. Maupin*, 2 Baxt. 342; *Norton v. Moore*, 3 Head 480.

*Texas*.—*Brown v. Mitchell*, 88 Tex. 350, 363, 31 S. W. 621, 36 L. R. A. 64, 75 Tex. 9, 12 S. W. 606 (witness present at execution of will); *Garrison v. Blanton*, 48 Tex. 299; *Cockrill v. Cox*, 65 Tex. 669.

*Utah*.—*In re Van Alstine's Estate*, 25 Utah 193, 72 Pac. 942.

*Vermont*.—*Foster v. Dickerson*, 64 Vt. 233, 244, 24 Atl. 253; *In re Blood's Will*, 62 Vt. 359, 19 Atl. 770.

*Virginia*.—*Whitelaw v. Sims*, 90 Va. 588, 19 S. E. 113; *Young v. Barner*, 27 Gratt. 96.

*Washington*.—*Higgins v. Nethery*, 30 Wash. 239, 70 Pac. 489; *In re Gorkow's Estate*, 20 Wash. 563, 56 Pac. 385.

*Wisconsin*.—*Crawford v. Christian*, 102 Wis. 51, 78 N. W. 406; *In re Welch*, 108 Wis. 387, 84 N. W. 550; *In re Butler's Will*, 110 Wis. 70, 85 N. W. 678.

**Argument**.—"The general doctrine is that all witnesses speaking from observation must, as far as possible, state such facts as they can give as the basis of their opinion. This rule does not require them to describe what is not susceptible of description, nor to narrate facts enough to enable a jury to form an opinion from those alone. This would be impossible, and, if it could be done, there would

given must be made by the party seeking to exclude them.<sup>28</sup>

a. *Rule Applies to All Testimony.* — All statements of witnesses concerning opinions of testator's competency must be based on their preliminary testimony.<sup>29</sup> The rule applies to a physician who has not shown his qualifications as an expert,<sup>30</sup> and to an attesting witness if the question is not limited to the time of the execution of the will,<sup>31</sup> as well as to testimony characterizing testator's conduct.<sup>32</sup>

b. *Facts Must All Be Disclosed.* — All the facts on which an opinion is based may be disclosed,<sup>33</sup> though the opinion expressed was based on the countenance and appearance.<sup>34</sup>

c. *Application of Rule Not Always Strict.* — The rule is not always strictly applied, on the theory that the facts and circumstances showing the extent of acquaintance will affect the weight of the opinion.<sup>35</sup>

be no occasion for any opinion from the witness. . . . But if witnesses were not compellable to state such facts as are tangible, there would be no means of testing their truthfulness. When they state visible and intelligible appearances and acts, others who had the same means of observation may contradict them, or show significant and explanatory facts in addition; and if their story is fabricated, or if they describe facts having a medical explanation, medical experts may detect falsehood in inconsistent symptoms, or determine how far the symptoms truly given have a scientific bearing." *Beaubien v. Cicotte*, 12 Mich. 459; *In re Isaac's Estate*, (Neb. Unof.), 107 N. W. 1016.

**Rule in Common Law Courts.** — It has been said that in England no express decisions of the point can be found for the reason that such evidence has always been admitted without objection. It has been universally regarded as so clearly competent that it seems no English lawyer has ever presented to any court any objection, question or doubt in regard to it. *Hardy v. Merrill*, 56 N. H. 227, 240, quoting from *State v. Pike*, 49 N. H. 399, 408.

The facts upon which opinions rest enable the jury to determine the value of the opinions. *Steele v. Helm*, 2 Marv. (Del.) 237, 43 Atl. 153; *In re Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695; *Turner v. American Security & T. Co.*, 29 App. Cas. (D. C.) 460.

**In California** the code prescribes that only an "intimate acquaintance" of the testator may give his opinion. *Huyck v. Rennie*, 151 Cal. 411, 90 Pac. 929.

28. *Appleby v. Brock*, 76 Mo. 314. See article "OBJECTIONS," Vol. IX, p. 28.

29. *Goldthorp v. Goldthorp*, 106 Iowa 722, 77 N. W. 471; *In re Jones' Estate*, 130 Iowa 177, 106 N. W. 610; *Furlong v. Carraher*, 102 Iowa 358, 71 N. W. 210; *Townshend v. Townshend*, 7 Gill (Md.) 10; *Safe Deposit & Tr. Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

30. *Sheehan v. Kearney* (Miss.), 21 So. 41, 35 L. R. A. 102.

31. *Furlong v. Carraher*, 108 Iowa 492, 79 N. W. 277.

32. *Wallace v. Whitman*, 201 Ill. 59, 66 N. E. 311; *Berry v. Safe Deposit Co.*, 96 Md. 45, 56, 53 Atl. 720.

33. *Burkhart v. Gladish*, 123 Ind. 337, 24 N. E. 118 (a witness should state every fact which could reasonably be made the foundation of an opinion, including the conduct and conversation of testator in his family); *In re Will of Norman*, 72 Iowa 84, 33 N. W. 374; *Foster v. Dickerson*, 64 Vt. 233, 247, 24 Atl. 253.

34. *Irish v. Smith*, 8 Serg. & R. (Pa.) 573.

35. *California.* — *In re Carpenter*, 79 Cal. 382, 21 Pac. 835 (if the witness discloses any material facts

d. *Relation of Facts to Conclusion.*—An opinion may be competent though the witness may not be able to state facts from which his conclusion would be a necessary sequence.<sup>36</sup>

e. *Statements Made by Witness.*—A witness may not state what he has said to others concerning testator's competency.<sup>37</sup>

f. *Effect of Statute Concerning Transactions with Deceased Persons.*—This subject is fully discussed elsewhere.<sup>38</sup>

g. *Theory on Which Testimony Received.*—The theory on which the testimony of non-experts is received is that they will give the facts indicating the mental characteristics and tendencies of the testator, and, because aspects of expression and action may not be placed before the jury by the witnesses they may give the opinions formed therefrom. Therefore, the witness may testify

tending to show knowledge and intimacy enabling him to form an opinion, his testimony must be received for whatever it may be worth).

*Georgia.*—*Credille v. Credille*, 131 Ga. 40, 61 S. E. 1042.

*Indiana.*—*Swygart v. Willard*, 166 Ind. 25, 76 N. E. 755 ("A contrary rule, requiring the trial court at his peril instantly to determine the effect of such evidence, would subject the court to constant danger of invading the province of the jury and result in many harmful errors; while the holding now approved can rarely, if ever, operate to the prejudice of the rights of either party"); *Staser v. Hogan*, 120 Ind. 207, 217, 21 N. E. 911, 22 N. E. 990.

*Iowa.*—*In re Fenton's Will*, 97 Iowa 192, 66 N. W. 99.

*Michigan.*—*Prentiss v. Bates*, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494.

*Vermont.*—*Foster v. Dickerson*, 64 Vt. 233, 244, 24 Atl. 253 (such witness cannot be precluded from giving his opinion because the conversations, dealings or other observed facts were of a limited rather than of an extended character, nor because he is unable to give the conversation, but can only state the manner in which the party conversed); *Cram v. Cram*, 33 Vt. 15.

*Washington.*—*In re Gorkow's Estate*, 20 Wash. 563, 56 Pac. 385.

*West Virginia.*—*Kerr v. Lunsford*, 31 W. Va. 659, 678, 8 S. E. 493, 2 L. R. A. 668; *Hopkins v. Wampler*, 108 Va. 705, 62 S. E. 926.

**Relaxation of the Rule.**—It has been suggested that the rule may be relaxed in the case of a near relative who had always been intimate with the testator. *Weems v. Weems*, 19 Md. 334. And also where the testimony is in favor of capacity. *Smith v. Ryan*, 136 Iowa 335, 112 N. W. 8.

36. *Stubbs v. Houston*, 33 Ala. 555, 567; *Shanley's Appeal*, 62 Conn. 325, 25 Atl. 245 (it was said in this case, quoting from *Sydeleman v. Beckwith*, 43 Conn. 9: "It is in all cases important, with a view to confirm the opinion, that the witness should be able to state such facts as will show presumptively that his opinion is well founded. But it is not quite correct to say that the opinion of a witness is entitled to consideration only so far as the facts stated by him sustain the opinion, unless the proposition is understood to include among the facts referred to the acquaintance of the witness with the subject-matter and his opportunities for observation"); *Newcomb v. Newcomb*, 96 Ky. 120, 27 S. W. 997 (if the proper opportunity has been afforded the witness to form an opinion its admissibility is not dependent on his ability to detail certain specific facts of themselves showing the testator's mental condition).

37. *Harrison v. Rowan*, 3 Wash. C. C. 580, 11 Fed. Cas. No. 6,141.

38. See article "TRANSACTIONS WITH DECEASED PERSONS," Vol. XII, 676.

only of the facts observed by him and his opinion as rested thereon.<sup>89</sup>

*h. Character of Such Testimony.* — In some cases such testimony as is indicated is said not to be opinion testimony, but to express the knowledge of the witness as is done when questions of personal identity or of handwriting are involved. It is, however, recognized that it is usually spoken of as opinion testimony.<sup>40</sup>

*i. Form of Questions.* — It is not practicable to state a rule governing the form of questions to be submitted to a witness because of the ever varying circumstances attending the cases. The notes may be suggestive.<sup>41</sup> A question is improper if it permits the

39. Shanley's Appeal, 62 Conn. 325, 25 Atl. 245; Kimberly's Appeal, 68 Conn. 428, 36 Atl. 847, 57 Am. St. Rep. 101, 37 L. R. A. 261; Brackney v. Fogle, 156 Ind. 535, 60 N. E. 303; Appleby v. Brock, 76 Mo. 314; Clifton v. Clifton, 47 N. J. Eq. 227, 239, 21 Atl. 333.

**Assumed Contradictions** in these reasons are indicated in Boardman v. Woodman, 47 N. H. 120, 133.

"The 'Intimate Acquaintance' is allowed to give his opinion merely because he has had exceptional opportunities for observing the mental condition of the person in question, and the result of his observation cannot be given adequate expression except in the form of an opinion." Huyck v. Rennie, 151 Cal. 411, 90 Pac. 929.

40. Dunham's Appeal, 27 Conn. 192; Safe Deposit & Tr. Co. v. Berry, 93 Md. 560, 49 Atl. 401; Townshend v. Townshend, 7 Gill 10, 28; Crockett v. Davis, 81 Md. 134, 31 Atl. 710; Williams v. Lee, 47 Md. 321; Weems v. Weems, 19 Md. 334; Waters v. Waters, 35 Md. 531.

**Admissibility Vindicated.** — "The impression made upon the mind of the witness by the conduct, manner, bearing, conversation, appearance and acts of the testator in various business transactions, for a long series of years, is not mere opinion; it is knowledge, and strictly analogous to the cases of personal identity and handwriting, which are constantly established in the courts by the opinion and judgment of persons who have enjoyed the opportunity of observing the person or handwriting sought to be identified or proved." Townshend v. Townshend, 7 Gill

(Md.) 10. See further, the able discussion in Clary v. Clary, 24 N. C. (2 Ired. L.) 78, which is, in large part, copied in Potts v. House, 6 Ga. 324, 336.

41. **It Is Competent** to ask a witness such questions as these concerning the testator: How was his appearance? What makes you think he did not know you on this day? Do you mean that his mind was simply weakened, or that it was impaired in some of its faculties? Did he get worse or better up to the last time you saw him? You may state whether he could or could not hold a conversation—an extended conversation. The court observed: It seems to us quite plain that if the witness could not reproduce the appearance of the decedent he could not detail facts so as to put the jury in his place. There must of necessity be expression of opinions by witnesses in regard to the appearance, conversation and acts of one whose mental capacity is brought in question. Meeker v. Meeker, 74 Iowa 352, 37 N. W. 773, 7 Am. St. Rep. 489.

Inquiry may be made respecting capacity to understand an ordinary document or hold a continuous conversation. Beaubien v. Cicotte, 12 Mich. 459, 507.

**It Is Not Competent** to ask a witness whether the decedent had a rational desire, or whether his desires were like the ravings of a madman, or the pratings of an idiot, or a childish whim. This would be beyond the range of legitimate opinion evidence. Slaughter v. Heath, 127 Ga. 747, 57 S. E. 69



witness to exercise discretion as to the facts and circumstances to be considered as the basis of his opinion.<sup>42</sup> It is, however, proper to ask a witness whether the testator's mind was clear at the time in question.<sup>43</sup>

**Hypothetical Questions** may not be put if they embody facts not testified to by the witness himself,<sup>44</sup> and are, it seems, improper in any case.<sup>45</sup>

j. *Form of Answer*.—An answer is not objectionable because of the witness' use of the word "belief" concerning testator's condition.<sup>46</sup> But ambiguity is objectionable.<sup>47</sup>

k. *Nature of Observed Facts*.—(1.) **Must Be Inconsistent With Sanity**.—The facts narrated must be somewhat inconsistent with mental soundness, as that they were unnatural or unusual, or such as would not ordinarily be anticipated from the testator before an opinion that he was insane can be received,<sup>48</sup> or the witness must

42. *Parsons v. Parsons*, 66 Iowa 754, 21 N. W. 570, 24 N. W. 564.

43. *McHugh v. Fitzgerald*, 103 Mich. 21, 61 N. W. 354.

44. *In re Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695; *Appleby v. Brock*, 76 Mo. 314.

45. *Dunham's Appeal*, 27 Conn. 192. See article "EXPERT AND OPINION EVIDENCE," Vol. V, pp. 664, 665.

46. *Hughes v. Hughes*, 31 Ala. 519.

47. **An Ambiguous and Indefinite Opinion**, as that the testator was childish, should be stricken out. It conveyed no intelligent meaning. A perfectly intelligent person may sometimes act in a childish manner,—that is, in an unsuspecting and confiding way—but that would be no indication of mental decay. *Safe Deposit & Tr. Co. v. Berry*, 93 Md. 560, 49 Atl. 401. But such testimony has been received on the theory that it related to matters which could not well be reproduced or described. *Vannest v. Murphy*, 135 Iowa 123, 112 N. W. 236.

**General Expressions**.—Sweeping expressions characterizing a testator's acts and conduct are not valuable. *Riley v. Sherwood*, 144 Mo. 354, 364, 45 S. W. 1077; *Wright's Estate*, 10 Pa. Dist. 133; *McFadin v. Catron*, 138 Mo. 197, 38 S. W. 932, 39 S. W. 771; *Hughes v. Rader*, 183 Mo. 630, 82 S. W. 32, 53.

48. *Delaware*.—*Pritchard v. Henderson*, 3 Penne. 128, 50 Atl. 217.

*Iowa*.—*Stutsman v. Sharpless*, 125 Iowa 335, 101 N. W. 105.

*Maryland*.—*Brashears v. Orme*, 93 Md. 442, 49 Atl. 620.

*Michigan*.—*Blackman v. Andrews*, 150 Mich. 322, 114 N. W. 218; *Prentiss v. Bates*, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494; *Hibbard v. Baker*, 141 Mich. 124, 142, 104 N. W. 399; *Leffingwell v. Bettinghouse*, 151 Mich. 513, 115 N. W. 731; *Roberts v. Bidwell*, 136 Mich. 191, 98 N. W. 1000; *Lamb v. Lippincott*, 115 Mich. 611, 73 N. W. 887; *Buys v. Buys*, 99 Mich. 354, 58 N. W. 331.

*Ohio*.—*Roush v. Wensel*, 15 Ohio C. C. 133.

*Pennsylvania*.—*Dickinson v. Dickinson*, 61 Pa. St. 401.

**Reason for the Rule**.—"Sanity is the rule; insanity, the exception; and when it appears that a witness has known a person for a long time and has never known anything unusual, either in his speech or actions, he is competent to express an opinion that the man is sane, because sane or normal acts and speech are consistent with the normal condition, sanity. Insanity, however, not being a normal condition, before one is competent to say that another is insane he must state some fact that is inconsistent with sanity; and this is not done until the witness is able to testify to something that the man has said or done which fairly tends to show insanity." *Lamb v. Lippincott*, 115 Mich. 611, 73 N. W. 887.

have stated facts tending to disclose that such was the condition of the testator.<sup>49</sup>

(2.) **Rule Where Opinion Is in Favor of Sanity.**—A qualified witness need not *in limine* be required to testify to the absence of facts which, if existing, would be evidence of insanity before giving his opinion that the testator was sane.<sup>50</sup>

(3.) **Conversation.**—An opinion may rest on statements made by the testator to the witness, though they were made four years before execution of the will.<sup>51</sup>

(4.) **Acts and Sayings.**—Observation of the acts of the testator in connection with other persons and his conversation with them justify an opinion.<sup>52</sup>

(5.) **Conduct.**—Long continued observation of testator's appearance, walk, habits, disposition and memory is ground for an opinion.<sup>53</sup>

(6.) **Acts of Others.**—A witness may give his opinion as to the incompetency of a testator to transact ordinary business though he had never seen him do any business, if he shows that some member of testator's family always acted in business affairs though he was present and the business was his.<sup>54</sup>

**"It May Be a Question of Some Difficulty** to determine in all cases whether a witness has shown himself competent, nor do we intimate that he may not be able to state to the jury his opinion, after showing that there were acts and appearances of the party which he is unable to describe to the jury, but which left an impression upon his mind; but in the absence of this, and where the testimony of the witness only goes to the length of showing acts which are entirely consistent with sanity, and which have not the slightest tendency to show insanity, it would be a dangerous rule which would permit his opinion to be received." *Prentis v. Bates*, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494.

Opinions to the effect that the testator was incompetent to do business "are utterly valueless and do not constitute any substantial evidence in the light of the admissions of the witnesses that they had no business, no conversation with him and heard no one else talk business to him, and that they neither knew nor ever heard of his doing or saying a foolish or improper thing, or that he ever lost a cent in any of his business transactions." *Wood v. Car-*

*penter*, 166 Mo. 465, 487, 66 S. W. 172.

49. *Furlong v. Carraher*, 108 Iowa 492, 79 N. W. 277.

**The Statement of a Single Remote Fact** in the life of a testator in connection with incidents denoting peculiarities about him does not qualify a witness to testify to his mental condition notwithstanding long and close acquaintance with him. *Brashears v. Orme*, 93 Md. 442, 49 Atl. 620.

50. *Burney v. Torrey*, 100 Ala. 157, 172, 14 So. 685, 46 Am. St. Rep. 33; *Vivian's Appeal*, 74 Conn. 257, 50 Atl. 797; *Jones v. Collins*, 94 Md. 403, 411, 51 Atl. 398; *Nash v. Hunt*, 116 Mass. 237; *Hogan v. Roche*, 179 Mass. 510, 61 N. E. 57.

51. *Bower v. Bower*, 142 Ind. 194, 41 N. E. 523.

52. *Denning v. Butcher*, 91 Iowa 425, 59 N. W. 69; *Appleby v. Brock*, 76 Mo. 314.

53. *Swygart v. Willard*, 166 Ind. 25, 76 N. E. 755.

**Opinions Based on the Untidy Appearance of the Testator** and his habits and behavior are not weighty. *Wright's Estate*, 10 Pa. Dist. 133.

54. *Ring v. Lawless*, 190 Ill. 520, 60 N. E. 881.

(7.) **Disposition of Estate and Post-Testamentary Talk.**—An opinion cannot be based on the disposition of the estate made in the will,<sup>55</sup> nor upon a conversation with testator after the will was made if it was not indicative of his mental condition.<sup>56</sup>

(8.) **Interpretation of Language.**—A witness may not base his opinion upon language used by the testator as interpreted by himself, the construction being based on hearsay.<sup>57</sup>

(9.) **Testimony.**—An opinion cannot be based on knowledge obtained from testimony on the hearing of a writ of *de lunatico* to fix the status of the testator.<sup>58</sup>

(10.) **Conduct as a Witness.**—If the testator, during the time of his alleged insanity, was a witness the officer who took his testimony may state the circumstances under which it was given, the appearance and deportment of the witness, the questions put and answers given for the purpose of establishing a basis for his opinion as to the witness' mental condition at that time.<sup>59</sup>

(11.) **Physical Condition.**—Testator's physical condition is not a basis on which a non-expert may rest an opinion as to his sanity.<sup>60</sup> It is otherwise in Missouri.<sup>61</sup>

(12.) **Failure To Remember.**—Failure to remember the name of a child not of testator's kin is not ground for an opinion of the latter's mental state.<sup>62</sup>

(13.) **Hearsay.**—Opinions based on hearsay are incompetent,<sup>63</sup> and a witness may not be cross-examined as to what he had heard others say of testator's sanity.<sup>64</sup>

1. **Sufficiency of Foundation.**—It is for the court to determine whether a witness has shown the necessary qualification. Its discretion will not be interfered with if it is wisely exercised.<sup>65</sup> But

55. *Commonwealth Title Ins. & Tr. Co. v. Gray*, 150 Pa. St. 255, 24 Atl. 640.

56. *Lamb v. Lynch*, 56 Neb. 135, 76 N. W. 428.

57. *Safe Deposit & Tr. Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

58. *Packham v. Glendmeyer*, 103 Md. 416, 63 Atl. 1048.

59. *Foster v. Dickerson*, 64 Vt. 233, 247, 24 Atl. 253.

60. *Rarick v. Ulmer*, 144 Ind. 25, 42 N. E. 1099; *Safe Deposit & Tr. Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

**Reason.**—Where the question of capacity is dependent upon physical exhaustion or the condition of the faculties because of the near approach of death, the basis of a witness' knowledge is insufficient because the inquiry does not relate to the general capacity of the testator to be determined from habit, con-

duct or demeanor. *Struth v. Decker*, 100 Md. 368, 59 Atl. 727.

61. *Appleby v. Brock*, 76 Mo. 314.

62. *Safe Deposit & Tr. Co. v. Berry*, 93 Md. 560, 49 Atl. 401. See this case for other facts upon which the testimony of witnesses was excluded.

63. *Turner v. American Security & T. Co.*, 29 App. Cas. (D. C.) 460; *In re Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695 (the question contained the words "from what you had learned"); *Kelly v. Kelly*, 103 Md. 548, 63 Atl. 1082; *In re Estate of Lefevre*, 102 Mich. 568, 61 N. W. 3; *Appleby v. Brock*, 76 Mo. 314.

64. *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990.

65. *California.*—*Huyck v. Rennie*, 151 Cal. 411, 90 Pac. 929; *In re Wax's Estate*, 106 Cal. 343, 39 Pac. 624; *Estate of Keithley*, 134 Cal. 9, 66 Pac. 5; *Estate of McKenna*, 143

have stated facts tending to disclose that such was the condition of the testator.<sup>49</sup>

(2.) **Rule Where Opinion Is in Favor of Sanity.**—A qualified witness need not *in limine* be required to testify to the absence of facts which, if existing, would be evidence of insanity before giving his opinion that the testator was sane.<sup>50</sup>

(3.) **Conversation.**—An opinion may rest on statements made by the testator to the witness, though they were made four years before execution of the will.<sup>51</sup>

(4.) **Acts and Sayings.**—Observation of the acts of the testator in connection with other persons and his conversation with them justify an opinion.<sup>52</sup>

(5.) **Conduct.**—Long continued observation of testator's appearance, walk, habits, disposition and memory is ground for an opinion.<sup>53</sup>

(6.) **Acts of Others.**—A witness may give his opinion as to the incompetency of a testator to transact ordinary business though he had never seen him do any business, if he shows that some member of testator's family always acted in business affairs though he was present and the business was his.<sup>54</sup>

**"It May Be a Question of Some Difficulty** to determine in all cases whether a witness has shown himself competent, nor do we intimate that he may not be able to state to the jury his opinion, after showing that there were acts and appearances of the party which he is unable to describe to the jury, but which left an impression upon his mind; but in the absence of this, and where the testimony of the witness only goes to the length of showing acts which are entirely consistent with sanity, and which have not the slightest tendency to show insanity, it would be a dangerous rule which would permit his opinion to be received." *Prentis v. Bates*, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494.

Opinions to the effect that the testator was incompetent to do business "are utterly valueless and do not constitute any substantial evidence in the light of the admissions of the witnesses that they had no business, no conversation with him and heard no one else talk business to him, and that they neither knew nor ever heard of his doing or saying a foolish or improper thing, or that he ever lost a cent in any of his business transactions." *Wood v. Car-*

*penter*, 166 Mo. 465, 487, 66 S. W. 172.

49. *Furlong v. Carraher*, 108 Iowa 492, 79 N. W. 277.

**The Statement of a Single Remote Fact** in the life of a testator in connection with incidents denoting peculiarities about him does not qualify a witness to testify to his mental condition notwithstanding long and close acquaintance with him. *Brashears v. Orme*, 93 Md. 442, 49 Atl. 620.

50. *Burney v. Torrey*, 100 Ala. 157, 172, 14 So. 685, 46 Am. St. Rep. 33; *Vivian's Appeal*, 74 Conn. 257, 50 Atl. 797; *Jones v. Collins*, 94 Md. 403, 411, 51 Atl. 398; *Nash v. Hunt*, 116 Mass. 237; *Hogan v. Roche*, 179 Mass. 510, 61 N. E. 57.

51. *Bower v. Bower*, 142 Ind. 194, 41 N. E. 523.

52. *Denning v. Butcher*, 91 Iowa 425, 59 N. W. 69; *Appleby v. Brock*, 76 Mo. 314.

53. *Swygart v. Willard*, 166 Ind. 25, 76 N. E. 755.

**Opinions Based on the Untidy Appearance of the Testator and his habits and behavior** are not weighty. *Wright's Estate*, 10 Pa. Dist. 133.

54. *Ring v. Lawless*, 190 Ill. 520, 60 N. E. 881.

(7.) **Disposition of Estate and Post-Testamentary Talk.**—An opinion cannot be based on the disposition of the estate made in the will,<sup>55</sup> nor upon a conversation with testator after the will was made if it was not indicative of his mental condition.<sup>56</sup>

(8.) **Interpretation of Language.**—A witness may not base his opinion upon language used by the testator as interpreted by himself, the construction being based on hearsay.<sup>57</sup>

(9.) **Testimony.**—An opinion cannot be based on knowledge obtained from testimony on the hearing of a writ of *de lunatico* to fix the status of the testator.<sup>58</sup>

(10.) **Conduct as a Witness.**—If the testator, during the time of his alleged insanity, was a witness the officer who took his testimony may state the circumstances under which it was given, the appearance and deportment of the witness, the questions put and answers given for the purpose of establishing a basis for his opinion as to the witness' mental condition at that time.<sup>59</sup>

(11.) **Physical Condition.**—Testator's physical condition is not a basis on which a non-expert may rest an opinion as to his sanity.<sup>60</sup> It is otherwise in Missouri.<sup>61</sup>

(12.) **Failure To Remember.**—Failure to remember the name of a child not of testator's kin is not ground for an opinion of the latter's mental state.<sup>62</sup>

(13.) **Hearsay.**—Opinions based on hearsay are incompetent;<sup>63</sup> and a witness may not be cross-examined as to what he had heard others say of testator's sanity.<sup>64</sup>

1. **Sufficiency of Foundation.**—It is for the court to determine whether a witness has shown the necessary qualification. Its discretion will not be interfered with if it is wisely exercised.<sup>65</sup> But

55. *Commonwealth Title Ins. & Tr. Co. v. Gray*, 150 Pa. St. 255, 24 Atl. 640.

56. *Lamb v. Lynch*, 56 Neb. 135, 76 N. W. 428.

57. *Safe Deposit & Tr. Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

58. *Packham v. Glendmeyer*, 103 Md. 416, 63 Atl. 1048.

59. *Foster v. Dickerson*, 64 Vt. 233, 247, 24 Atl. 253.

60. *Rarick v. Ulmer*, 144 Ind. 25, 42 N. E. 1099; *Safe Deposit & Tr. Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

**Reason.**—Where the question of capacity is dependent upon physical exhaustion or the condition of the faculties because of the near approach of death, the basis of a witness' knowledge is insufficient because the inquiry does not relate to the general capacity of the testator to be determined from habit, con-

duct or demeanor. *Struth v. Decker*, 100 Md. 368, 59 Atl. 727.

61. *Appleby v. Brock*, 76 Mo. 314.

62. *Safe Deposit & Tr. Co. v. Berry*, 93 Md. 560, 49 Atl. 401. See this case for other facts upon which the testimony of witnesses was excluded.

63. *Turner v. American Security & T. Co.*, 29 App. Cas. (D. C.) 460; *In re Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695 (the question contained the words "from what you had learned"); *Kelly v. Kelly*, 103 Md. 548, 63 Atl. 1082; *In re Estate of Lefevre*, 102 Mich. 568, 61 N. W. 3; *Appleby v. Brock*, 76 Mo. 314.

64. *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990.

65. *California.*—*Huyck v. Rennie*, 151 Cal. 411, 90 Pac. 929; *In re Wax's Estate*, 106 Cal. 343, 39 Pac. 624; *Estate of Keithley*, 134 Cal. 9, 66 Pac. 5; *Estate of McKenna*, 143

if a witness' qualifications are shown his testimony, if material, must be received.<sup>66</sup>

m. *Time to Which Opinion Relates.*—Opinions may not deal with the condition of the testator at a time later than he was seen by the witnesses,<sup>67</sup> nor with a period long anterior to the will,<sup>68</sup> at least if they favor incapacity.<sup>69</sup> An opinion formed from observation of the testator months after the will was made is not admissible.<sup>70</sup> The time to which the opinion relates must be disclosed,<sup>71</sup> unless the inquiry calls for an answer covering all the time of the witness' acquaintance with the testator,<sup>72</sup> or it is shown that his condition was not materially changed in the time intervening between that at which the opinion was formed and the will executed.<sup>73</sup>

n. *Cross-Examination.*—Witnesses may not be cross-examined upon the facts and grounds of their opinions before they testify to them.<sup>74</sup> But preference for that practice has been declared, though it is merely a matter of convenience.<sup>75</sup>

o. *Subjects on Which Opinions Competent.*—(1.) *Change of Condition.*—An opinion as to a change in the mental state of the

Cal. 580, 77 Pac. 461; Estate of Keegan, 139 Cal. 123, 72 Pac. 828.

*District of Columbia.*—Turner v. American Security & T. Co., 29 App. Cas. 460.

*Indiana.*—Mull v. Carr, 4 Ind. App. 491, 32 N. E. 591.

*Iowa.*—Denning v. Butcher, 91 Iowa 425, 59 N. W. 69; *In re* Estate of Goldthorp, 94 Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400.

**Impracticable To State a General Rule.**—Because habits of observation and conditions of the subjects of investigation differ so radically no general rule as to the character or number of the circumstances to be related to qualify a witness can be expressed. "Having indicated some facts which tend to support the opinion to be given, the witness should be allowed to express it, and its value, as well as the effect thereon of any explanatory circumstances, is for the jury." Stutsman v. Sharpless, 125 Iowa 335, 101 N. W. 105; Turner v. American Surety & T. Co., 29 App. Cas. (D. C.) 460; Beaubien v. Cicotte, 12 Mich. 459, 502.

It is a question of fact whether a witness is qualified to give an opinion. Carpenter v. Hatch, 64 N. H. 573, 15 Atl. 219.

66. *In re* Carpenter, 79 Cal. 382, 21 Pac. 835.

67. Blake v. Rourke, 74 Iowa 519, 38 N. W. 392; Denning v. Butcher, 91 Iowa 425, 59 N. W. 69.

68. Buys v. Buys, 99 Mich. 354, 58 N. W. 331.

69. Brashears v. Orme, 93 Md. 442, 49 Atl. 620; Gesell v. Baugher, 100 Md. 677, 60 Atl. 481; Jones v. Collins, 94 Md. 403, 51 Atl. 398; Baugher v. Gesell, 103 Md. 450, 63 Atl. 1078. But compare Estate of Toomes, 54 Cal. 509.

70. Huyck v. Rennie, 151 Cal. 411, 90 Pac. 929 (the observation of an "intimate acquaintance" must have been made within a reasonable time with respect to the date of the will); Hoban v. Piquette, 52 Mich. 346, 362, 17 N. W. 797; Eckert v. Flowry, 43 Pa. St. 46.

71. Huyck v. Rennie, 151 Cal. 411, 90 Pac. 929; Denning v. Butcher, 91 Iowa 425, 59 N. W. 69.

72. Townshend v. Townshend, 7 Gill (Md.) 10; Jones v. Collins, 94 Md. 403, 51 Atl. 398; Brashears v. Orme, 93 Md. 442, 49 Atl. 620.

73. Threlkeld v. Bond, 29 Ky. L. Rep. 177, 92 S. W. 606.

74. Moore v. Caldwell, 6 Ohio C. C. (N. S.) 484.

75. *In re* Gorkow's Estate, 20 Wash. 563, 56 Pac. 385.

testator during a given time is competent;<sup>76</sup> but the testimony must be limited to stated periods.<sup>77</sup> A comparison of the testator's mental condition at a time after the will was made with his previous state is immaterial.<sup>78</sup> But such comparison may be made by a qualified witness with testator's condition on the day the will was executed and his previous condition, though at such former time he was physically exhausted and was near to death.<sup>79</sup> A witness may state his opinion as to testator's mental condition in terms of comparison.<sup>80</sup>

(2.) **Mental Qualities.** — Witnesses qualified to testify to the sanity of a testator may give opinions concerning his firmness of character,<sup>81</sup> but not the local reputation concerning it.<sup>82</sup>

(3.) **Correctness of Testator's Statements.** — A witness may not give his opinion as to the probability or possibility of statements made by testator.<sup>83</sup>

(4.) **Scope of Opinions.** — The opinions of witnesses may be limited to the capacity of the testator to make the will in question. Inquiries which are more comprehensive than the requirement of the law may be objected to.<sup>84</sup>

p. **Weight of Testimony.** — The extent and character of the impairment of the testator's health, the witness' opportunity to know, his intelligence and the reasonableness of his conclusion from the facts testified to by him are considerations affecting the weight to be accorded his opinion.<sup>85</sup> If the standards of competency enter-

76. *Watson v. Anderson*, 11 Ala. 43; *In re Carpenter*, 79 Cal. 382, 21 Pac. 835; *Severin v. Zack*, 55 Iowa 28, 7 N. W. 404; *In re Norman's Will*, 72 Iowa 84, 33 N. W. 374 (during illness and while in good health); *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 882.

77. *Denning v. Butcher*, 91 Iowa 425, 59 N. W. 69.

78. *Kenworthy v. Williams*, 5 Ind. 375.

79. *Struth v. Decker*, 100 Md. 368, 59 Atl. 727.

80. *Richmond's Appeal*, 59 Conn. 226, 22 Atl. 82, 21 Am. St. Rep. 85; *Parsons v. Parsons*, 66 Iowa 754, 21 N. W. 570, 24 N. W. 564.

81. *Moore v. Spier*, 80 Ala. 129; *Vivian's Appeal*, 74 Conn. 257, 50 Atl. 797; *Patten v. Cilley*, 67 N. H. 520, 42 Atl. 47.

82. *Moore v. Spier*, 80 Ala. 129.

83. *Titus v. Gage*, 70 Vt. 13, 39 Atl. 246.

84. *Trubey v. Richardson*, 224 Ill. 136, 79 N. E. 592; *Jones v. Collins*, 94 Md. 403, 51 Atl. 398; *Mad-*

*dox v. Maddox*, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734.

85. *England.* — *Harwood v. Baker*, 3 Moore P. C. 282, 13 Eng. Reprint 117; *Waring v. Waring*, 6 Moore P. C. 341, 364, 13 Eng. Reprint 715; *Aitken v. McMeckan*, L. R. (1895) App. Cas. 310; *Keays v. McDonnell*, Ir. R. 6 Eq. 611.

*Alabama.* — *Burney v. Torrey*, 100 Ala. 157, 172, 14 So. 685, 46 Am. St. Rep. 33; *Leeper v. Taylor*, 47 Ala. 221.

*Connecticut.* — *Kinne v. Kinne*, 9 Conn. 102.

*Illinois.* — *Schmidt v. Schmidt*, 201 Ill. 191, 66 N. E. 371; *Spence v. Huckins*, 208 Ill. 304, 70 N. E. 289; *Scott v. Scott*, 212 Ill. 597, 72 N. E. 708; *Trubey v. Richardson*, 224 Ill. 136, 79 N. E. 592; *Shults v. Shults*, 229 Ill. 420, 82 N. E. 312; *Snell v. Weldon*, 239 Ill. 279, 87 N. E. 1022; *American Bible Soc. v. Price*, 115 Ill. 623, 642, 5 N. E. 126.

*Indiana.* — *Bower v. Bower*, 142 Ind. 194, 41 N. E. 523; *McReynolds v. Smith*, 86 N. E. 1009.

*Iowa*.—*Gates v. Cole*, 137 Iowa 613, 115 N. W. 236.

*Kentucky*.—*Allison v. Allison*, 7 Dana 90; *McDaniel's Will*, 2 J. J. Marsh. 331; *Sanders v. Blakley*, 21 Ky. L. Rep. 1321, 55 S. W. 10; *Zimlich v. Zimlich*, 90 Ky. 657, 14 S. W. 837.

*Louisiana*.—*Ducasse's Heirs v. Ducasse*, 120 La. 731, 45 So. 565. *Compare Succession of Jones*, 120 La. 986, 45 So. 965.

*Michigan*.—*Beaubien v. Cicotte*, 12 Mich. 459, 500.

*Missouri*.—*Crowson v. Crowson*, 172 Mo. 691, 702, 72 S. W. 1065; *Southworth v. Southworth*, 173 Mo. 59, 73 S. W. 129; *Catholic University v. O'Brien*, 181 Mo. 68, 92, 79 S. W. 901; *Knapp v. St. Louis Tr. Co.*, 199 Mo. 640, 662, 98 S. W. 70; *Archambault v. Blanchard*, 198 Mo. 384, 429, 95 S. W. 834; *Winn v. Grier*, 117 S. W. 48; *Sehr v. Lindemann*, 153 Mo. 276, 54 S. W. 537.

*New Jersey*.—*Clifton v. Clifton*, 47 N. J. Eq. 227, 239, 21 Atl. 333.

*Oregon*.—*In re Pickett's Will*, 49 Or. 127, 89 Pac. 377 (witnesses present at execution of will).

*Pennsylvania*.—*Estate of Woods*, 13 Phila. 236; *Englert v. Englert*, 198 Pa. St. 326, 47 Atl. 940; *Wright's Estate*, 202 Pa. St. 395, 51 Atl. 1031; *Mulholland's Estate*, 217 Pa. St. 65, 66 Atl. 150; *Cox's Estate*, 167 Pa. St. 501, 31 Atl. 747.

*Wisconsin*.—*In re Butler's Will*, 110 Wis. 70, 85 N. W. 678.

**The Facts Upon Which an Opinion Is Predicated** may be gone into either to sustain and give force to or to discredit it, and the opinion will be entitled to much, little or no weight, depending upon the facts upon which it is predicated and the intelligence and character of the witness. *Craig v. Southard*, 148 Ill. 37, 35 N. E. 361; *Baker v. Baker*, 202 Ill. 595, 608, 67 N. E. 410; *Whitenack v. Stryker*, 2 N. J. Eq. 8; *Stewart v. Lyons*, 54 W. Va. 665, 47 S. E. 442; *In re Wintermute's Will*, 27 N. J. Eq. 447; *Chase v. Winans*, 59 Md. 475; *McMaster v. Scriven*, 85 Wis. 162, 55 N. W. 149, 39 Am. St. Rep. 28; *Hudson v. Adams' Admr.*, 20 Ky. L. Rep. 1267, 49 S. W. 192; *In re Raplee's Will*, 66 Hun 558, 21 N. Y. Supp. 801, 141 N. Y. 553, 36 N. E. 343

(no opinion); *Kinne v. Kinne*, 9 Conn. 102.

**The Opportunity of the Witness To Form an Opinion** is a large factor in determining its value. (*In re Merriam's Appeal*, 108 Mich. 454, 66 N. W. 372; *Holton v. Cochran*, 208 Mo. 314, 415, 106 S. W. 1035; *Waddington v. Buzby*, 45 N. J. Eq. 173, 16 Atl. 690, 14 Am. St. Rep. 706; *Clifton v. Clifton*, 47 N. J. Eq. 227, 239, 21 Atl. 333), especially if it is based on business transactions had with decedent. *Baker v. Baker*, 202 Ill. 595, 609, 67 N. E. 410; *Wilcoxon v. Wilcoxon*, 165 Ill. 454, 46 N. E. 369; *Schmidt v. Schmidt*, 201 Ill. 191, 66 N. E. 371; *Wickes v. Walden*, 228 Ill. 56, 73, 81 N. E. 798; *In re Owen's Estate* (Neb. Unof.), 103 N. W. 675; *Archambault v. Blanchard*, 198 Mo. 384, 429, 95 S. W. 834; *In re Isaac's Will* (Neb. Unof.), 107 N. W. 1016; *Succession of Jones*, 120 La. 986, 45 So. 965; *Aitken v. McMeckan*, L. R. (1895) App. Cas. 310; *Zimlich v. Zimlich*, 90 Ky. 657, 14 S. W. 837.

**Opinions Do Not Weigh Much** as against proven conversation, claims, declarations and acts. *In re Wells*, 96 Me. 161, 51 Atl. 868.

**The Facts Stated by Witnesses** are more convincing than their opinion from the facts stated, is it—*Marsh. (Ky.) 331*; *Garrison v. Garrison*, 15 N. J. Eq. 266.

**Opinion To Be Regarded**.—"The fact that the witness formed the opinion from the facts stated, is itself a fact proper for the consideration of the court, as evincing the sincerity of the opinion, but the court must form its opinion from the whole evidence, consisting of facts and opinions." *Newton v. Carbery*, 5 Cranch C. C. 626, 18 Fed. Cas. No. 10,189.

The opinion of an intelligent witness having adequate opportunity of observation is the best testimony which can be adduced, for no mere description of the acts, words, tone of voice, glance of the eye, general expression or manner or bearing can convey to the jury the same impressions or indications of insanity which they will create in the mind of a competent observer. *Appleby v. Brock*, 76 Mo. 314.

**Comparison With Expert Testi-**



tained by a witness are incorrect his opinions are valueless.<sup>88</sup> They are not to be disregarded for that reason if admitted without objection.<sup>87</sup>

(1.) **Scrivener's Testimony.** — The testimony of the attorney who drew the will is most convincing if he was familiar with the testator, and especially if he had previously refused to write it because of the testator's intoxication.<sup>88</sup>

(2.) **Nature of Affliction.** — The weight of non-expert testimony may be affected by the nature of the testator's mental disease. In case of a particular hallucination or delusion such testimony is not entitled to much weight.<sup>89</sup> But in cases of senile dementia it is otherwise.<sup>90</sup> It is cause for distrusting opinions if the incapacity is alleged to have resulted from the use of medicine.<sup>91</sup>

**mony.** — The testimony of lay witnesses who saw the testator daily and who had transactions with him of a social or business nature is entitled to more weight than that of an expert with limited opportunity for observation, and that at a remote time. *In re Kiedaisch's Will*, 13 N. Y. Supp. 255. This is especially the case when the former saw the testator at the time the will was executed. *In re Seagrist's Will*, 1 App. Div. 615, 37 N. Y. Supp. 496.

The ability to fully state the facts may add greatly to the weight of the opinion. But testimony based on observation, though the facts may appear unsubstantial and indefinite, does not take a secondary place to expert testimony based on hypothetical questions. *Newcomb's Exr. v. Newcomb*, 96 Ky. 120, 27 S. W. 997.

**Not Persuasive as Against Business Ability.** — "Upon the whole case we have first, delusions showing impairments of mind in some directions, but not in any way relevant to the making of a will; failure of memory as to persons, places and recent small occurrences, but not shown to extend to a single serious matter, and the opinions of a number of witnesses, most of them unlearned on the subject, that the testator was unfit to make a will; and secondly, on the other side, a will drawn by counsel and executed in the presence of business friends called in for that purpose, with no evidence at all of want of testamentary capacity at the time of execution, and the will itself containing clear internal evidence of recogni-

tion of her estate, and of all persons who may be said to be the natural objects of testatrix's bounty, and finally the continued transaction of important business for five years after the making of the will, with no suggestion from any one that she was not capable of attending to it. In the face of these actual transactions the opinions of witnesses are of very little weight." *Shreiner v. Shreiner*, 178 Pa. St. 57, 35 Atl. 974.

<sup>86.</sup> *Rice v. Rice*, 50 Mich. 448, 15 N. W. 545.

<sup>87.</sup> *Appleby v. Brock*, 76 Mo. 314.

<sup>88.</sup> *Truitt v. Cullen*, 3 Penne. (Del.) 311, 50 Atl. 174. See *In re Lewis*, 51 Wis. 101, 7 N. W. 829.

**Conversation at Time Will Executed.** — The attorney who drew the will may give the conversation between him and the testator at the time of so doing for the sole purpose of enabling the jury to determine the weight of his opinion as to the competency of the testator. *In re Knox's Will*, 123 Iowa 24, 98 N. W. 468.

<sup>89.</sup> *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681; *Matter of Long's Will*, 43 Misc. 560, 89 N. Y. Supp. 555; *Seamen's Friend Soc. v. Hopper*, 33 N. Y. 619, 631. In the last case the court said: "Where the mental disorder is a delusion upon one or a few particular subjects, the testimony of persons with whom the testator has not had occasion to speak on those subjects is of no weight."

<sup>90.</sup> *In re Wendel's Will*, 43 Misc. 571, 89 N. Y. Supp. 543.

<sup>91.</sup> *Mullen v. Johnson* (Ala.), 47 So. 584.

**Testimony as to Observed Facts.**—The testimony of non-experts as to competency must be restricted to facts, involving a narration and description of appearances, conduct and conditions. These may be received though they include some element of opinion.<sup>8</sup> Notice of change in intelligence and coherence of conversation may be testified to.<sup>9</sup>

**Rule Applies to Questions.**—The rule of exclusion applies to the form of the questions; not to the answers. If they include opinions the remedy is by motion to strike.<sup>10</sup>

separated and defined. The courts do not deal with the plain cases only; those which come near the line, or where the disease is partial and limited, are those which most commonly occupy attention, and require the application of skill and experience. *May v. Bradlee*, 127 Mass. 414. For a criticism of the Massachusetts rule, see *Hardy v. Merrill*, 56 N. H. 227, 251.

8. *McDaniel v. Crosby*, 19 Ark. 533, 546; *McCoy v. Jordan*, 184 Mass. 575, 69 N. E. 358; *Clark v. Clark*, 168 Mass. 523, 47 N. E. 510 (as to whether there has been failure of mental capacity within a given time); *Jenkins v. Weston*, 200 Mass. 488, 86 N. E. 955; *Boardman v. Woodman*, 47 N. H. 120, 134.

**Illustrations.**—A witness may properly be asked if he has observed any facts that have relation to the subject upon which information is sought. Such a question can usually be answered by yes or no. If he answers in the affirmative, he may be asked to state what he observed. If the purpose is to prove a negative, the question may be so framed as to direct the attention of the witness to his observation as to peculiarities of speech or manner or conduct, or anything else indicating an unusual mental condition. But it is otherwise as to what the witness inferred as to testator's capacity. *McCoy v. Jordan*, 184 Mass. 575, 69 N. E. 358; *Gorham v. Moor*, 197 Mass. 522, 84 N. E. 436; *Hogan v. Roche*, 175 Mass. 510, 61 N. E. 57; *Ratigan v. Judge*, 181 Mass. 572, 64 N. E. 204 (not proper to ask if testator was subject to delusions or hallucinations).

A witness may only state his contemporary impressions as to the rationality or irrationality of the

conversations or conduct testified to by him. *Matter of Myer*, 184 N. Y. 54, 76 N. E. 920; *Clapp v. Fullerton*, 34 N. Y. 190. It is said in the last case that a witness may characterize as rational or irrational the acts and declarations to which he testifies. It is legitimate to give them such additional weight as may be derived from the conviction they produced at the time. The party calling him may require it to fortify the force of the facts, and the adverse party may demand it as a mode of probing the truth and good faith of the narration. But to render his opinion admissible to this extent it must be limited to his conclusions from the specific facts he discloses. *Petrie v. Petrie*, 53 Hun 638, 6 N. Y. Supp. 831, 126 N. Y. 683, 27 N. E. 958 (no opinion); *Howell v. Taylor*, 11 Hun (N. Y.) 214; *Johnson v. Cochrane*, 91 Hun 165, 36 N. Y. Supp. 283, are to the same effect. *Compare In re Small's Will*, 118 App. Div. 502, 103 N. Y. Supp. 705.

In *Delafield v. Parish*, 25 N. Y. 9, 106, the court relied on such testimony as this: "I had no doubt, and have not any, of his entire capacity to understand what he was doing, and the effect of it. In my judgment his capacity was perfect for the purpose of making a codicil of this kind; he fully understood it and fully agreed to it. I have not myself the least doubt of the soundness of his mind, nor could I have supposed that any intelligent person could doubt its soundness." Testimony of the same general character was received in *Tatham v. Wright*, 2 Russ. & M. (Eng.) 1.

9. *Barker v. Comins*, 110 Mass. 477.

10. *May v. Bradlee*, 127 Mass. 414.

v. *Conclusions*. — Opinions as to testator's competency to make a will are inadmissible because that is the issue before the jury or the court.<sup>11</sup> The rule applies to experts.<sup>12</sup> It seems to be otherwise in Maryland,<sup>13</sup> and in Pennsylvania the fitness of a testator to make a will may be testified to<sup>14</sup> if the witness shows familiarity with the requirements of the law.<sup>15</sup>

**11. California.** — Estate of Taylor, 92 Cal. 564, 28 Pac. 603; Huyck v. Rennie, 151 Cal. 411, 90 Pac. 929. *Illinois.* — Baker v. Baker, 202 Ill. 595, 610, 67 N. E. 410; Schneider v. Manning, 121 Ill. 376, 12 N. E. 267 (but not necessarily cause for reversal); Keithley v. Stafford, 126 Ill. 507, 18 N. E. 740.

*Indiana.* — Brackney v. Fogle, 156 Ind. 535, 60 N. E. 303.

*Iowa.* — Furlong v. Carrahar, 108 Iowa 492, 79 N. W. 277; Glass v. Glass, 127 Iowa 646, 103 N. W. 1013; Pelamourges v. Clark, 9 Iowa 1.

*Michigan.* — Page v. Beach, 134 Mich. 51, 95 N. W. 981. See Kempsey v. McGinniss, 21 Mich. 123, 141.

*Missouri.* — Farrell v. Brennan, 32 Mo. 328; Hamon v. Hamon, 180 Mo. 685, 698, 79 S. W. 422.

*Tennessee.* — Gibson v. Gibson, 9 Yerg. 329; Wisener v. Maupin, 2 Baxt. 342, 358.

*Texas.* — Brown v. Mitchell, 88 Tex. 350, 361, 31 S. W. 621, 36 L. R. A. 64, overruling cases to the contrary, including the same case in 87 Tex. 140, 26 S. W. 1059.

*Vermont.* — *In re Blood's Will*, 62 Vt. 359, 19 Atl. 770. See article "EXPERT AND OPINION EVIDENCE," Vol. V, pp. 665, 699.

**Reason.** — "What degree of mental capacity is necessary to the making of a will is a question of law, which was not to be determined by the witness, and as to which he could not be assumed to be informed, unless the legal requirements of testamentary capacity were stated in the interrogatory, or otherwise explained to him. Without some such explanation it would be impossible to say that the witness, the jury and the judge were not each governed by a different standard in settling the question." May v. Bradlee, 127 Mass. 414. And see Kempsey v. McGinniss, 21 Mich. 123, 141.

**12.** Walker v. Walker, 34 Ala.

469; Garrus v. Davis, 234 Ill. 326, 84 N. E. 924; Hall v. Perry, 87 Me. 569, 33 Atl. 160, 47 Am. St. Rep. 352. May v. Bradlee, 127 Mass. 414 (unless the legal requisites were stated in the interrogatory or otherwise explained); White v. Bailey, 10 Mich. 155; Moore v. Caldwell, 6 Ohio C. C. (N. S.) 484 (the question was as to capacity to make such a will as good reason and a normal condition of mind required); Fairchild v. Bascomb, 35 Vt. 398. See article "EXPERT AND OPINION EVIDENCE," Vol. V, p. 567.

**Form of Question.** — The question should be so framed as to require the witness to state the measure of the testator's capacity in his own language and by such ordinary terms as will best convey his own ideas of the matter; or, to use Judge Ruffin's expression in Crowell v. Kirk, 14 N. C. (3 Dev. L.) 355, to state the degree of intelligence or imbecility in the best way he can. Fairchild v. Bascomb, 35 Vt. 398, 417. Judge Christiancy said the question should call for a statement of what the real condition of the testator's mind was, how much intelligence he possessed, how far he was capable of understanding the nature and situation of his property, his relations to others, and the reasons for giving or withholding his bounty as to any of them. Kempsey v. McGinniss, 21 Mich. 123, 144.

In Illinois a witness may be asked respecting the testator's capacity to do ordinary business. Keithley v. Stafford, 126 Ill. 507, 18 N. E. 740. In Indiana the rule is to the contrary. Rarick v. Ulmer, 144 Ind. 25, 42 N. E. 1099.

**13.** Brashears v. Orme, 93 Md. 442, 49 Atl. 620. But compare Kelly v. Kelly, 103 Md. 548, 63 Atl. 1082.

**14.** Wogan v. Small, 11 Serg. & R. (Pa.) 141.

**15.** Eddy's Appeal, 109 Pa. St.

In Minnesota and North Carolina a witness may be asked his opinion as to the sufficiency of the testator's mind and intelligence to enable him to have a reasonable judgment of the kind and value of his estate and to whom he was willing it.<sup>16</sup> In Missouri if opinions are received without objection they may be considered.<sup>17</sup> A distinction is made in Iowa if the testimony relates to the testator's capacity at a time prior to the execution of the will.<sup>18</sup> In Michigan the cases seem to be divergent.<sup>19</sup>

**Testimony in the Nature of a Conclusion.** — If the testimony of a non-expert relates to matters which cannot well be reproduced or described he may state his conclusion as to the facts observed.<sup>20</sup>

**C. OF SUBSCRIBING WITNESSES.** — a. *Opinions Competent.* The condition of testator's mind at the time the will was executed may be stated according to the belief of the subscribing witnesses without first showing the grounds on which the belief is rested.<sup>21</sup>

406, 420, 1 Atl. 425; *Shreiner v. Shreiner*, 178 Pa. St. 57, 35 Atl. 974.

16. *In re Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144. *Bost v. Bost*, 87 N. C. 477, where the court said: "The question and response do not determine the standard, but extract such information as may be needed in its application."

17. *Appleby v. Brock*, 76 Mo. 314.

18. *Glass v. Glass*, 127 Iowa 646, 103 N. W. 1013.

19. *Porter v. Throop*, 47 Mich. 313, 323, 11 N. W. 174; *Kempsey v. McGinniss*, 21 Mich. 123; *McGinnis v. Kempsey*, 27 Mich. 363. But compare *Page v. Beach*, 134 Mich. 51, 95 N. W. 981, *distinguishing* *Beaubien v. Cicotte*, 12 Mich. 459. In *In re Morse's Estate*, 146 Mich. 463, 109 N. W. 858, the form of the question was held not to be conclusive if the cross-examination of the witness and the instructions made it clear that he was speaking of the degree of testator's intelligence and understanding.

20. *Vannest v. Murphy*, 135 Iowa 123, 112 N. W. 236.

21. *Alabama*. — *Walker v. Walker*, 34 Ala. 469; *Burney v. Torrey*, 100 Ala. 157, 172, 14 So. 685, 46 Am. St. Rep. 33 (it seems).

*Arkansas*. — *McDaniel v. Crosby*, 19 Ark. 533, 546; *Tobin v. Jenkins*, 29 Ark. 151.

*Delaware*. — *Jamison v. Jamison*, 3 Houst. 108, 119; *Steele v. Helm*, 2 Marv. 237, 43 Atl. 153; *Lodge v. Lodge's Will*, 2 Houst. 418; *Eth-*

*ridge v. Bennett*, 9 Houst. 295, 31 Atl. 813.

*Georgia*. — *Scott v. McKee*, 105 Ga. 256, 31 S. E. 183; *Potts v. House*, 6 Ga. 324.

*Illinois*. — *Entwistle v. Meikle*, 180 Ill. 9, 54 N. E. 217; *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113.

*Indiana*. — *Call v. Byram*, 39 Ind. 499.

*Iowa*. — *Furlong v. Carraher*, 108 Iowa 492, 79 N. W. 277; *Parsons v. Parsons*, 66 Iowa 754, 21 N. W. 570, 24 N. W. 564 (without being called as an expert); *Hertrich v. Hertrich*, 114 Iowa 643, 87 N. W. 689, 89 Am. St. Rep. 389 (in an action to set the will aside).

*Kentucky*. — *In re Harper's Will*, 4 Bibb 244.

*Louisiana*. — *Godden v. Burke*, 35 La. Ann. 160.

*Maine*. — *Robinson v. Adams*, 62 Me. 369, 409.

*Maryland*. — *Williams v. Lee*, 47 Md. 321.

*Massachusetts*. — *May v. Bradlee*, 127 Mass. 414; *Gorham v. Moor*, 197 Mass. 522, 84 N. E. 436; *Poole v. Richardson*, 3 Mass. 330; *Hastings v. Rider*, 99 Mass. 622.

*Minnesota*. — *Geraghty v. Kilroy*, 103 Minn. 286, 114 N. W. 838.

*Mississippi*. — *Martin v. Perkins*, 56 Miss. 204.

*Missouri*. — *Appleby v. Brock*, 76 Mo. 314.

*New Hampshire*. — *Boardman v. Woodman*, 47 N. H. 120, 134.

*New York*. — *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681;

The rule applies to the attorney who drew the will if he attested it at the testator's request.<sup>22</sup> It has been assumed that the rule is otherwise.<sup>23</sup>

b. *Facts May Be Given.*—Such witnesses may state the facts and circumstances upon which they rest their opinions.<sup>24</sup> If they do so their testimony may be tested in the same way as that of other opinion witnesses.<sup>25</sup> The facts shown will control the opinion if they do not harmonize.<sup>26</sup>

c. *Opinion of Witness as to Competency of Another Witness.* The opinion of a witness that other witnesses were better qualified than he to judge of the competency of the testator is inadmissible. The facts may be shown for the consideration of the jury.<sup>27</sup>

d. *Result of Investigation.*—Such witnesses may testify to the result of an investigation of the testator's condition made at the time the will was executed.<sup>28</sup>

e. *Extent of Knowledge.*—The fact of being a subscribing witness gives the right to express an opinion concerning the competency of the testator, regardless of the extent of knowledge. This

*Petrie v. Petrie*, 53 Hun 638, 6 N. Y. Supp. 831, 126 N. Y. 683, 27 N. E. 958 (no opinion); *In re Kieda-sch's Will*, 13 N. Y. Supp. 255; *Dewitt v. Barley*, 9 N. Y. 371; *In re Coleman*, 111 N. Y. 220, 19 N. E. 71. *North Carolina.*—*Crowell v. Kirk*, 14 N. C. (3 Dev. L.) 355.

*Pennsylvania.*—*Titlow v. Titlow*, 54 Pa. St. 216; *Logan v. McGinnis*, 12 Pa. St. 27; *Pidcock v. Potter*, 68 Pa. St. 342.

*South Carolina.*—*Kaufman v. Caughman*, 49 S. C. 159, 27 S. E. 16, 61 Am. St. Rep. 808.

*Tennessee.*—*Gibson v. Gibson*, 9 Yerg. 329; *Van Huss v. Rainbolt*, 2 Coldw. 139; *Puryear v. Reese*, 6 Coldw. 21.

*Vermont.*—*Foster v. Dickerson*, 64 Vt. 233, 24 Atl. 253.

*Virginia.*—*Young v. Barner*, 27 Gratt. 66.

*Reason.*—In *Boardman v. Woodman*, 47 N. H. 120, 134, the theory that the opinions of attesting witnesses are received because they were selected by the testator is disapproved, and the reason is based on the fact that the statute only requires credible or competent witnesses, and it is beyond the power of the court to say that it is not competent for such a witness to testify to every point involved in the issue.

*Waiver of Right.*—The right to

the opinions of attesting witnesses is waived by not insisting that they be called. *Field's Appeal*, 36 Conn. 277.

22. *In re Wax's Estate*, 106 Cal. 343, 39 Pac. 624 (the code provides that the opinion of a subscribing witness respecting the sanity of the signer may be received); *Denning v. Butcher*, 91 Iowa 425, 59 N. W. 69.

23. *In re Folts' Will*, 71 Hun 492, 24 N. Y. Supp. 1052.

24. *Abraham v. Wilkins*, 17 Ark. 292; *Walker v. Walker*, 14 Ga. 242; *Minor v. Thomas*, 12 B. Mon. (Ky.) 106; *Cilley v. Cilley*, 34 Me. 162; *Titlow v. Titlow*, 54 Pa. St. 216.

25. *In re Wharton's Will*, 132 Iowa 714, 109 N. W. 492.

*Reasons for Testimony.*—A subscribing witness may add to his negative answers concerning questions put to him respecting statements he was claimed to have made about the testator's competency the reasons for his denial thereof. *Nash v. Hunt*, 116 Mass. 237, 253.

26. *Cilley v. Cilley*, 34 Me. 162.

27. *Prather v. McClelland* (Tex. Civ. App.), 26 S. W. 657.

28. *Jones v. Collins*, 94 Md. 403, 51 Atl. 398.

*Their Testimony Is Not To Be Rejected* because they secured an expert to examine the testator.

is a question for inquiry by either party.<sup>29</sup> Limited knowledge concerning the testator may deprive the testimony of attesting witnesses of controlling weight.<sup>30</sup>

f. *Time Opinion Formed.* — The opinion of an attesting witness formed at another time, whether before or after the execution of the will, stands on the same footing as that of any other witness.<sup>31</sup> In Ohio an opinion formed afterward is competent.<sup>32</sup>

g. *Function of.* — It is the function of subscribing witnesses to inspect and judge the mental condition of the testator before they sign the will.<sup>33</sup> It is presumed that such witnesses performed their duty. The fact may be inquired into on their cross-examination.<sup>34</sup>

h. *Weight of Testimony.* — (1.) **Generally.** — Hence peculiar weight is given their testimony if it is in accordance with their attestation, and it is often disparaged if it differs therefrom.<sup>35</sup> The

Swinfen *v.* Swinfen, 27 Beav. (Eng.) 148, 160.

29. Robinson *v.* Adams, 62 Me. 369, 409.

30. *In re* Lockwood's Will, 8 N. Y. Supp. 345, 28 N. Y. St. 164 (surrogate's court); Hoopes' Estate, 174 Pa. St. 373, 34 Atl. 603.

31. Gwin *v.* Gwin, 5 Idaho 271, 48 Pac. 295; *In re* Ingalls' Will, 148 Ill. 287, 35 N. E. 743; Robinson *v.* Adams, 62 Me. 369, 409; Williams *v.* Spencer, 150 Mass. 346, 23 N. E. 105, 15 Am. St. Rep. 206, 5 L. R. A. 790 ("It might be competent in cross-examination to affect the value of his testimony as to his conclusion at the time of attestation, but it could not be received on account of the value to be attached to it as a mere opinion"); Clapp *v.* Fullerton, 34 N. Y. 190, 90 Am. Dec. 681.

32. Runyan *v.* Price, 15 Ohio St. 1, 86 Am. Dec. 469.

33. *England.* — Hindson *v.* Kersey, 4 Burns' Ecc. L. 119.

*United States.* — Stevens *v.* Vancleve, 4 Wash. C. C. 262, 23 Fed. Cas. No. 13,412.

*Arkansas.* — McDaniel *v.* Crosby, 19 Ark. 533, 545; Tobin *v.* Jenkins, 29 Ark. 151.

*Georgia.* — Potts *v.* House, 6 Ga. 324, 335; Scott *v.* McKee, 105 Ga. 256, 31 S. E. 183.

*Indiana.* — Stevens *v.* Leonard, 154 Ind. 67, 56 N. E. 27, 77 Am. St. Rep. 446.

*Maryland.* — Jones *v.* Collins, 94 Md. 403, 51 Atl. 398; Safe Deposit & Tr. Co. *v.* Berry, 93 Md. 560, 49

Atl. 401, 413; Townshend *v.* Townshend, 7 Gill 10; Jennings *v.* Pendergast, 10 Md. 346.

*New Jersey.* — O'Brien *v.* Dwyer, 45 N. J. Eq. 689; Clifton *v.* Clifton, 47 N. J. Eq. 227, 239.

*New York.* — Scribner *v.* Crane, 2 Paige 147.

*Pennsylvania.* — Harden *v.* Hays, 9 Pa. St. 151 (though attestation is not required).

*Philippine Islands.* — Hernaez *v.* Hernaez, 1 Phillip. Isl. 689 ("The intervention of the notary and the witnesses constitute a true guaranty of the capacity of the testator by reason of their knowledge").

*South Carolina.* — Heyward *v.* Hazard, 1 Bay 349; Kaufman *v.* Caughman, 49 S. C. 159, 27 S. E. 16, 61 Am. St. Rep. 808; Jeter *v.* Tucker, 1 S. C. 245.

The Contrary View has been expressed where the attestation was silent as to the mental condition of the testator and the statute required that the subscribing witnesses shall testify as to their belief in that regard. *In re* D'Avignon's Will, 12 Colo. App. 489, 55 Pac. 936.

34. Jones *v.* Collins, 94 Md. 403, 51 Atl. 398.

35. *England.* — Tatham *v.* Wright, 2 Russ. & M. 1; Walton *v.* Shelley, 1 Durnf. & E. 300 (Lord Mansfield said that such a witness was worthy of the pillory); Bootle *v.* Blundell, 19 Ves. 494, 34 Eng. Reprint 600; Harwood *v.* Baker, 3 Moore P. C. 282, 13 Eng. Reprint 117; Goodtitle *v.* Clayton, 4 Burr. 2224 ("it is of terrible con-

disparagement may be especially severe if the attesting witness

sequence that witnesses to wills should be tampered with to deny their own attestation"); Jones *v.* Godrich, 5 Moore P. C. 16, 13 Eng. Reprint 394.

*United States.*—Stevens *v.* Van-cleve, 4 Wash. C. C. 262, 23 Fed. Cas. No. 13,412 ("the evidence of the attesting witnesses, and next to them, of those who were present at the execution—all other things being equal—is most to be relied upon").

*Arkansas.*—McDaniel *v.* Crosby, 19 Ark. 533, 546; Tobin *v.* Jenkins, 29 Ark. 151.

*California.*—Estate of Motz, 136 Cal. 558, 69 Pac. 294; Estate of Tyler, 121 Cal. 405, 53 Pac. 928; Estate of Nelson, 132 Cal. 182, 64 Pac. 294 (error to instruct on the subject, but not cause for reversal).

*Colorado.*—*In re* Shapter's Estate, 35 Colo. 578, 85 Pac. 688, 6 L. R. A. (N. S.) 575. But compare *In re* D'Avignon's Will, 12 Colo. App. 489, 55 Pac. 936.

*Delaware.*—Ethridge *v.* Bennett, 9 Houst. 295, 31 Atl. 813.

*Idaho.*—Gwin *v.* Gwin, 5 Idaho 271, 48 Pac. 295.

*Illinois.*—White Memorial Home *v.* Haeg, 204 Ill. 422, 68 N. E. 568. See *In re* Arrowsmith's Estate, 206 Ill. 352, 69 N. E. 77.

*Indiana.*—Stevens *v.* Leonard, 154 Ind. 67, 56 N. E. 27, 77 Am. St. Rep. 446.

*Kentucky.*—McMeekin *v.* McMeekin, 2 Bush 79; Synder's Exr. *v.* Cunningham, 13 Ky. L. Rep. 24, 16 S. W. 130; Allison *v.* Allison, 7 Dana 90; Howard's Will, 5 T. B. Mon. 199, 17 Am. Dec. 60; Hoerth *v.* Zable, 92 Ky. 202, 17 S. W. 360 (the testimony should not be singled out and condemned by an instruction).

*Maryland.*—Safe Deposit & Tr. Co. *v.* Berry, 93 Md. 560, 49 Atl. 401, 413; Davis *v.* Denny, 94 Md. 390, 50 Atl. 1037 (testimony is not to be rejected).

*Massachusetts.*—Buckminster *v.* Perry, 4 Mass. 593.

*Mississippi.*—Brock *v.* Luckett, 4 How. 459, 479.

*Missouri.*—Odenwaelder *v.* Schorr, 8 Mo. App. 458; South-

worth *v.* Southworth, 173 Mo. 59, 74, 73 S. W. 129 (testimony wholly worthless if contrary to attestation).

*New Jersey.*—Boylan *v.* Meeker, 28 N. J. L. 274; Whitenack *v.* Stryker, 2 N. J. Eq. 8 (the testamentary witnesses and their opinions, and the facts they state are to be particularly regarded by the court. They are placed around the testator for the very purpose of attesting after his death, to the circumstances under which so solemn an instrument is executed); Garrison *v.* Garrison, 15 N. J. Eq. 266; Frost *v.* Wheeler, 43 N. J. Eq. 573; Sutton *v.* Morgan, 30 N. J. Eq. 629.

*New York.*—Miller *v.* White, 5 Redf. Sur. 320; *In re* Nelson's Will, 97 App. Div. 212, 89 N. Y. Supp. 865.

*North Carolina.*—Cornelius *v.* Cornelius, 52 N. C. (7 Jones' L.) 593.

*Ohio.*—*In re* Stacey, 6 Ohio Dec. 501.

*Oregon.*—Chrisman *v.* Chrisman, 16 Or. 127, 139, 18 Pac. 6; *In re* Pickett's Will, 49 Or. 127, 89 Pac. 377.

*Pennsylvania.*—Harden *v.* Hays, 9 Pa. St. 151; Draper's Estate, 215 Pa. St. 314, 64 Atl. 520 (special weight is due their testimony if the witnesses are eminent physicians and made an examination of testator before attesting the will); Cook's Estate, 16 Phila. 322.

*South Carolina.*—Means *v.* Means, 5 Strobb. L. 167, 190.

*Virginia.*—Young *v.* Barner, 27 Gratt. 96; Lamberts *v.* Cooper, 29 Gratt. 61; Cheatham *v.* Hatcher, 30 Gratt. 56, 23 Am. Rep. 650.

*West Virginia.*—Kerr *v.* Lunsford, 31 W. Va. 659, 679, 8 S. E. 493, 2 L. R. A. 668; Ward *v.* Brown, 53 W. Va. 227, 44 S. E. 488; Stewart *v.* Lyons, 54 W. Va. 665, 47 S. E. 442.

*Wisconsin.*—Trieloff *v.* Muel-lenschlader, 128 Wis. 364, 107 N. W. 652; *In re* Lewis, 51 Wis. 101, 7 N. W. 829.

**Failure To Call the Attesting Witnesses** on the trial has been made occasion for remark. *In re* Tuttle's Will, 123 App. Div. 167, 108 N. Y. Supp. 133.

drew the will and was named as executor,<sup>36</sup> or if the subsequent opinions are based on hearsay or are uncertain,<sup>37</sup> or if the attestation is sought to be impeached by declarations,<sup>38</sup> or is inconsistent with the business acts of the witness and testator.<sup>39</sup>

(2.) **No Uniform Value.** — Circumstances may materially affect the weight to be given the testimony of attesting witnesses in opposition to their act,<sup>40</sup> or in support of it.<sup>41</sup>

(3.) **No Official Value.** — There is disagreement as to the official value to be given the testimony of subscribing witnesses. In some courts no especial importance is attached thereto.<sup>42</sup> The only reason

36. *Loughney v. Loughney*, 87 Wis. 92, 58 N. W. 250.

37. *Chrisman v. Chrisman*, 16 Or. 127, 140, 18 Pac. 6.

38. *Stevens v. Vancleve*, 4 Wash. C. C. 262, 23 Fed. Cas. No. 13,412.

39. *Sechrest v. Edwards*, 4 Met. (Ky.) 163.

40. *Minor v. Thomas*, 12 B. Mon. (Ky.) 106; *Williams v. Lee*, 47 Md. 321 (as that they attested the will to please the testator who was admittedly incompetent). In Iowa it is not competent for a witness to give the reason inducing him to attest the will (*Stephenson v. Stephenson*, 62 Iowa 163, 17 N. W. 456). It seems to be otherwise in Kentucky. (*Synder's Exr. v. Cunningham*, 13 Ky. L. Rep. 24, 16 S. W. 130); *Tucker v. Sandridge*, 85 Va. 546, 571, 8 S. E. 650 (as where they were suddenly called upon and had no time for due deliberation); *Hartley v. Lord*, 38 Wash. 221, 80 Pac. 433.

41. *Griffin v. Griffin*, Charl. (Ga.) 217; *Christy v. Clarke*, 45 Barb. (N. Y.) 529, 546; *Gray v. Rumrill*, 101 Va. 507, 44 S. E. 697; *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314 (failure of testator to recognize them and apparent unconsciousness of their presence).

**Their Acquaintance With the Testator** may be so limited as to render their testimony almost valueless. *Swenarton v. Hancock*, 9 Abb. N. C. (N. Y.) 326, 338.

42. *England*. — *LeBreton v. Fletcher*, 2 Hagg. Ecc. 365; *Cartwright v. Cartwright*, 1 Phil. Ecc. 90.

*Canada*. — *In re Harrison's Will*, 30 N. Bruns. 164.

*Alabama*. — *Burney v. Torrey*, 100

Ala. 157, 172, 14 So. 685, 46 Am. St. Rep. 33.

*California*. — *Huyck v. Rennie*, 151 Cal. 411, 90 Pac. 929 (it seems).

*Connecticut*. — *Crandall's Appeal*, 63 Conn. 365, 28 Atl. 531, 38 Am. St. Rep. 375.

*Georgia*. — *Potts v. House*, 6 Ga. 324, 336 (this case says that the subscribing witnesses are placed "around the testator to try, judge and determine whether he is compos to execute it," and adds that the reason for the distinction between their testimony and any others who may happen to be present is certainly not very obvious. "The latter are more likely to be free from bias, which naturally will influence the former to support their attestation. It should seem, therefore, *caeteris paribus*, that the testimony of other witnesses should have more weight on account of their being more indifferent").

*Massachusetts*. — *Sewall v. Robbins*, 139 Mass. 164, 29 N. E. 650; *Baxter v. Abbott*, 7 Gray 71.

*Mississippi*. — *King v. Rowan*, 82 Miss 1, 34 So. 325.

*New Hampshire*. — *Boardman v. Woodman*, 47 N. H. 120, 135.

*New Jersey*. — *Garrison v. Garrison*, 15 N. J. Eq. 266; *Turner v. Cheesman*, 15 N. J. Eq. 243, 261.

*New York*. — *Orser v. Orser*, 24 N. Y. 51.

*Vermont*. — *Thornton v. Thornton*, 39 Vt. 122, 157; *Foster v. Dickerson*, 64 Vt. 233, 263, 24 Atl. 253.

*West Virginia*. — *Webb v. Dye*, 18 W. Va. 376; *Martin v. Thayer*, 37 W. Va. 38, 53, 16 S. E. 489.

**Argument.** — The court said: "Is there a weight given by law to the testimony of a subscribing witness



their testimony is entitled to special credence is because of the opportunity they had to observe the testator at the precise time in issue.<sup>43</sup> Their intelligence and integrity are material as affecting the weight to be given their testimony,<sup>44</sup> as is their disinterestedness.<sup>45</sup> All the tests of credibility may be applied to their testimony.<sup>46</sup> The extent of their acquaintance with testator is a relevant circumstance.<sup>47</sup> If they do not agree in their testimony the greater weight will be accorded the testimony of those who knew the testator best.<sup>48</sup> Such witnesses are not always the best to prove the sanity of the testator.<sup>49</sup>

i. *Terms of Testimony.* — The testimony of subscribing witnesses need not be in the exact statutory language or in the terms of the oath administered; the use of equivalent words is sufficient.<sup>50</sup> It may be negative in form.<sup>51</sup> The conclusion of a subscribing witness as to the competency of the testator has been held competent.<sup>52</sup>

j. *Their Testimony Not Exclusive.* — On appeal the competency or incompetency of the testator may be determined on other testimony than that of the attending witnesses,<sup>53</sup> and other evidence

apart from or beyond what it would be entitled to under the considerations which usually govern the value of testimony? We think the prominence which, in opinions where both law and fact are discussed, is given by courts to the testimony of a subscribing witness to a will arises from his acknowledged opportunity of observation at the precise time in question, and from the probability of his using the opportunity on account of his participation in the transaction. If it clearly appears from his own testimony that he did not use the opportunity, this special value of his opinion ceases." *Thornton v. Thornton*, 39 Vt. 122, 158.

43. *Crandall's Appeal*, 63 Conn. 365, 28 Atl. 531, 38 Am. St. Rep. 375; *King v. Rowan*, 82 Miss. 1, 34 So. 325; *Turner v. Cheesman*, 15 N. J. Eq. 243, 261; *Orser v. Orser*, 24 N. Y. 51; *Martin v. Thayer*, 37 W. Va. 38, 53, 16 S. E. 489; *Webb v. Dye*, 18 W. Va. 376.

44. *Irish v. Smith*, 8 Serg. & R. (Pa.) 573.

The Character of a deceased attesting witness may be shown. *Black v. Ellis*, 3 Hill (S. C.) 68.

45. *Swinfen v. Swinfen*, 27 Beav. (Eng.) 148, 160; *Sutton v. Morgan*, 30 N. J. Eq. 629.

46. *Lee's Will*, 46 N. J. Eq. 193, 18 Atl. 525.

47. *Swinfen v. Swinfen*, 27 Beav. (Eng.) 148, 160; *Turner v. Cheesman*, 15 N. J. Eq. 243; *Clifton v. Clifton*, 47 N. J. Eq. 227, 239, 21 Atl. 333; *Bell v. Clark*, 31 N. C. (9 Ired. L.) 239.

48. *Copeland v. Copeland*, 32 Ala. 512.

49. *McTaggart v. Thompson*, 14 Pa. St. 149.

50. *Hughes v. Hughes*, 31 Ala. 519; *Daly v. Daly*, 183 Ill. 269, 55 N. E. 671; *Rice v. Hall*, 120 Ill. 597, 12 N. E. 236; *Yoe v. McCord*, 74 Ill. 33; *In re Estate of Arrow-smith*, 206 Ill. 352, 69 N. E. 77 ("rational and under no restraint" equivalent to "sound mind and memory"); *In re Harper's Will*, 4 Bibb (Ky.) 244.

51. *Chrisman v. Chrisman*, 16 Or. 127, 140, 18 Pac. 6.

52. *Irving v. Bruen*, 110 App. Div. 558, 97 N. Y. Supp. 180, 186 N. Y. 605, 79 N. E. 1107 (no opinion); *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 68. *Contra*, *In re McCarthy's Will*, 55 Hun 7, 8 N. Y. Supp. 578.

53. *England.* — *LeBreton v. Fletcher*, 3 Hagg. Ecc. 365; *Bootle v. Blundell*, 19 Ves. 494, 507, 34 Eng. Reprint 600; *Lowe v. Jolliffe*, 1 W. Black. 365.

*Colorado.* — *Ashworth v. McNamée*, 18 Colo. App. 85, 70 Pac. 156;

may be adduced in rebuttal of contestant's case by the proponent.<sup>54</sup>

**Under the Illinois Statute** the only evidence admissible in the county court concerning the capacity of the testator must come from the attending witnesses.<sup>55</sup> This rule was formerly applied on a hearing *de novo* on appeal.<sup>56</sup> In consequence of later legislation the rule is limited to cases where probate has been refused.<sup>57</sup> Those seeking it may give general evidence of the testator's sanity; those opposing are limited to the testimony of the attesting witnesses.<sup>58</sup> On appeal from an order probating a will if the subscribing witnesses differ as to testator's sanity probate must be refused.<sup>59</sup> But on filing a bill in chancery any and all testimony respecting the sanity of the testator is admissible.<sup>60</sup>

**(1.) May Be Discredited by Proponent.**—The proponent is not bound by the testimony of such a witness if he must call him, but may discredit him by proof of previous declarations inconsistent

*In re D'Avignon's Will*, 12 Colo. App. 489, 55 Pac. 936.

*Connecticut.*—Field's Appeal, 36 Conn. 277.

*Illinois.*—Rigg v. Wilton, 13 Ill. 14, 54 Am. Dec. 419 (on an issue in chancery).

*Kentucky.*—Howard's Will, 5 T. B. Mon. 199, 17 Am. Dec. 60; Sechrist v. Edwards, 4 Met. 163; Maupin v. Wools, 1 Duv. 223.

*Maryland.*—Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666.

*Mississippi.*—Martin v. Perkins, 56 Miss. 204.

*Missouri.*—Odenwaelder v. Schorr, 8 Mo. App. 458; Mays v. Mays, 114 Mo. 536, 21 S. W. 921; Morton v. Heidorn, 135 Mo. 608, 37 S. W. 504.

*New Jersey.*—Garrison v. Garrison, 15 N. J. Eq. 266.

*New York.*—Rugg v. Rugg, 21 Hun 383; *In re Folts' Will*, 71 Hun 492, 24 N. Y. Supp. 1052; Jackson v. Christman, 4 Wend. 277; Butler v. Benson, 1 Barb. 526.

*North Carolina.*—Bell v. Clark, 31 N. C. (9 Ired. L.) 239.

*Pennsylvania.*—Irish v. Smith, 8 Serg. & R. 573; Rambler v. Tryon, 7 Serg. & R. 90; Harden v. Hays, 9 Pa. St. 151.

*Tennessee.*—Frear v. Williams, 7 Baxt. 550.

*Vermont.*—Thornton v. Thornton, 39 Vt. 122, 152.

*Virginia.*—Cheathan v. Hatcher, 30 Gratt. 56, 23 Am. Rep. 650.

*Wisconsin.*—Jenkins' Will, 43 Wis. 610.

54. Key v. Holloway, 7 Baxt. (Tenn.) 575.

55. Walker v. Walker, 3 Ill. 291; Stuke v. Glaser, 223 Ill. 316, 79 N. E. 105.

**Statute Valid.**—The statute which limits the evidence of mental capacity to the testimony of the attesting witnesses is valid, since the probate of the will is not a final adjudication of the question of capacity. O'Brien v. Bonfield, 213 Ill. 428, 72 N. E. 1090.

56. Walker v. Walker, 3 Ill. 291; Crowley v. Crowley, 80 Ill. 469; Weld v. Sweeney, 85 Ill. 50; *In re Noble*, 124 Ill. 266, 15 N. E. 850; Hobart v. Hobart, 154 Ill. 610, 39 N. E. 581, 45 Am. St. Rep. 151.

**The Comatose Condition of the Testator** at the time of the execution of the paper offered as a will can only be shown by the attesting witnesses, if it is not claimed that it was the result of a trick. Stuke v. Glaser, 223 Ill. 316, 79 N. E. 105.

57. Andrews v. Black, 43 Ill. 256; Rice v. Hall, 120 Ill. 597, 12 N. E. 236; O'Brien v. Bonfield, 213 Ill. 428, 72 N. E. 1090; Crowley v. Crowley, 80 Ill. 469.

58. Critz's Heirs v. Pierce, 106 Ill. 167; Stuke v. Glaser, 223 Ill. 316, 79 N. E. 105; Illinois Masonic Orphan's Home v. Gracy, 190 Ill. 95, 60 N. E. 194.

59. Weld v. Sweeney, 85 Ill. 50; Allison v. Allison, 46 Ill. 61 (opinion or belief must be shown).

60. Critz's Heirs v. Pierce, 106

with his testimony,<sup>61</sup> and by proof of his previous testimony.<sup>62</sup>

(2.) **Competent To Show Insanity.**—Subscribing witnesses may be called to prove the insanity of the testator.<sup>63</sup> It has been held otherwise on a proceeding to contest the will,<sup>64</sup> at least if they do not testify to facts indicating incompetency.<sup>65</sup>

k. **Declarations.**—(1.) **Admissibility.**—The *prima facie* effect of the attestation of a deceased subscribing witness may be met in some courts upon the trial of issues as to the validity of the will, by proof of his declarations concerning the competency of the testator.<sup>66</sup> And such declarations are admissible to impeach a will

Ill. 167; *In re Will of Ingalls*, 148 Ill. 287, 35 N. E. 743.

61. *Maine.*—*Dennett v. Dow*, 17 Me. 19; *Shorey v. Hussey*, 32 Me. 579.

*Missouri.*—*Odenwaelder v. Schorr*, 8 Mo. App. 458.

*New Hampshire.*—*Whitman v. Morey*, 63 N. H. 448, 2 Atl. 899.

*North Carolina.*—*Crowell v. Kirk*, 14 N. C. (3 Dev. L.) 355.

*Pennsylvania.*—*Cowden v. Reynolds*, 12 Serg. & R. 281; *Harden v. Hays*, 9 Pa. St. 151.

*Vermont.*—*Thornton v. Thornton*, 39 Vt. 122, 152. See "CONTRA-DICTION OF WITNESSES," Vol. III, p. 536.

62. *Harden v. Hays*, 9 Pa. St. 151.

63. *Kentucky.*—*Sechrest v. Edwards*, 4 Met. 163.

*Louisiana.*—*Marie v. Avart's Heirs*, 10 Mart. (O. S.) 25.

*North Carolina.*—*Hampton v. Garland*, 3 N. C. (2 Hayw.) 147.

*Tennessee.*—*Sellers v. Sellers*, 2 Heisk. 430.

*Texas.*—*Garrison v. Blanton*, 48 Tex. 299.

*Virginia.*—*Young v. Barner*, 27 Gratt. 96; *Lamberts v. Cooper*, 29 Gratt. 61.

*Washington.*—*Hartley v. Lord*, 38 Wash. 221, 80 Pac. 433.

64. *Kenworthy v. Williams*, 5 Ind. 375.

65. *Dickinson v. Dickinson*, 61 Pa. St. 401.

66. *Abraham v. Wilkins*, 17 Ark. 292, 322 (and see cases cited in next to the last preceding paragraph); *Townshend v. Townshend*, 9 Gill (Md.) 506; *Colvin v. Warford*, 20 Md. 357; *Beaubien v. Cicotte*, 12 Mich. 459, 486; *Harden v. Hays*, 9 Pa. St. 151. (*Contra*, as to the

declarations of an absent witness whose handwriting had not been proved, two witnesses having proved the will. *Fox v. Evans*, 3 Yeates [Pa.] 506; *Black v. Ellis*, 3 Hill (S. C.) 68. See *Thornton v. Thornton*, 39 Vt. 122.

**It Is Not Cause for Excluding Proof of Declarations** that a subscribing witness is dead and the will was established by the aid of proof of his handwriting. *Harden v. Hays*, 9 Pa. St. 151.

**Objections to Admissibility Answered.**—Among the objections to the admissibility of proof of the declarations of a deceased subscribing witness to a deed set up in *Stobart v. Dryden*, 1 Mees. & W. (Eng.) 615, was the danger to which the security of titles would be exposed. In *Harden v. Hays*, 9 Pa. St. 151, it was observed that there is force in this view of the case, and that such testimony calls for vigilance and strict scrutiny, but I cannot agree that this is a reason for the exclusion of the testimony altogether, thereby, in many cases, destroying the possibility of exposing fraud, forgery and villainy of every description, so apt to be practiced on persons of weak understanding, particularly when debilitated by sickness and disease. It is better that we should incur the risk mentioned than that we should sanction fraud and imposition. . . . The result of this novel doctrine, for it is nothing less, it seems to me will be to produce this result, that a man who has a valid title to-day, by the accident of death will have none tomorrow. To obtain this questionable benefit it is hardly worth while to overturn a current of authorities establishing a different principle.

which by probate has become presumptively valid as to real estate, the title to which was involved.<sup>67</sup> The admissibility of such declarations is denied by several courts.<sup>68</sup>

(2.) **For What Purpose Competent.** — The declarations of a sub-

And be it remarked, not a solitary case to the contrary has been cited on this side the Atlantic. And that the admission of the evidence is better calculated to attain the ends of justice would also appear from this, that the same principle must be extended to cases where the subscribing witness is out of the jurisdiction of the court. It is not difficult to see how easy it would be to spirit away a subscribing witness on the eve of trial, prove his handwriting, thereby giving full effect to his testimony, and then excluding all testimony of his repeated declarations that the bond or will was a forgery or a conspiracy to cheat or defraud."

67. *Colvin v. Warford*, 20 Md. 357, 385.

**Discussion.** — In *Harden v. Hays*, 9 Pa. St. 151, the question is discussed. It is there said that the weight of authority in England, at the time *Stobart v. Dryden*, 1 Mees. & W. 615, was ruled was all opposed to the doctrine of that case, and reference is made to *Wright v. Littler*, 3 Burr. 1244, decided by Lord Mansfield, to *Doe v. Ridgway*, 4 Barn. & Ald. 53, 6 E. C. L. 347, and to *Provis v. Reed*, 5 Bing. 435, 15 E. C. L. 490. After stating the reasons on which *Stobart v. Dryden* was ruled the Pennsylvania court said: "It is not true, at least in this state, where subscribing witnesses are not required to a will, that the evidence of handwriting in the attestation is offered merely as the declaration of the fact that he put his name there in the manner in which attestations are usually placed to genuine signatures. On the contrary, proof of the handwriting of a deceased subscribing witness is not merely evidence that he attested the will, but is also proof of the sanity of the testator. It is evidence of that asserted fact because the principle of law is that no man would attest the will of any but a sane

person of sound, disposing mind, memory and understanding. On such evidence, without more, a will must be admitted to probate. It is in effect the attestation of the witness that the testator was sane. In *Hays v. Harden*, 6 Pa. St. 409, it is ruled that proof of the handwriting of the subscribing witness to a will, when the witness cannot be called, is equivalent to his oath to the signature of the testator."

68. *Stobart v. Dryden*, 1 Mees. & W. (Eng.) 615 (declarations of a deceased attesting witness to a deed tending to show that he forged or fraudulently altered it, were held inadmissible); *Goodtitle v. Clayton*, 4 Burr. (Eng.) 2224; *Sewall v. Robbins*, 139 Mass. 164, 29 N. E. 650; *Baxter v. Abbott*, 7 Gray (Mass.) 71 (In the last case it was observed: The fact that the deceased attested the will as a witness does not, we think, furnish evidence of any opinion he had as to the sanity of the testator. He may have had no opinion on the subject. He may have attested the will with the full belief that the testator was insane, and with the view of testifying to that opinion whenever the will should be offered for probate. No inference as to his opinion can be drawn from the fact of signing, and therefore evidence of a contradictory opinion expressed by him was inadmissible); *Boardman v. Woodman*, 47 N. H. 120, 135.

"**There Is No Presumption** that a witness to a will will state one way or the other in regard to the sanity of the testator. There is no legal presumption because the name of a person appears on a will as attesting witness that the person actually attested it. *Boardman v. Woodman*, 47 N. H. 120, 135; *Crenshaw v. Johnson*, 120 N. C. 270, 26 S. E. 810 (it is hearsay); *Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 469; *Sellers v. Sellars*, 2 Heisk. (Tenn.) 430.

scribing witness who testifies on the trial may be proved only to discredit his testimony.<sup>69</sup>

(3) **Previous Expressions of Opinion.**—Subscribing witnesses may not be contradicted by proof of expressions of opinions contrary to those testified to.<sup>70</sup>

1. **Form of Testimony.**—(1.) **Depositions.**—In some states the testimony of the subscribing witnesses may be given in a deposition.<sup>71</sup>

(2.) **Certified Copy of Testimony.**—A certified copy of their testimony given in the probate court is admissible,<sup>72</sup> though they have testified to the same effect on appeal,<sup>73</sup> the trial being *de novo*. The right to cross-examine does not exist in such a case.<sup>74</sup> And where the trial is *de novo* it may be offered by either party. Its weight is solely for the jury.<sup>75</sup> But the record of the county court is not admissible as a certificate of the oath of the witnesses if it shows that their testimony was taken after the will was probated. The recital cannot be contradicted by parol.<sup>76</sup>

(3.) **Affidavit.**—A statute providing that any attesting witness may sign an affidavit stating such facts as he would be required to testify to prove the attested will in court, and that such affidavit shall be accepted as evidence, is valid.<sup>77</sup>

(4.) **Handwriting.**—If any of the attesting witnesses are deceased or without the jurisdiction, proof of their handwriting is given the same effect as their testimony.<sup>78</sup>

m. **Cross-Examination.**—Under the "American rule" the cross-examination of a witness must not extend beyond the matters inquired about on his direct examination.<sup>79</sup> It must be limited to

69. *Burney v. Torrey*, 100 Ala. 157, 14 So. 685, 46 Am. St. Rep. 33; *Stirling v. Stirling*, 64 Md. 138, 21 Atl. 273; *Lewis v. Mason*, 109 Mass. 169.

70. *McFadin v. Catron*, 120 Mo. 252, 263, 25 S. W. 506. But compare *Burney v. Torrey*, 100 Ala. 157, 14 So. 685, 46 Am. St. Rep. 33.

71. *Johnson v. Farrell*, 215 Ill. 542, 74 N. E. 760. *In re Estate of Arrowsmith*, 206 Ill. 352, 69 N. E. 77.

A deposition taken upon a commission issued by the county court may be received on the trial of the appeal in the circuit court, though one of the counsel was present when it was taken. *In re Estate of Arrowsmith*, 206 Ill. 352, 69 N. E. 77.

72. *Entwistle v. Meikle*, 180 Ill. 9, 54 N. E. 217; *Slingloff v. Bruner*, 174 Ill. 561, 51 N. E. 772; *McConnell v. Keir*, 76 Kan. 527, 92 Pac. 540.

73. *Baker v. Baker*, 202 Ill. 595, 67 N. E. 410.

74. *Prather v. McClelland*, 75 Tex. 574, 13 S. W. 543, ruled under art. 1855, R. S.

75. *Rigg v. Wilton*, 13 Ill. 14, 54 Am. Dec. 419; *Rogers v. Thomas*, 1 B. Mon. (Ky.) 390.

76. *Godfrey v. Phillips*, 209 Ill. 584, 71 N. E. 19.

77. *Vivian's Appeal*, 74 Conn. 257, 50 Atl. 797.

78. *Illinois*.—*O'Brien v. Bonfield*, 213 Ill. 428, 72 N. E. 1090.

*Iowa*.—*Boyeu's Will*, 23 Iowa 354.

*New York*.—*Jackson v. VanDusen*, 5 Johns. 144; *Jauncey v. Thorne*, 2 Barb. Ch. 40; *Losee v. Losee*, 2 Hill 609.

*North Carolina*.—*Crowell v. Kirk*, 14 N. C. (3 Dev. L.) 355.

*Ohio*.—*Clark v. Boyd*, 2 Ohio 56. *Pennsylvania*.—*Harden v. Hays*, 9 Pa. St. 151, 6 Pa. St. 409; *Kirk v. Carr*, 54 Pa. St. 285.

79. *Crenshaw v. Johnson*, 120 N. C. 270, 26 S. E. 810.

the testator's state of mind when the will was executed.<sup>80</sup> But under the "English rule" it may extend to the witness' previous knowledge concerning the testator.<sup>81</sup> All the matters which transpired at the time the will was executed may be inquired into.<sup>82</sup> The closest inquiry is permissible as to the facts and reasons for their opinions.<sup>83</sup> It is not competent to inquire concerning the testator's comprehension of a clause in the will creating charitable trusts;<sup>84</sup> nor whether the witness would have become such if he had known the provisions of the will, nor as to the testator's hostility to him.<sup>85</sup> An attesting witness may be recalled in rebuttal and re-examined without restriction.<sup>86</sup>

**13. Judicial Proceedings.** — A. APPLICATION FOR COMMITMENT. An application for testator's admission to an insane asylum and the certificate of physicians to the effect that he was insane are inadmissible because unverified and because given in a different proceeding and upon a different issue.<sup>87</sup>

B. DISMISSAL OF PROCEEDINGS. — The dismissal of proceedings for the appointment of a guardian, with consent of the contestant of the will, is a relevant circumstance.<sup>88</sup>

C. EFFECT OF PRIOR ADJUDICATION. — A finding of mental incapacity on an inquisition of lunacy is *prima facie* evidence only as against persons not parties to the proceeding, though statutory notice of it was given them.<sup>89</sup> That effect must be given the adjudication.

80. *Egbert v. Egbert*, 78 Pa. St. 326.

81. *Nichols v. Wentz*, 78 Conn. 429, 62 Atl. 610.

82. *Robinson v. Adams*, 62 Me. 369; *Egbert v. Egbert*, 78 Pa. St. 326 (this is not a departure from the rule which prohibits a defendant who has not opened his case from introducing it to the jury for cross-examination, for the reason that the mental condition of the testator at the time in issue is a part of the *res gestae*. *Puryear v. Reese*, 6 Coldw. (Tenn.) 21, is to the same effect.

83. *Huff v. Huff*, 41 Ga. 696.

84. *Melanefy v. Morrison*, 152 Mass. 473, 26 N. E. 36. The question was put on cross-examination. "Perhaps the judge in his discretion might have allowed it to be answered. But we think his discretion was wisely exercised in excluding it. It involved an opinion on a subject about which jurors and the witnesses might have differed, and which would not have furnished a safe standard for comparison."

85. *Spence v. Spence*, 4 Watts (Pa.) 165.

86. *Nash v. Hunt*, 116 Mass. 237.

87. *Keely v. Moore*, 196 U. S. 38, 22 App. Cas. (D. C.) 9; *Leggate v. Clark*, 111 Mass. 308; *Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144 (record of probate court showing application for appointment of guardian).

88. *Lewis v. Mason*, 109 Mass. 169.

89. *England*. — *Cooke v. Cholmondeley*, 2 Macn. & G. 18, 2 H. & Tw. 162, 19 L. J. Ch. 81 (in this case Lord Chancellor Cottenham said: "It is very possible that there may have been a period during which it was competent for the testator to make a will, and that such a will might be valid though the commission existed. The existence of the commission is, no doubt, a circumstance of extreme suspicion, and one which gives rise to the strongest presumption against the validity of the will; but this presumption is nevertheless capable of being rebutted"). *California*. — *Estate of Johnson*, 57

cation though the appointment of a guardian was made after the execution of the will, but on the same day.<sup>90</sup> No greater effect can be given it because the executor was the party who promoted the proceedings and was appointed the lunatic's committee.<sup>91</sup>

a. *Scope of the Issue.*—A judgment of incompetency is not *prima facie* evidence of testamentary incapacity unless the issue of sanity was raised. The fact of its rendition is relevant as a part of the testator's history contemporaneous with the testamentary act.<sup>92</sup>

Cal. 529 (ruled under the statute in force in 1877).

Georgia.—*Slaughter v. Heath*, 127 Ga. 747, 57 S. E. 69.

Hawaii.—*In re Lunalilo's Estate*, 3 Haw. 519 (spendthrift guardianship).

Kentucky.—*Hawkins v. Grimes*, 13 B. Mon. 257.

Maine.—*In re Chandler's Will*, 102 Me. 72, 101, 66 Atl. 215; *Halley v. Webster*, 21 Me. 461.

Massachusetts.—*May v. Bradlee*, 127 Mass. 414; *Leonard v. Leonard*, 14 Pick. 280; *Breed v. Pratt*, 18 Pick. 115 (the guardian may show, in his capacity as executor, though a legatee, that the ward was sane when the will was made); *White v. Palmer*, 4 Mass. 147; *Stone v. Damon*, 12 Mass. 488; *Crowninshield v. Crowninshield*, 2 Gray 524.

New Jersey.—*Whitenack v. Stryker*, 2 N. J. Eq. 8.

New York.—*In re Pendleton's Will*, 5 N. Y. Supp. 849; *Lewis v. Jones*, 50 Barb. 645.

Pennsylvania.—*Leckey v. Cunningham*, 56 Pa. St. 370; *Dugan's Estate*, 6 Pa. Dist. 222.

Vermont.—*In re Wheelock's Will*, 76 Vt. 235, 56 Atl. 1013.

90. *Ames v. Ames*, 40 Or. 495, 67 Pac. 737.

#### Admission Need Not Be Qualified.

If an inquisition fixes the period at which lunacy began the court is not bound, of its own motion, to tell the jury that it could not operate retroactively or prospectively. *Hawkins v. Grimes*, 13 B. Mon. (Ky.) 257.

91. *Titlow v. Titlow*, 54 Pa. St. 216.

The Pleadings and Decree in a suit by the guardian of the testator against the proponent of the will,

the finding being that a contract executed in his favor, and made about the time the will was made and as part of a plan to convey all of testator's property to him, are admissible against the proponent of the will in an action to have it probated. *In re Estate of Hendershott*, 134 Iowa 320, 111 N. W. 969.

Record of an Inquisition de lunatico inquirendo is admissible; but it is otherwise with so much of the order as refers to the duties of the committee. *Kerr v. Lunsford*, 31 W. Va. 659, 676, 8 S. E. 493, 2 L. R. A. 668.

A Report Made After the Testator's Death, respecting the necessity of continuing the guardianship, is inadmissible. *Fairchild v. Bascomb*, 35 Vt. 398, 418.

92. *Rice v. Rice*, 50 Mich. 448, 15 N. W. 545 (Cooley, J., said: "The substantial averment in the petition was that R. was mentally incompetent to have the charge and management of his property, and was wasting it. Insanity was not alleged or put in issue, and the recital of the existence of insanity in the order was very likely an inadvertence. But, whether inadvertent or intentional, it went beyond anything to which R. had been called upon to answer, and was of no force. The order judicially determined that R. had become unfit to manage his property, and it determined nothing more. But this is not inconsistent with testamentary capacity; the state of being unfit to manage property is not even inconsistent with capacity to make contracts"); *Mulholland's Estate*, 217 Pa. St. 65, 66 Atl. 150.

The Findings of the Court on an inquisition are admissible to show

b. *Effect of Appeal.* — It is immaterial that the will was executed pending an appeal from the decree appointing a guardian; the decree was not vacated by the appeal.<sup>93</sup>

c. *Weight To Be Given.* — The weight to be given a judgment of incompetency will depend upon the nature of the mental state of the incompetent. In any event, the presumption to which it gives rise may be overcome by a preponderance of the evidence.<sup>94</sup> The effect of such a judgment as evidence may be overthrown by showing that it was secured at the sole instance of the contestant.<sup>95</sup> But the presumption arising from it may not be overcome by such testimony as is required to establish the probate of a will.<sup>96</sup>

D. *RETROACTIVE JUDGMENT.* — An inquisition finding incompetency previous to the examination is inadmissible.<sup>97</sup> Such is the rule though it was expressly found that the testator was insane at a time prior to the execution of the will. In either event it does not affect the burden of proof.<sup>98</sup> It is at least not conclusive though there has been no change in the testamentary condition since it was rendered.<sup>99</sup>

An *Adjudication of Idiocy* is competent though made after execution of the will,<sup>1</sup> especially as to acts subsequently done, though the disease affecting the ward was likely to impair his mind.<sup>2</sup>

E. *DISCHARGE OF GUARDIAN.* — A judgment discharging a guar-

the scope of the judgment, that being a matter of doubt. So far as the facts recited are not made a part of the judgment or of the record, they are not binding in a case involving testamentary capacity, though the parties are the same to both proceedings. *Nichols v. Wentz*, 78 Conn. 429, 62 Atl. 610.

93. *Hamilton v. Hamilton*, 10 R. I. 538.

94. *In re Chandler's Will*, 102 Me. 72, 102, 66 Atl. 215, the court said: "If the guardianship was imposed on account of the impairment of some particular function of the brain which did not materially interfere with the judgment, comprehension and memory, it might require scarcely any evidence at all to remove the effect of it. On the other hand, if it was imposed on account of long standing and chronic insanity involving the destruction of all these faculties, no amount of evidence could overcome it. Of the impairment of the mind between these two extremes, the amount of evidence required to overcome the disability would depend upon the

facts and circumstances of each particular case; so that when we reach the final determination as to mental capacity or incapacity, whether the person is in an insane asylum, under guardianship, or under no legal disability, we revert to the simple proposition of law whether, under all the circumstances in the particular case under consideration, the testator was of sound and disposing mind."

95. *Mulholland's Estate*, 217 Pa. St. 65, 66 Atl. 150.

96. *Entwistle v. Meikel*, 180 Ill. 9, 25, 54 N. E. 217; *King v. Gilson*, 191 Mo. 307, 90 S. W. 367; *In re Hoffman's Estate*, 209 Pa. St. 357, 58 Atl. 665.

97. *In re Harvey's Will* (Iowa), 94 N. W. 559; *In re Preston's Will*, 113 App. Div. 732, 99 N. Y. Supp. 312; *Mulholland's Estate*, 217 Pa. St. 65, 66 Atl. 150.

98. *In re Preston's Will*, 113 App. Div. 732, 99 N. Y. Supp. 312.

99. *Nichols v. Wentz*, 78 Conn. 429, 62 Atl. 610.

1. *Townsend v. Bogart*, 5 Redf. Sur. (N. Y.) 93, 108.

2. *Arnold v. Arnold* (Ky. L. Rep.), 17 S. W. 203.



dian is not conclusive that the person discharged possessed testamentary capacity.<sup>3</sup>

F. JUDGMENT RES INTER ALIOS ACTA. — A judgment which is *res inter alios acta* is not admissible.<sup>4</sup>

G. VERDICT ON ANOTHER WILL. — A verdict as to the capacity of a testator when a will was executed is not admissible on the question of his capacity when a prior will was made.<sup>5</sup>

H. PROCEEDINGS IN PROBATE COURT. — It is irrelevant in a proceeding to establish a will in solemn form to show that the probate court has granted letters of administration on testator's estate.<sup>6</sup>

I. CORONER'S VERDICT. — The verdict of a coroner's jury passing on the cause of testator's death is not competent to show his mental condition.<sup>7</sup>

J. DISCHARGE FROM INSTITUTION. — The discharge of a person from an insane asylum is *prima facie* evidence of restoration to reason, or of improper confinement therein, though the certificate of discharge is silent as to the reason, these being the only statutory grounds for a discharge.<sup>8</sup>

K. REPORTS CONCERNING LUNATICS. — Under a statute requiring that reports made by visitors to lunatics so found by inquisition shall be destroyed on the death of any patient to whom they relate, such reports must, though in existence, be treated as destroyed in a contest over the will of a patient.<sup>9</sup>

14. Question of Fact. — It is for the jury to pass upon the question of a testator's mental capacity,<sup>10</sup> whether incompetency is alleged to have resulted from inebriety or otherwise,<sup>11</sup> though the testimony is uncontradicted.<sup>12</sup> But in some states there must be substantial evidence of incompetency to justify the submission of the issue to the jury.<sup>13</sup> Under the New York Code the probate of a will is *prima facie* evidence of the capacity of the testator. On appeal the question of capacity need not go to the jury unless the evidence tends to show incapacity.<sup>14</sup>

15. Quantum of Evidence. — A. GENERALLY. — Insanity must be shown by the clearest and most satisfactory proof,<sup>15</sup> especially if

3. *In re* Will of Fenton, 97 Iowa 192, 66 N. W. 99.

4. *Terry v. Buffington*, 11 Ga. 337.

5. *Packham v. Glendmyer*, 103 Md. 416, 63 Atl. 1048.

6. *Brown v. McBride*, 129 Ga. 92, 58 S. E. 702.

7. *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999.

8. *Clements v. McGinn* (Cal.), 33 Pac. 920.

9. *Roe v. Nix*, (1893) Prob. 55.

10. *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *Petefish v. Becker*, 176 Ill. 448, 52 N. E. 71; *Odenwaelder v. Schorr*, 8 Mo. App. 458; *Gass v. Gass*, 3 Humph. (Tenn.) 278.

11. *Estate of Johnson*, 57 Cal. 529; *Best v. Best's Exrs.*, 11 Ky. L. Rep. 215, 11 S. W. 810.

12. *Townshend v. Townshend*, 7 Gill (Md.) 10, 32.

13. *Southworth v. Southworth*, 173 Mo. 59, 73, 73 S. W. 129 and local cases cited; *Hamon v. Hamon*, 180 Mo. 685, 702, 79 S. W. 422.

14. *Dobie v. Armstrong*, 160 N. Y. 584, 55 N. E. 302, 27 App. Div. 520, 50 N. Y. Supp. 801; *Haughian v. Conlon*, 86 App. Div. 290, 83 N. Y. Supp. 830.

15. *Gass v. Gass*, 3 Humph. (Tenn.) 278.

a delusion is alleged and general competency admitted.<sup>16</sup> The proof must be clear and convincing.<sup>17</sup> It is sufficiently established by a preponderance of the testimony.<sup>18</sup> It need not be shown beyond a reasonable doubt.<sup>19</sup> The rule in the Ecclesiastical courts of England seems to have been otherwise in some cases.<sup>20</sup> In the common law courts competency must be shown by satisfactory evidence.<sup>21</sup>

**B. RULE AFFECTED BY CIRCUMSTANCES.**—The burden may be increased by proof that the will was written, or procured to be written, by a person who is largely benefited by it and that the testator was in an enfeebled state,<sup>22</sup> unless he is shown to have acted on a previous intention.<sup>23</sup> The cause of the testator's condition is immaterial.<sup>24</sup> Proof of the testator's prior or subsequent delusions

16. *Taylor v. McClintock* (Ark.), 112 S. W. 405.

17. *Home of the Aged v. Bantz*, 107 Md. 543, 69 Atl. 376; *Grubbs v. McDonald*, 91 Pa. St. 236; *Palmer's Estate*, 219 Pa. St. 303, 68 Atl. 710; *Tucker v. Sandidge*, 85 Va. 546, 8 S. E. 650; *Gray v. Rumrill*, 101 Va. 507, 44 S. E. 697. *Sut see Wallen v. Wallen*, 107 Va. 131, 57 S. E. 596; *Riddell v. Johnson*, 26 Gratt. (Va.) 152.

**It Is Not Enough To Raise a Doubt** as to the competency of the testator; it must be shown by a preponderance of the evidence that his mind was unsound. *Entwistle v. Meikle*, 180 Ill. 9, 28, 54 N. E. 217.

18. *Hopkins v. Wampler*, 108 Va. 705, 62 S. E. 926.

19. *King v. Rowan*, 82 Miss. 1, 34 So. 325; *disapproving* a contrary statement in *Mullins v. Cottrell*, 41 Miss. 291.

20. *Fulleck v. Allinson*, 3 Hagg. (Eng.) 527. In this case Sir John Nicholl said that, in view of the fact that the testator's general sanity was established, the existence of insanity at the time of the execution of the will ought to be clear beyond all doubt.

21. *Sutton v. Sadler*, 3 C. B. (N. S.) 87, 26 L. J. C. P. 284, 3 Jur. (N. S.) 1150; *Smith v. Tebbitt*, L. R. 1 P. (Eng.) 354, 436, 15 L. T. 594.

22. *England*.—*Butlin v. Barry*, 1 Curt. 617; *Paske v. Ollatt*, 2 Phill. Ecc. 323; *Ingram v. Wyatt*, 4 Hagg. Ecc. 384; *Billinghurst v. Vickers*, 1 Phill. Ecc. 187.

*Connecticut*.—*Drake's Appeal*, 45 Conn. 9, 21 ("The amount of proof

required varies with the circumstances. If the interest is small in proportion to the whole estate and the decedent at the time of making the will was in health and the possession of his faculties, slight proof will suffice. On the other hand, if his mind is feeble and the party drawing the will takes a considerable portion of the estate to the exclusion of heirs, proof of the most conclusive nature will be required").

*Illinois*.—*England v. Fawbush*, 204 Ill. 384, 68 N. E. 526; *Purdy v. Hall*, 134 Ill. 298, 25 N. E. 645; *Smith v. Henline*, 174 Ill. 184, 51 N. E. 227; *Keyes v. Kimmel*, 186 Ill. 109, 57 N. E. 851.

**Suspicious Circumstances.**—If the testator's condition is such as to render it desirable, in the judgment of the proponent of the will, to have a medical consultation and opinion as to testator's sanity, the circumstance requires full and strong proof to show capacity. *Christy v. Clarke*, 45 Barb. (N. Y.) 529, 546. But the attestation of codicils by experts in mental disease is not such a circumstance as may arouse suspicion. *In re Journeay's Will*, 15 App. Div. 567, 44 N. Y. Supp. 548.

23. *Harwood v. Baker*, 3 Moore P. C. 282, 313, 13 Eng. Reprint 117.

24. *Illinois*.—*England v. Fawbush*, 204 Ill. 384, 68 N. E. 526; *Cheney v. Goldy*, 225 Ill. 394, 80 N. E. 289; *Smith v. Henline*, 174 Ill. 184, 198, 51 N. E. 227; *McCommon v. McCommon*, 151 Ill. 428, 38 N. E. 145; *Purdy v. Hall*, 134 Ill. 298, 25 N. E. 645.

may make it necessary for the proponent to show his sanity by much clearer proof than would have been required had no such condition existed.<sup>26</sup>

## VII. EXECUTION.

**1. Burden of Proof.**—A. ON PETITION FOR PROBATE.—It is the universal rule that the party propounding a will for probate has the burden of proving its due execution in compliance with all the statutory requirements<sup>26</sup> existing at the date of its execution.<sup>27</sup>

B. ON CONTEST OR APPEAL.—The general rule, also, is that whenever the validity of a will comes directly in issue, the burden

*Minnesota.*—*In re Casey's Will*, 99 N. W. 363.

*New Jersey.*—Byard v. Conover, 39 N. J. Eq. 244.

*Pennsylvania.*—Yardley v. Cuthbertson, 108 Pa. St. 395, 454, 1 Atl. 765, 56 Am. Rep. 218; Boyd v. Boyd, 66 Pa. St. 283; Wilson v. Mitchell, 101 Pa. St. 495, 505.

<sup>25.</sup> Waring v. Waring, 6 Moore P. C. 341, 13 Eng. Reprint 715.

<sup>26.</sup> *Alabama.*—Woodroof v. Hundley, 133 Ala. 395, 32 So. 570; Barnewall v. Murrell, 108 Ala. 366, 18 So. 831.

*Colorado.*—Snodgrass v. Smith, 42 Colo. 60, 94 Pac. 312.

*Connecticut.*—Lockwood v. Lockwood, 80 Conn. 513, 69 Atl. 8.

*Delaware.*—Sutton v. Sutton, 5 Har. 459; Lodge v. Lodge's Will, 2 Houst. 418.

*Georgia.*—Slaughter v. Heath, 127 Ga. 747, 57 S. E. 69; Brown v. McBride, 129 Ga. 92, 58 S. E. 702; Evans v. Arnold, 52 Ga. 169; Wetter v. Habersham, 60 Ga. 193.

*Illinois.*—Webster v. Yorty, 194 Ill. 408, 62 N. E. 907; Harp v. Parr, 168 Ill. 459, 48 N. E. 113; Bevelot v. Lestrade, 153 Ill. 625, 38 N. E. 1056.

*Indiana.*—Miller v. Coulter, 156 Ind. 290, 59 N. E. 853; Morrell v. Morrell, 157 Ind. 179, 60 N. E. 1092; Steinkuehler v. Wempner, 169 Ind. 154, 81 N. E. 482, 15 L. R. A. (N. S.) 673.

*Iowa.*—*In re Goldthorp's Estate*, 115 Iowa 430, 88 N. W. 944; *In re Hull's Will*, 117 Iowa 738, 89 N. W. 979; Ross v. Ross, 117 N. W. 1105.

*Kansas.*—McConnell v. Keir, 76 Kan. 527, 92 Pac. 540; Hospital Co. v. Hale, 69 Kan. 616, 77 Pac. 537; Wright v. Young, 75 Kan. 287, 89 Pac. 194.

*Kentucky.*—Barlow v. Waters, 16 Ky. L. Rep. 426, 28 S. W. 785.

*Maine.*—Barnes v. Barnes, 66 Me. 286.

*Maryland.*—Cramer v. Crumbaugh, 3 Md. 491.

*Massachusetts.*—Barker v. Comins, 110 Mass. 477.

*Minnesota.*—Tobin v. Haack, 79 Minn. 101, 81 N. W. 758.

*Missouri.*—Teckenbrock v. McLaughlin, 209 Mo. 533, 108 S. W. 46; Campbell v. Carlisle, 162 Mo. 634, 63 S. W. 701; Mowry v. Norman, 204 Mo. 173, 103 S. W. 15; Goodfellow v. Shannon, 197 Mo. 271, 94 S. W. 979; Bradford v. Blossom, 207 Mo. 177, 105 S. W. 289; Morton v. Heidorn, 135 Mo. 608, 37 S. W. 504; Sehr v. Lindemann, 153 Mo. 276, 54 S. W. 537.

*New York.*—*In re Hitchler's Will*, 25 Misc. 365, 55 N. Y. Supp. 642; *In re Mackay's Will*, 110 N. Y. 611, 18 N. E. 433, 6 Am. St. Rep. 409, 1 L. R. A. 491; Lewis v. Lewis, 11 N. Y. 220; Matter of Kellum, 52 N. Y. 517.

*North Carolina.*—*In re Hedgepeth's Will*, 63 S. E. 1025.

*South Carolina.*—Reynolds v. Reynolds, 1 Spears' L. 253, 40 Am. Dec. 599.

*Tennessee.*—Puryear v. Reese, 6 Coldw. 21; Bartee v. Thompson, 8 Baxt. 508.

*Texas.*—Renn v. Samos, 33 Tex. 760; Beazley v. Denson, 40 Tex. 416.

**Right To Open and Close Where Several Wills Are Propounded.** Hutley v. Grimston, 48 L. J., P. 68, 5 P. D. 24, 41 L. T. 531.

<sup>27.</sup> Where a will is without date, the burden of proof is upon the proponent to show that it was executed at such a time that the formalities

of proving its formal execution is upon the person relying upon the will. And it is immaterial whether the question arises upon a contest of the will,<sup>28</sup> in an action to set the probate aside,<sup>29</sup> on appeal from the order of the probate court,<sup>30</sup> or on an issue out of chancery.<sup>31</sup> And due execution must be regularly proved although it is not specifically in issue.<sup>32</sup> The fact that specific grounds of con-

required by the law in force at the time it was presented were not required by the law in force at the time it was executed. *Jones v. Jones*, 3 Met. (Ky.) 266.

28. *Purdy v. Hall*, 134 Ill. 298, 25 N. E. 645; *Goodfellow v. Shannon*, 197 Mo. 271, 94 S. W. 979; *Carl v. Gabel*, 120 Mo. 283, 25 S. W. 214; *Craig v. Craig*, 156 Mo. 358, 56 S. W. 1097; *Maddox v. Maddox*, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734; *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506; *In re Sullivan's Estate*, 40 Wash. 202, 82 Pac. 297.

"A will contest has its peculiar features. It comes after the will has been formally admitted to probate in the probate court, and it has the effect of throwing upon those who assert the will the burden of proving it in the circuit court. The plaintiffs or contestants in such case may not introduce any evidence at all; they may even expressly abandon the contest, still the burden of proving the will devolves upon those who maintain it." *Cowan v. Shaver*, 197 Mo. 203, 95 S. W. 200.

Where the validity of a will is attacked by a direct proceeding after probate in common form, or on *ex parte* proceedings, the person seeking to maintain the validity of the will has the burden of proving every essential fact not admitted or waived by the pleadings necessary to authorize probate in the county court. *In re Mendenhall's Will*, 43 Or. 542, 72 Pac. 318, 73 Pac. 1033.

**Right To Open and Close** is with the proponents. *Gable v. Rauch*, 50 S. C. 95, 27 S. E. 555 (Gen. Stats. 1882, § 1872). See *McBee v. Bowman*, 89 Tenn. 132, 14 S. W. 481.

29. *Peale v. Ware*, 131 Ga. 826, 63 S. E. 581; *Harris v. Hayes*, 53 Mo. 90; *Land v. Helm*, 56 Mo. 420.

Where a will has been probated in

common form and the validity of the will is attacked by direct proceedings, it lies upon the person seeking to maintain the validity of the will to re-probate the same by original proof in the same manner as if no probate thereof had been had, except as to such matters as are admitted by the pleadings. In every such proceeding the *onus probandi* is upon the party propounding the will. *Luper v. Werts*, 19 Or. 122, 23 Pac. 850.

30. *Ex parte Brock*, 37 S. C. 348, 16 S. E. 38 (Gen. Stat. § 1872); *Taff v. Hosmer*, 14 Mich. 309; *Boardman v. Woodman*, 47 N. H. 120; *Potter v. Potter*, 41 Ill. 80; *O'Brien v. Bonfield*, 213 Ill. 428, 72 N. E. 1090; *Ware v. Ware*, 8 Me. 42.

"In appeals from the probate court for proving a will, it matters not which party is the appellant. The party who affirms that a will was made, has the primary burden of proof and the accompanying right to close." *Judge, of Probate v. Stone*, 44 N. H. 593, 605.

The proceedings upon an appeal from the act of the register of wills are *de novo*, and the burden of proof is upon the proponent to show the execution of a paper propounded by the register. *Simcox's Estate*, 11 Pa. Co. Ct. 545.

31. *Rigg v. Wilton*, 13 Ill. 15, 54 Am. Dec. 419; *Rogers v. Thomas*, 1 B. Mon. (Ky.) 390; *Hawkins v. Grimes*, 13 B. Mon. (Ky.) 257.

32. *Craig v. Craig*, 156 Mo. 358, 56 S. W. 1097; *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642.

On appeal from the probate of a will the burden of proof is still upon the proponents and they must prove its due execution, although such execution is not put in issue by the appellants. *Livingston's Appeal*, 63 Conn. 68, 26 Atl. 470.

test are set forth which the contestant must prove,<sup>33</sup> does not affect the duty of the proponent to establish the due execution of the will.<sup>34</sup>

**A Prima Facie Case** is made in those jurisdictions in which the order of probate or the certificate of the attesting witnesses is admissible, by the introduction in evidence of the will and the order of probate<sup>35</sup> or certificate,<sup>36</sup> and the burden of proof then shifts to the contestants.<sup>37</sup>

**By Statutory Enactments** in a few states the courts have considered themselves bound to regard the contestants as having the burden of proof of execution.<sup>38</sup>

**2. Presumptions.**—**A. SIGNATURE BY TESTATOR.**—Signature by the testator will not be presumed from the mere fact that the body of the will was admittedly in his handwriting.<sup>39</sup>

<sup>33.</sup> *In re Brown's Will* (Iowa), 120 N. W. 667.

<sup>34.</sup> *Thames v. Rouse* (S. C.), 62 S. E. 254.

<sup>35.</sup> *Kettemann v. Metzger*, 3 Ohio C. C. (N. S.) 224.

Where a will has been admitted to probate, the proceedings *prima facie* establish the validity of the will, and on a subsequent attack the contestant has the burden of proof. *Succession of Gaines*, 38 La. Ann. 123; *Fox v. McDonald's Succession*, 18 La. Ann. 419.

<sup>36.</sup> *Purdy v. Hall*, 134 Ill. 298, 25 N. E. 645.

<sup>37.</sup> *Mears v. Mears*, 15 Ohio St. 90; *Behrens v. Behrens*, 47 Ohio St. 323, 25 N. E. 209, 21 Am. St. Rep. 820.

<sup>38.</sup> *Estate of Scott*, 128 Cal. 57, 60 Pac. 527; *Estate of Dole*, 147 Cal. 188, 81 Pac. 534; *Estate of Collins*, *Myrick's Prob. Rep.* (Cal.) 73; *In re Doyle's Estate*, 73 Cal. 564, 15 Pac. 125; *Farleigh v. Kelley*, 28 Mont. 421, 72 Pac. 756 (§ 1080 Code of Civ. Proc. similar to § 1312 of the California Code of Civ. Proc.); *In re Van Alstine's Estate*, 26 Utah 193, 72 Pac. 942 (Utah Rev. Stat. 1898, § 3791 applied).

**In California** the supreme court considers itself bound by § 1312 Code Civ. Proc. to hold that on the contest of a will whether made before probate or after probate the burden of proof is upon the contestant as plaintiff to prove every allegation contained in his contest, including the negative allegation of non-execution of the will when he alleges it as a ground of contest.

But this opinion was rendered only by a divided court, and Beatty, C. J., renders an elaborate dissenting opinion which was concurred in by two of the other judges, and the matter cannot therefore be regarded as finally settled in this state. *In re Estate of Latour*, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441. See *Estate of McKenna*, 143 Cal. 580, 77 Pac. 461.

**Montana.**—"In every will case under our statute the rule of procedure is that the proponent of the will must first make out a *prima facie* case; that is to say, must make such proof as would entitle the will to probate in the absence of a contest. Then the contestant attacks the validity of the will, the proponent defends the same, and the contestant rebuts the testimony of the proponent. Doubtless the proponent may surmount any new testimony adduced for the first time in rebuttal (*Maloney v. King*, 30 Mont. 158, 76 Pac. 4), but the contestant has the right to open and close the case (sections 2340-2346, Code Civ. Proc.)." *In re Colbert's Estate*, 31 Mont. 461, 78 Pac. 971, 80 Pac. 248.

**Iowa.**—Under Code, § 3296, which provides that the probate of the will shall be conclusive evidence of its due execution until set aside by an original or appellate proceeding, an issue as to the execution of the will is properly withheld from the jury in an action to set aside its probate in the absence of evidence that it was not duly executed. *Smith v. Ryan*, 136 Iowa 335, 112 N. W. 8.

<sup>39.</sup> *In re Burtis' Will*, 43 Misc.

B. TIME OF SIGNING. — The testator is presumed to have signed the will before the attesting witnesses did so.<sup>40</sup>

C. ACKNOWLEDGMENT. — A proper acknowledgment may be presumed to have been made from the fact that the will upon its face appears to have been properly executed.<sup>41</sup>

D. REQUEST TO WITNESSES TO SIGN. — A request from the testator to the subscribing witnesses to sign his will will be presumed, where it appears that he signed in their presence, declaring the instrument to be his will, and they thereupon signed in his presence.<sup>42</sup>

E. PRESENCE OF TESTATOR. — The attestation of the subscribing witnesses is presumed to have been done in the presence of the testator when done in the same room with him,<sup>43</sup> but when done in another room the presumption is the other way.<sup>44</sup> In the absence of all other evidence, a signing in the presence of the testator will

437, 89 N. Y. Supp. 441 (issue being forgery).

40. *In re Kane's Will*, 20 N. Y. Supp. 123; *Flood v. Kerwin*, 113 Wis. 673, 89 N. W. 845; *Dewey v. Dewey*, 1 Met. (Mass.) 349; *Allen v. Griffin*, 69 Wis. 529, 35 N. W. 21; *O'Hagan's Will*, 73 Wis. 78, 40 N. W. 649; *In re Will of Lewis*, 51 Wis. 101, 7 N. W. 829. See *In re Baldwin's Will*, 146 N. C. 25, 59 S. E. 163; *Hobart v. Hobart*, 154 Ill. 610, 39 N. E. 581, 45 Am. St. Rep. 151; *Gould v. Theological Sem.*, 189 Ill. 282, 59 N. E. 536.

**Strength of Presumption.** — The only signature to a will appeared in the attestation clause which was written out by the testator. The attesting witnesses did not know whether or not the signature was on the paper when they subscribed their names; but the court drew the inference from the face of the paper that it was. In *Goods of Hucklevale*, 36 L. J., P. 84, L. R. 1 P. 375, 16 L. T. 434, 16 W. R. 64.

"The will of the deceased had an imperfect attestation clause, and the name of the deceased appeared written beneath the signatures of the attesting witnesses. The witnesses were both dead, and no evidence could be given as to the order in which the signatures were made. The court, nevertheless, decreed probate of the will." In the *Goods of Puddephatt*, 39 L. J., P. 84, L. R. 2 P. 97.

**Outweighs Contrary Testimony of Witness.** — On the question whether a will was signed at the

time it was attested by the witnesses, the court placed more reliance upon the improbability that a person who knew the requirements of the statute would offer a will which lacked his signature than upon the positive testimony of one of the witnesses to the effect that it was not signed. *Pilkington v. Gray*, (1899) App. Cas. (Eng.) 401.

**Evidence in Rebuttal.** — The presumption that the testator signed his will before the attesting witnesses is rebutted by proof that the paper offered for probate was written by a third person and signed by him as a witness before the testator signed, and not in his presence, and that the witness never saw the testator after the paper was left at his residence to be executed by him. *In re Baldwin's Will*, 146 N. C. 25, 59 S. E. 163.

41. *Lloyd v. Roberts*, 12 Moore P. C. 158, 14 Eng. Reprint 871.

42. *Butler v. Benson*, 1 Bradf. (N. Y.) 526.

43. *Stewart v. Stewart*, 56 N. J. Eq. 761, 40 Atl. 438, *affirmed*, 68 Atl. 1116; *In re Beggans' Will*, 68 N. J. Eq. 572, 59 Atl. 874; *Mandeville v. Parker*, 31 N. J. Eq. 242; *Ayres v. Ayres*, 43 N. J. Eq. 565, 12 Atl. 621; *Hill v. Barge*, 12 Ala. 687.

44. *Lamb v. Girtman*, 26 Ga. 625. If it is shown that the deceased placed herself in a position to see the witnesses sign and was looking in that direction, the presumption that the signing in an adjoining room was not a signing in her presence

be presumed from mere proof of the genuineness of the signatures.<sup>45</sup>

F. OF REGULARITY. — a. *In Absence of Attestation Clause.* — By the better rule the due execution of a will which appears on its face to have been formally executed will be presumed in the absence of all evidence to the contrary, although there is no attestation clause attached to the will.<sup>46</sup> There are cases, however, which refuse to draw the presumption in such a case.<sup>47</sup>

b. *Effect of Attestation Clause.* — (1.) *In General.* — A full and complete attestation clause properly signed is *prima facie* evidence of the due execution of the will,<sup>48</sup> and has the effect of shifting the

would be overcome. *In re Beggans' Will*, 68 N. J. Eq. 752 59 Atl. 874.

45. *Price v. Brown*, 1 Bradf. (N. Y.) 291; *Beadles v. Alexander*, 9 Baxt. (Tenn.) 604; *Pate's Admr. v. Joe*, 3 J. J. Marsh. (Ky.) 113.

46. *England.* — *Goods of Johnson*, 2 Curteis 341, 7 Eng. Ecc. 137; *Harris v. Knight*, 15 P. D. 170, 62 L. T. 507; *Byles v. Cox*, 74 L. T. 222.

*Alabama.* — *Woodruff v. Hundley*, 127 Ala. 640, 29 So. 98, 85 Am. St. Rep. 145.

*California.* — *Tevis v. Pitcher*, 10 Cal. 466; *In re Tyler's Estate*, 121 Cal. 405, 53 Pac. 928.

*Delaware.* — *Pennell's Lessee v. Wagent*, 2 Har. 51.

*Illinois.* — *More v. More*, 211 Ill. 268, 71 N. E. 988; *Mead v. Presbyterian Church*, 229 Ill. 526, 82 N. E. 371.

*Kentucky.* — *Chisholm v. Ben*, 7 B. Mon. 408.

*Massachusetts.* — *Eliot v. Eliot*, 10 Allen 357.

*New York.* — *Jackson v. Christman*, 4 Wend. 277; *Butler v. Benson*, 1 Barb. 526.

*Ohio.* — *Carpenter v. Denoon*, 29 Ohio St. 379.

*Rhode Island.* — *Fry's Will*, 2 R. I. 88.

*South Carolina.* — *Ex parte Brock*, 37 S. C. 348, 16 S. E. 38.

*Virginia.* — *Young v. Barner*, 27 Gratt. 96.

*West Virginia.* — *Webb v. Dye*, 18 W. Va. 376.

And see *Skinner v. Lewis*, 40 Or. 571, 62 Pac. 523, 67 Pac. 961; *Cheaney v. Arnold*, 18 Barb. (N. Y.) 434; *In re Mendenhall's Will*, 43 Or. 542, 72 Pac. 318, 73 Pac. 1033.

#### When the Presumption Will Arise.

In order for the presumption as to regularity of execution to arise where the attestation clause is absent or incomplete, there must be no better mode of proving the fact. *Price v. Brown*, 1 Bradf. (N. Y.) 291.

#### Presence of Attestation Clause Not Required for Validity of Will.

The only effect of the absence of an attestation clause is to change the method of proof of due execution of the will. It does not render the will invalid. *Ward v. Board of Comrs.*, 12 Okla. 267, 70 Pac. 378.

47. *Stewart v. Stewart*, 56 N. J. Eq. 761, 40 Atl. 438, *affirmed*, 68 Atl. 1116; *In re Beggans' Will*, 68 N. J. Eq. 572, 59 Atl. 874; *Vernon v. Vernon*, 69 N. J. Eq. 759, 61 Atl. 409; *Mundy v. Mundy*, 15 N. J. Eq. 290; *Swain v. Edmunds*, 53 N. J. Eq. 142, 32 Atl. 369; *s. c.*, 54 N. J. Eq. 438, 37 Atl. 1117.

48. *England.* — In the *Goods of Leach*, 12 Jur. 381.

*Georgia.* — *Underwood v. Thurman*, 111 Ga. 325, 36 S. E. 788.

*Iowa.* — *In re Hull's Will*, 117 Iowa 738, 89 N. W. 979.

*Maine.* — *Barnes v. Barnes*, 66 Me. 286.

*Michigan.* — *In re Sullivan's Will*, 114 Mich. 189, 72 N. W. 135.

*Nebraska.* — *In re Robertson's Estate*, 109 N. W. 506. See *In re Ayers' Estate*, 120 N. W. 491.

*New Jersey.* — *In re Sandmann's Will*, 68 Atl. 754; *In re Beggans' Will*, 68 N. J. Eq. 572, 59 Atl. 874; *Hildreth v. Marshall*, 51 N. J. Eq. 241, 27 Atl. 465; *Stoutenburgh v. Hopkins*, 43 N. J. Eq. 577, 12 Atl. 689; *Mundy v. Mundy*, 15 N. J. Eq. 290.

*New York.* — *Walsh v. Walsh*, 4

burden of proof to those who deny the proper execution of the will.<sup>49</sup> It is as strong evidence as to what was done and said by the survivor of two attesting witnesses as it is to the acts and declarations of the deceased witnesses.<sup>50</sup>

(2.) **Conclusiveness.**—(A.) **IN GENERAL.**—The presumption of due execution arising from the presence of a full attestation clause is not conclusive evidence of the facts recited, but may be overcome

Redf. 165; *In re Hunt's Will*, 110 N. Y. 278, 18 N. E. 106; *Chaffee v. Baptist Miss. Conv.*, 10 Paige 85; *Matter of Kellum*, 52 N. Y. 517; *In re Sizier's Will*, 129 App. Div. 7, 113 N. Y. Supp. 210; *Peebles v. Case*, 2 Bradf. 226; *In re Carey's Will*, 14 Misc. 486, 36 N. Y. Supp. 817; *In re Buel's Will*, 49 App. Div. 4, 60 N. Y. Supp. 385; *Matter of Hunt*, 42 Hun 434; *In re Jones' Will*, 85 N. Y. Supp. 294 (even though the event was of recent occurrence); *Brinckerhoof v. Brinckerhoof*, 8 Paige 488; *Cheaney v. Arnold*, 18 Barb. 434; *In re Purdy's Will*, 25 Misc. 458, 55 N. Y. Supp. 644.

*Oregon.*—*Skinner v. Lewis*, 40 Or. 571, 62 Pac. 523, 67 Pac. 951.

*Vermont.*—*In re Clafin's Will*, 73 Vt. 129, 50 Atl. 815, 87 Am. St. Rep. 693.

*Wisconsin.*—*Will of Meurer*, 44 Wis. 392; *In re Lewis' Will*, 51 Wis. 101, 7 N. W. 829; *Will of O'Hagan*, 73 Wis. 78, 40 N. W. 649; *Hanley v. Kraftczyk*, 119 Wis. 352, 96 N. W. 820; *In re Gillmor's Will*, 117 Wis. 302, 94 N. W. 32.

**Purpose of Attestation Clause.**—“It is made for the very purpose of preserving, in permanent form, a record of the facts attending the execution of the will, so that, in case of the failure of the memory of the attesting witnesses, or their death, or other casualty, they may still be proved. It is for this reason that the courts have uniformly held that, on proof of the authenticity of the signatures of the subscribing witnesses, the facts stated in the attestation clause must be considered and accepted as true, until it is shown by affirmative proof that they are not.” *Farley v. Farley*, 50 N. J. Eq. 434, 26 Atl. 178.

**Not a Statutory Rule.**—*In re*

*Oliver's Will*, 13 Misc. 466, 34 N. Y. Supp. 706.

**Position of Attestation Charge Immaterial.**—*Woodhouse v. Balfour*, 13 P. D. 2, 57 L. J. P., 22, 58 L. T. 59.

**Testatrix Signing by Mark.**—In a case where the subscribing witnesses to a will, signed by the testatrix merely by her mark, are dead, due execution will be presumed from a full attestation clause and proof of the handwriting of the deceased witnesses. *In re Sullivan's Will*, 114 Mich. 189, 72 N. W. 135; *Nickerson v. Buck*, 12 Cush. (Mass.) 332.

**Witnesses Signing by Mark.**—In *Clarke v. Clarke*, 5 L. R. Ir. 47, the attesting witnesses signed by mark, the testator himself writing out their names. They died before he did; but the will containing a complete attestation clause and appearing to be duly executed on its face, the instrument was admitted to probate.

**Publication Strengthens Presumption.**—Where the testatrix declares the instrument to be her will, this fact together with the attestation clause is almost conclusive evidence of a formal execution of the instrument. *In re Mendenhall's Will*, 43 Or. 542, 72 Pac. 318, 73 Pac. 1033.

**After a Considerable Lapse of Time** and when it may be reasonably supposed that the attesting witnesses may have forgotten the circumstances surrounding the execution of the will, the jury may infer that the statutory requirements were complied with from the statements of the attestation clause. *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y.) 158.

<sup>49</sup>. *Patton v. Hope*, 37 N. J. Eq. 522 (publication); *Tappen v. Davidson*, 27 N. J. Eq. 459; *Turnure v. Turnure*, 35 N. J. Eq. 437; *Farley v. Farley*, 50 N. J. Eq. 434, 26 Atl. 178.

<sup>50</sup>. *Orser v. Orser*, 24 N. Y. 51.



by other evidence.<sup>51</sup> It is sufficient in all cases, however, where there is a mere failure of recollection on the part of the subscribing witnesses as to what actually took place at the time of executing the will.<sup>52</sup>

(B.) POSITIVE TESTIMONY OF WITNESSES. — The statements of the attestation clause will be given no effect when contradicted by the direct testimony of the subscribing witnesses,<sup>53</sup> unless corroborated

51. *Manners v. Manners* (N. J.), 66 Atl. 583; *In re Berdan's Will*, 65 N. J. Eq. 681, 55 Atl. 728; *In re Hull's Will*, 117 Iowa 738, 89 N. W. 979; *Scott v. Hawk*, 107 Iowa 723, 77 N. W. 467.

"Does the presumption arising from the attestation clause outweigh the testimony of both subscribing witnesses? It is true that five years have passed since the transaction, and all testimony in respect to details which were then thought to be of only ordinary importance must be received with caution. The present relations which one of these witnesses has with the caveator must also be taken into account. With due consideration of all these conditions, I am constrained to the belief that the testator did not make known to the witnesses that the paper they then attested was his will." *In re Clark's Will* (N. J.), 52 Atl. 222.

52. *Illinois*. — *Mead v. Presbyterian Church*, 229 Ill. 526, 82 N. E. 371; *In re Estate of Kohley*, 200 Ill. 189, 65 N. E. 699.

*Minnesota*. — *Hennes v. Hennes*, 81 Minn. 30, 83 N. W. 439.

*Nebraska*. — *In re Robertson's Estate*, 109 N. W. 506.

*New York*. — *In re Duffy's Will*, 127 App. Div. 174, 111 N. Y. Supp. 491; *In re Schweigert's Will*, 17 Misc. 186, 40 N. Y. Supp. 979; *In re Sanderson's Will*, 9 Misc. 574, 30 N. Y. Supp. 848; *Matter of Kellum*, 52 N. Y. 517; *Rugg v. Rugg*, 83 N. Y. 592; *Matter of Pepon*, 91 N. Y. 255; *Rolla v. Wright*, 2 Dem. 482; *In re Wright's Estate*, 67 How. Pr. 117; *Orser v. Orser*, 24 N. Y. 51; *Brown v. Clark*, 77 N. Y. 369.

Where the attestation clause recites a signing in the presence of the witnesses, the fact that the witnesses themselves do not remember

the fact is immaterial. *In re Alpaugh's Will*, 23 N. J. Eq. 507.

A finding that a will dated eighteen years before the testator's death was duly executed is properly made where the attestation clause contains a recital or compliance with all the statutory formalities, although one attesting witness is dead and the other does not remember the circumstances. *In re Brissell's Will*, 16 App. Div. 137, 45 N. Y. Supp. 122.

53. *England*. — *Wyatt v. Berry*, 62 L. J., P. 28, (1893) P. 5, 1 R. 462, 68 L. T. 416; *Wright v. Rogers*, L. R. 1 P. 678, 21 L. T. 156, 17 W. R. 833; *Glover v. Smith*, 57 L. T. 60, 50 J. P. 456.

*Illinois*. — *Thompson v. Owen*, 174 Ill. 229, 51 N. E. 1046, 45 Am. St. Rep. 682.

*New Jersey*. — *Matter of Alpaugh's Will*, 23 N. J. Eq. 507.

*New York*. — *Lewis v. Lewis*, 11 N. Y. 220; *Woolley v. Woolley*, 95 N. Y. 231; *Burke v. Nolan*, 1 Dem. 436; *In re Duffy's Will*, 51 Misc. 543, 101 N. Y. Supp. 974; *In re Nash's Will*, 76 App. Div. 212, 78 N. Y. Supp. 449.

*Ohio*. — *Haynes v. Haynes*, 33 Ohio St. 598, 31 Am. Rep. 579.

*Oregon*. — *In re Mendenhall's Will*, 43 Or. 542, 72 Pac. 318, 73 Pac. 1033; *Skinner's Will*, 40 Or. 571, 62 Pac. 523, 67 Pac. 951.

*Pennsylvania*. — *Vernon v. Kirk*, 30 Pa. St. 218.

In *Adams v. Rodman*, 102 Wis. 456, 78 N. W. 588, 759, the testimony of two of the subscribing witnesses that the statutory formalities were not complied with was held under the circumstances of the case to outweigh the formal attestation clause, although drawn by the deceased subscribing witness, who was also an attorney.

Where Subscribing Witnesses Dis-

by the surrounding circumstances or the testimony of other witnesses.<sup>54</sup>

(3.) **Reading by Witnesses.**—There is no requirement that the attestation clause should be read by the subscribing witnesses before signing, and failure to prove affirmatively that it was read by them does not affect the general presumption;<sup>55</sup> but it has been held that where it expressly appears that it was not read over to or by them no probative force will be given to the clause.<sup>56</sup>

(4.) **Weight.**—There is no doubt but that the attestation clause is persuasive evidence<sup>57</sup> of the facts recited in it, and stands in the place of affirmative evidence of such facts.<sup>58</sup> Strong evidence is required to overcome its recitals,<sup>59</sup> though it has been said that it

agree the attestation clause will justify a finding in favor of due execution of the will. *In re Berdan's Will*, 65 N. J. Eq. 681, 55 Atl. 728; *In re Sandman's Will* (N. J.), 68 Atl. 754; *Matter of Bernsee*, 141 N. Y. 389, 36 N. E. 314; *McCurdy v. Neall*, 42 N. J. Eq. 333, 7 Atl. 566; *In re Stillman's Estate*, 9 N. Y. Supp. 446; *In re Bedell's Will*, 12 N. Y. Supp. 96; *O'Meagher v. O'Meagher*, 11 L. R. Ir. 117.

54. *Underwood v. Thurman*, 111 Ga. 325, 36 S. E. 788; *In re Van Houten's Will*, 15 Misc. 196, 37 N. Y. Supp. 39; *Matter of Cottrell's Will*, 95 N. Y. 329 (New York Code Civ. Proc. § 2620); *Connell v. Connell*, 4 Ont. W. R. 360.

The execution of a will may be proved by the attestation clause and the surrounding circumstances, although denied by the attesting witnesses. *In re Estate of Hill*, 34 Nova Scotia 494.

"It would seem from the language of the Code that proof of the handwriting of the testator, and of the subscribing witnesses, to a proper attestation clause, was regarded as the most important and conclusive fact on the trial of an issue as to a proper execution of a will. Such evidence, in connection with other circumstances tending to prove its due execution, would seem, within all the authorities, to justify a decree admitting it to probate, even against the positive evidence of the subscribing witnesses." *Matter of Cottrell's Will*, 95 N. Y. 329.

**Mere Lapse of Time Enough.**—*In*

*re Tredwell's Will*, 58 Misc. 103, 110 N. Y. Supp. 764.

55. *In re Foley's Will*, 55 Misc. 162, 106 N. Y. Supp. 474.

"The force of this legal presumption would, in my view, be greatly lessened, were it clearly proved that the attestation clause was not read to the witnesses. But even then, we are to intend (unless shown to be otherwise) that the witnesses understood what they were signing, and perhaps if they did not read that clause, after the lapse of ten years, if the witnesses do not remember the manner of execution, the maxim *omnia praesumuntur recte et solemniter esse acta* applies." *Butler v. Benson*, 1 Barb. (N. Y.) 526.

56. *In re Balmforth's Will*, 60 Misc. 492, 113 N. Y. Supp. 934; *In re Hitchler's Will*, 25 Misc. 365, 55 N. Y. Supp. 642.

"Where the attestation clause was not read to or by the witnesses, as in this case, and where one fails to recollect publication and the other testifies positively against it, I think the will should be refused probate, although another person present testify to such publication, but fails to show that it could have been heard by the witnesses." *M'Cord v. Lounsbury*, 5 Dem. (N. Y.) 68.

57. *In re Nelson's Will*, 141 N. Y. 152, 36 N. E. 3.

58. *In re Gillmor's Will*, 117 Wis. 302, 94 N. W. 32.

59. *Adams v. Rodman*, 102 Wis. 456, 78 N. W. 588, 759 (such presumption should prevail unless overcome by clear and satisfactory evi-

is not equivalent to the testimony of a credible living witness.<sup>60</sup>

(5.) **Incomplete Clause.**—Since no attestation clause is required for the validity of a will, the failure of the clause to recite a compliance with all of the statutory requirements of due execution should be immaterial, and this is the general rule. It follows that in those jurisdictions in which a presumption of regularity of execution is applied in the entire absence of an attestation clause, the same proof may be made of the fact omitted from the clause,<sup>61</sup> while in those jurisdictions in which no such presumption ever arises affirmative evidence must be introduced.<sup>62</sup>

(6.) **Attestation Clause as Memorandum.**—The attestation clause cannot be used by a subscribing witness to refresh his recollection as to what occurred at the time.<sup>63</sup>

**3. Declarations.**—A. OF TESTATOR.—Declarations of the testator are admissible in corroboration<sup>64</sup> of other evidence, to show the execution of a will.<sup>65</sup> While there are decisions to the contrary

dence); *Wright v. Rogers*, 38 L. J., P. 67, L. R. 1 P. 678, 21 L. T. 156, 17 W. R. 833; *In re Berdan's Will*, 65 N. J. Eq. 681, 55 Atl. 728; *In re Gillmor's Will*, 117 Wis. 302, 94 N. W. 32.

60. "It is clear, that the certificate of attestation is not equivalent to the testimony of the living witness. If equivalent, it should have equal weight as against conflicting testimony; a force which cannot reasonably be attributed to it. The statute makes it evidence; but it is evidence of a secondary and inferior nature, which is received from the necessity of the case." *Orser v. Orser*, 24 N. Y. 51.

61. *Deupree v. Deupree*, 45 Ga. 415; *Kelly v. Moore*, 22 App. Cas. (D. C.) 9; *In re Schweigert's Will*, 17 Misc. 186, 40 N. Y. Supp. 979.

Failure of a subscribing witness to recollect whether all of the statutory formalities were complied with will not defeat the probate of a will which appears on its face to be complete, although the attestation clause is lacking in some particulars. *In re Tyler's Estate*, 121 Cal. 405, 53 Pac. 928.

**Attesting Witnesses May Supplement Recitals.**—The subscribing witnesses may be permitted to testify that they subscribed the will in the presence of the testator, whether the attestation clause so states or not. *Lucas v. Parsons*, 24 Ga. 640, 71 Am. Dec. 147.

62. *In re Beggans' Will*, 68 N. J. Eq. 572, 59 Atl. 874; *Ayres v. Ayres*, 43 N. J. Eq. 565, 12 Atl. 621; *Schofield v. Thomas*, 236 Ill. 417, 86 N. E. 122.

63. *Butler v. Benson*, 1 Barb. (N. Y.) 526.

64. *Lane v. Hill*, 68 N. H. 275, 44 Atl. 393, 73 Am. St. Rep. 591; *Beadle's v. Alexander*, 9 Baxt. (Tenn.) 604.

65. *Walton v. Kendrick*, 122 Mo. 504, 27 S. W. 872, 25 L. R. A. 701; *In re Young*, 27 Ont. Rep. 698; *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151, 110 Am. St. Rep. 431, 62 L. R. A. 383; *Clark v. Turner*, 50 Neb. 290, 69 N. W. 843, 38 L. R. A. 433; *Howell v. Barden*, 14 N. C. (3 Dev. L.) 442; *Geraghty v. Kilroy*, 103 Minn. 286, 114 N. W. 838.

Where the subscribing witnesses are dead, other evidence of the execution of the will is admissible; and the fact that the deceased upon examination of the instrument and the signature thereto declared it his will is convincing evidence of its execution by him. *Scott v. Hawk*, 105 Iowa 467, 75 N. W. 368.

A declaration by the testator to the effect that he had made a will with a similar devise to the one offered in evidence is admissible to prove the execution of the will. *Adams v. Norris*, 23 How. (U. S.) 353.

**Theories Stated.**—“Two theories

most of these cases<sup>66</sup> must be taken as merely holding that such declarations are never of themselves sufficient proof of execution.<sup>67</sup>

**B. OF DECEASED SUBSCRIBING WITNESS.**—The declarations of a deceased subscribing witness tending to show the due execution of a will are inadmissible.<sup>68</sup> But statements made under oath at a

for the admission of the testator's declarations touching his will have been advanced. The first is that they constitute an exception to the hearsay rule. This theory has been applied in a limited way in this state. *Lane v. Hill*, 68 N. H. 275, 44 Atl. 393, 73 Am. St. Rep. 591. The second theory is that the declarations show present state of mind, that on the doctrine of continuity the past state of mind can be inferred from the present one, and that the past act may be inferred from the state of mind at the time the act was done. 3 Wig. Ev. §1736. The latter theory is contrary to the recent decision of this court. *Stevens v. Stevens*, 72 N. H. 360, 56 Atl. 916." *Managle v. Parker* (N. H.), 71 Atl. 637.

**Holographic Will.**—Succession of Morvant, 25 La. Ann. 207.

**New York.**—*In re Leaird's Will*, 58 Misc. 477, 111 N. Y. Supp. 631; *In re Briggs' Will*, 47 App. Div. 47, 62 N. Y. Supp. 294; *Matter of Foley*, 55 Misc. 162, 106 N. Y. Supp. 474; *In re Nelson's Will*, 141 N. Y. 157, 36 N. E. 3; *In re Oliver's Will*, 13 Misc. 466, 34 N. Y. Supp. 706. But see *In re Lawlor's Will*, 86 App. Div. 527, 83 N. Y. Supp. 726.

**66. England.**—*Eyre v. Eyre*, L. R. (1903) P. D. 131.

**Arkansas.**—*Leslie v. McMurtry*, 60 Ark. 301, 30 S. W. 33.

**Illinois.**—*Schofield v. Thomas*, 236 Ill. 417, 86 N. E. 122 (declarations of the testatrix that she intended to make a will in favor of a certain person and that she had executed such a will, are irrelevant).

**Indiana.**—*Hayes v. West*, 37 Ind. 21 (declarations of a testator, made at any other time than when engaged in the execution of his will, are not to be considered by a jury except upon the question of mental capacity).

**Missouri.**—*Wells v. Wells*, 144

Mo. 198, 45 S. W. 1095 (statements of testatrix that she never made a will never admissible as evidence that she did not make the will in question).

**New Jersey.**—*Boylan v. Meeker*, 28 N. J. L. 274.

**West Virginia.**—*LaRue v. Lee*, 63 W. Va. 388, 60 S. E. 388 (declarations manifesting the existence of the will are not competent to show that the testator never had made the will in question).

"Declarations that the declarant has made a will not only want that guaranty for their truth on which the rule admitting evidence of declarations is based, but, of all kinds of declarations relating to important subjects, none are more unreliable than declarations concerning wills." *Mercer's Admr. v. Mackin*, 14 Bush (Ky.) 434.

"As with deeds so with wills—the parties making them cannot invalidate them by their own parol declarations made previously or subsequently. *Dickie v. Carter*, 42 Ill. 376. And see *Gibson v. Gibson*, 24 Mo. 227.

**67. Mealing v. Pace**, 14 Ga. 596, 636; *Atkinson v. Morris*, 66 L. J., P. 17, L. R. (1897) P. 40, 75 L. T. 440. 45 W. R. 293, (declarations by a testator to the effect that he has executed a will are inadmissible in substitution for the proper and regular evidence of the fact of execution); *Beaty v. Beaty*, 1 Addams 154, 5 Eng. Ecc. Rep. 60; *Mercer's Admr. v. Mackin*, 14 Bush (Ky.) 434; *Tynam v. Paschal*, 27 Tex. 286, 84 Am. Dec. 610.

**68. Collins v. Nichols**, 5 Har. & J. (Md.) 400; *Collins v. Elliott*, 5 Har. & J. (Md.) 1; *Morell v. Morell*, 157 Ind. 179, 60 N. E. 1092.

In *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144, the declarations of a deceased subscribing witness were given in evidence to prove the due execution of the will.

previous hearing have been admitted where the presence of the witness could not be obtained.<sup>69</sup>

C. OF OTHER PERSONS. — The declarations of persons other than the testator or the subscribing witnesses are inadmissible.<sup>70</sup>

4. **Attesting Witnesses.** — A. IN GENERAL. — The subject of attesting witnesses, in general, will be found discussed elsewhere in this work,<sup>71</sup> and many of the cases there cited will be found to be will cases. The discussion at this point will therefore be limited strictly to matters arising where the execution of a will is in question.

B. NUMBER REQUIRED TO PROVE WILL. — a. *In England.* — Under the early English practice the testimony of but one of the subscribing witnesses to a will was sufficient to establish the will at common law and the others were not required to be called,<sup>72</sup> and such is the rule at the present time.<sup>73</sup>

In Chancery and in the Ecclesiastical Courts, however, it was necessary to call all of the witnesses.<sup>74</sup>

69. *Gornall v. Mason*, 56 L. J., P. 86, 12 P. D. 142, 57 L. T. 601, 35 W. R. 672.

By Connecticut Gen. Stat. § 545, it is provided that if any of the attesting witnesses make affidavit to the effect that all the statutory requirements were complied with, such affidavit shall be accepted by the court of probate as if it had been taken before the court, and such a modification of the common law procedure does not violate the right of trial by jury and is constitutional. *In re Vivian's Appeal*, 74 Conn. 257, 50 Atl. 797.

70. *In re Murray's Will*, 141 N. C. 588, 54 S. E. 435.

71. See article "WRITTEN INSTRUMENTS."

72. "In England, the statute of 29 Charles 2, is substantially the same as ours, and there it has always been held, that one witness who could swear to the execution of the will by the testator, and that he subscribed the will, and also prove its attestation by the other subscribing witnesses, is sufficient proof of the due execution of the will, in a court of common law. (*Longford v. Eyre*, 1 P. Will. 741; see the authorities collected in 3 C. & H. of Phill. on Ev. 1349.) The same rule obtains in Chancery, where the direct object of the will, is not to establish the will, but it is offered as an instrument of evidence. (*Concannon v. Cruise*, 2

*Molloy*, 332). When however the bill is filed for probate of the will, or when an issue is directed out of Chancery, to ascertain whether the will was duly executed, all the witnesses, if alive and within the jurisdiction of the court, must be produced, or their absence accounted for. If the witness is dead, out of the kingdom, insane, or has become incompetent to testify, his handwriting may be proved. (See *Powell v. Cleaver*, 2 Bro. C. C. 504; *Carrington v. Payne*, 5 Vesey, 411; *Burnett v. Taylor*, 9 Id. 381.) In the United States, there have been a great number of decisions to the same effect." *Bowling v. Bowling*, 8 Ala. 538.

73. "There is no doubt that at common law it was necessary to call the witness to a document in order to prove its execution. The Common Law Procedure Act of 1854 (2), s. 26, altered the rule to this extent — that a witness to a document, which does not by law require a witness, need not be called in order to prove it; but whenever a document is required by law to be attested, one of the attesting witnesses must still be called." *Bowman v. Hodgson*, 36 L. J. P. 124, L. R. 1 P., 362, 16 L. T. 392.

74. *Ogle v. Cook*, 1 Ves. Sr. 177, 27 Eng. Reprint 967; *Hudson v. Kersey*, 4 Burn Ecc. L. (Eng.) 102; *Bootle v. Blundell*, 19 Ves. 494, 34 Eng. Reprint 600; *Walker v. Hun-*

**b. In United States.** — (1.) **Rule That All Must Be Called.** — In a few jurisdictions it is held that where there is a contest over a will,<sup>75</sup> all of the subscribing witnesses must be produced<sup>76</sup> where they are alive, within the jurisdiction of the court and otherwise competent.<sup>77</sup>

(2.) **One Witness Sufficient.** — In most of the states, however, the proponent is required to call but one of the attesting witnesses,<sup>78</sup>

ter, 17 Ga. 364; *Johnston v. Glasscock*, 2 Ala. 218.

75. If no person appears to contest the probate of a will it may be probated on the testimony of one of the subscribing witnesses. *Dean v. Dean's Heirs*, 27 Vt. 726; *Chase v. Lincoln*, 3 Mass. 236; *Sears v. Dillingham*, 12 Mass. 358; *Barney v. Chittenden*, 2 G. Gr. (Iowa) 165 (Iowa Rev. Stat. p. 668, par. 13).

76. *Alabama*. — *Bowling v. Bowling*, 8 Ala. 538.

*Delaware*. — *Rash v. Rash*, 2 Har. 448.

*Massachusetts*. — *Chase v. Lincoln*, 3 Mass. 236; *Howes v. Colburn*, 165 Mass. 385, 43 N. E. 125.

*Mississippi*. — *Ragland v. Green*, 14 Smed. & M. 194; *Evans v. Evans*, 10 Smed. & M. 402.

*Montana*. — *Farleigh v. Kelley*, 28 Mont. 421, 72 Pac. 756.

*New York*. — *Jackson v. Vickory*, 1 Wend. 406, 19 Am. Dec. 522 (but see *New York* cases in succeeding section).

*Tennessee*. — *M'Donald v. M'Donald*, 5 Yerg. 307.

*Vermont*. — *Thornton v. Thornton*, 39 Vt. 122.

**Issue Arising in Equity.** — *Bailey v. Stiles*, 2 N. J. Eq. 220; *Chapman v. Rodgers*, 12 Hun (N. Y.) 342.

"As the statute expressly requires, that there should be three witnesses to every will to pass lands; consequently, they should be produced, if alive, or within the jurisdiction of the court; if not, then their handwritings should be proved; for if only the handwritings of two of them are proved, it does not come up to the meaning and intent of the statute." *Hopkins v. Albertson*, 2 Bay (S. C.) 484.

**In Connecticut.** — Where the issue involves the question of the testatrix's capacity the heir is entitled to insist that the proponent call all of the subscribing witnesses who may be reached, but this right may be

waived by him. *Field's Appeal*, 36 Conn. 277.

**In Georgia** all the witnesses must be produced where probate in solemn form is sought. *Brown v. McBride*, 129 Ga. 92, 58 S. E. 702; *Gillis v. Gillis*, 96 Ga. 1, 23 S. E. 107; *Evans v. Arnold*, 52 Ga. 169.

**In New Hampshire.** — "Whether the executor is or is not bound by a general and inflexible rule of law to call the subscribing witnesses on issues of insanity and undue influence, the usage of requiring him to call them before reading the will is a practice which there is no occasion to discontinue and should not be departed from without good reason." *Whitman v. Morey*, 63 N. H. 448, 2 Atl. 899 (the issue being the due execution of a will).

**Where More Than Required Number Attested the Will.** — See *O'Connell v. Dow*, 182 Mass. 541, 66 N. E. 788.

77. *Patten v. Tallman*, 27 Me. 17 (one of the subscribing witnesses was the judge before whom the will was offered for probate and was excused); *Thornton v. Thornton*, 39 Vt. 122; *Sears v. Dillingham*, 12 Mass. 358.

78. *Connecticut*. — *Field's Appeal*, 36 Conn. 277 (they must all be called to prove capacity of testator).

*Georgia*. — *Walker v. Hunter*, 17 Ga. 364.

*Illinois*. — *Slingloff v. Bruner*, 174 Ill. 561, 51 N. E. 772; *In re Page*, 118 Ill. 576, 8 N. E. 852, 59 Am. Rep. 395 (but see *Illinois* cases cited in note 81).

*Indiana*. — *Hayes v. West*, 37 Ind. 21.

*Kentucky*. — *Hall v. Sims*, 2 J. J. Marsh. 509; *Turner v. Turner*, 1 Litt. 101; *Lindsay's Heirs v. M'Cormack*, 2 A. K. Marsh. 229, 12 Am. Dec. 387; *Harper v. Wilson*, 2 A. K. Marsh. 811; *Griffith's Exr. v. Griffith*, 5 B. Mon. 511; *Overall v. Overall*, Litt. Sel. Cas. 501.

provided his testimony is sufficient to prove due execution.<sup>79</sup> Failure to produce the other subscribing witness is sometimes regarded as a suspicious circumstance.<sup>80</sup>

By Statute in some states two of the witnesses must be called.<sup>81</sup>

C. ADMISSIBILITY OF OTHER EVIDENCE. — a. *In General*. — Ex-

*Louisiana*. — *Boutheny v. Drew*, 10 Mart. (O. S.) 639.

*Missouri*. — *Lorts v. Wash*, 175 Mo. 487, 75 S. W. 95.

*New Jersey*. — *Ward v. Wilcox*, 64 N. J. Eq. 303, 51 Atl. 1094, *affirmed*, 65 N. J. Eq. 397, 54 Atl. 1125; *Den. ex dem Mickle v. Matlack*, 17 N. J. L. 86 (ejectment).

*New York*. — *In re Briggs' Will*, 47 App. Div. 47, 62 N. Y. Supp. 294.

*South Carolina*. — *Kaufman v. Caughman*, 49 S. C. 159, 27 S. E. 16.

*Virginia*. — *Johnson v. Dunn*, 6 Gratt. 625; *Bruce v. Shuler*, 108 Va. 670, 62 S. E. 973; *Lamberts v. Cooper*, 29 Gratt. 61; *Cheatham v. Hatcher*, 30 Gratt. 58, 32 Am. Rep. 650; *Jesse v. Parker's Admr.*, 6 Gratt. 57.

*West Virginia*. — *Webb v. Dye*, 18 W. Va. 376.

*Wisconsin*. — *In re Jones' Will*, 96 Wis. 427, 70 N. W. 685, 71 N. W. 883.

**Reason for Rule.** — See *Trustees of Auburn Sem. v. Calhoun*, 25 N. Y. 422.

<sup>79.</sup> *Jackson v. LeGrange*, 19 Johns. (N. Y.) 386; *Coles v. Coles*, 35 L. J., P. 40, L. R. 1 P. 70, 13 L. T. 608, 14 W. R. 290. And see *Stephenson v. Stephenson*, 6 Tex. Civ. App. 529, 25 S. W. 649, *distinguishing* *Heist v. Universalist Convention*, 76 Tex. 514.

**Presumption That the One Witness Sufficiently Proved Execution.** See *Cornelison v. Browning*, 10 B. Mon. (Ky.) 425; *Crusoe v. Butler*, 36 Miss. 150.

<sup>80.</sup> *Rugg v. Wilton*, 13 Ill. 15, 54 Am. Dec. 419. And See *Craig v. Craig*, 156 Mo. 358, 56 S. W. 1097.

Although the production of all of the subscribing witnesses is only inferentially required, the failure to produce such witnesses in the probate court or on appeal, if the witnesses were within the jurisdiction,

would be a very suspicious omission which should have its weight. *Abbott v. Abbott*, 41 Mich. 540, 2 N. W. 810.

<sup>81.</sup> *Colorado*. — *In re Shapter's Estate*, 35 Colo. 578, 85 Pac. 688.

*Illinois*. — *Hill v. Kehr*, 228 Ill. 204, 81 N. E. 848; *Crowley v. Crowley*, 80 Ill. 469; *Senn v. Gruendling*, 218 Ill. 458, 75 N. E. 1020; *Greene v. Hitchcock*, 222 Ill. 216, 78 N. E. 614.

*New York*. — *In re Sizer's Will*, 129 App. Div. 7, 113 N. Y. Supp. 210; *Graber v. Haaz*, 2 Dem. 216 (New York Code Civ. Proc., par. 2618); *In re Stewart's Will*, 59 Hun 618, 13 N. Y. Supp. 219; *Upton v. Bernstein*, 76 Hun 516, 27 N. Y. Supp. 1078.

*Tennessee*. — *Johnson v. Fry*, 4 Coldw. 101. And see *Franklin v. Franklin*, 90 Tenn. 44, 16 S. W. 557; *Bartee v. Thompson*, 8 Baxt. 508.

**In North Carolina** the early practice was to allow proof of the will in common form to be made upon the testimony of one of the subscribing witnesses only. *Blount v. Patton*, 9 N. C. (2 Hawks) 237; *Jenkins v. Jenkins*, 96 N. C. 254, 2 S. E. 522. But under the modern practice and law the testimony of both of the subscribing witnesses must be produced. *In re Thomas*, 111 N. C. 409, 16 S. E. 226; *Steadman v. Steadman*, 143 N. C. 345, 55 S. E. 784 (Rev. Code, ch. 119, § 15).

**In Pennsylvania** proof of execution must be made by two witnesses; and where circumstantial proof is relied on it cannot be made by the two witnesses alternating with each other as to the different parts of the aggregate of circumstances which are to make up the necessary sum of proof, since the evidence of each witness must go to the whole. *Derr v. Greenawalt*, 76 Pa. St. 239; *Scott's Estate*, 147 Pa. St. 89, 23 Atl. 212, 30 Am. St. Rep. 713; *Carson's Appeal*, 59 Pa. St. 493; *Mullen v. McKelvy*, 5 Watts 399; *Hock v.*

cept in Illinois<sup>82</sup> there are no statutory provisions limiting the evidence of execution to that given by attesting witnesses,<sup>83</sup> and other evidence is admissible to aid in proving execution or to rebut the evidence already admitted<sup>84</sup> since it is well established that the proof of due execution does not depend upon the mere recollection of the subscribing witnesses,<sup>85</sup> or their honesty and truthfulness in testifying.<sup>86</sup>

b. *Concurrence of Attesting Witnesses.*—There is no requirement that the testimony of each attesting witness must by itself prove the proper execution of the will.<sup>87</sup>

Hock, 6 Serg. & R. 47; Dunn's Estate, 14 Pa. Co. Ct. 584. And see Reynolds v. Reynolds, 16 Serg. & R. 82. But these witnesses need not be subscribing witnesses, and in fact no subscribing witnesses are required (Carson's Appeal, 59 Pa. St. 493; Michell v. Low, 213 Pa. St. 526, 63 Atl. 246; Ginder v. Farnum, 10 Pa. St. 98), except as to wills devising property for religious purposes. *In re Phillips' Estate*, 11 Pa. Co. Ct. 500.

82. *In Illinois.*—On the hearing in the probate court evidence is properly confined to the testimony of the two attesting witnesses. Gould v. Theological Sem., 189 Ill. 282, 59 N. E. 536; Illinois Masonic Orphans' Home v. Gracy, 190 Ill. 95, 60 N. E. 194. But if the will cannot be proved by them, resort may be had to a bill in chancery, where extrinsic evidence is admitted.

83. Gwinn v. Radford, 2 Litt. (Ky.) 137; Hopf v. State, 72 Tex. 281, 10 S. W. 589; *In re Graham's Will*, 56 Hun 640, 9 N. Y. Supp. 122.

84. *England.*—Lowe v. Jolliffe, 1 Bl. 365.

*Alabama.*—Barnewall v. Murrell, 108 Ala. 366, 18 So. 831; Hall v. Hall, 38 Ala. 131.

*Colorado.*—*In re Shapter's Estate*, 35 Colo. 578, 85 Pac. 688.

*Georgia.*—Gillis v. Gillis, 96 Ga. 1, 23 S. E. 107.

*Maine.*—Barnes v. Barnes, 66 Me. 286.

*Michigan.*—Abbott v. Abbott, 41 Mich. 540, 2 N. W. 810.

*Missouri.*—Morton v. Heidorn, 135 Mo. 608, 37 S. W. 504; Mays v. Mays, 114 Mo. 536, 21 S. W. 921; Holmes v. Holloman, 12 Mo. 535.

*New York.*—Jauncey v. Thorne, 2 Barb. Ch. 40; Orser v. Orser, 24 N. Y. 51; Nelson v. McGiffert, 3

Barb. Ch. 158; Peck v. Cary, 27 N. Y. 9, 84 Am. Dec. 220; *In re Purdy's Will*, 25 Misc. 458, 55 N. Y. Supp. 644; Rugg v. Rugg, 83 N. Y. 592; *In re Nelson's Will*, 141 N. Y. 152, 36 N. E. 3; Reeve v. Crosby, 3 Redf. 74; Butler v. Benson, 1 Barb. 526.

*North Carolina.*—Bell v. Clark, 31 N. C. (9 Ired. L.) 239.

*Virginia.*—Dudleys v. Dudleys, 3 Leigh 436; Clarke v. Dunnivant, 10 Leigh 13; Jesse v. Parker, 6 Gratt. 57; Spencer v. Moore, 4 Call 423.

85. *Alabama.*—Hall's Heirs v. Hall's Exr., 38 Ala. 131; Barnewall v. Murrell, 108 Ala. 366, 18 So. 831.

*California.*—*In re Johnson's Estate*, 152 Cal. 778, 93 Pac. 1015; *In re Tyler's Estate*, 121 Cal. 405, 53 Pac. 928.

*Maine.*—Barnes v. Barnes, 66 Me. 286.

*Massachusetts.*—Eliot v. Eliot, 10 Allen 357; Tilden v. Tilden, 13 Gray 110.

*New York.*—Jackson v. LeGrange, 19 Johns. 386; Lewis v. Lewis, 11 N. Y. 220; Rugg v. Rugg, 83 N. Y. 592; Brown v. Clark, 77 N. Y. 369.

*Ohio.*—Haynes v. Haynes, 33 Ohio St. 598, 31 Am. Rep. 579.

*Oregon.*—Mendenhall's Will, 43 Or. 542, 72 Pac. 318, 73 Pac. 1033; Skinner v. Lewis, 40 Or. 571, 67 Pac. 951.

*Pennsylvania.*—Kirk v. Carr, 54 Pa. St. 285.

*South Carolina.*—Gable v. Rauch, 50 S. C. 95, 27 S. E. 555.

*Vermont.*—Dean v. Dean's Heirs, 27 Vt. 746.

*Virginia.*—Clarke v. Dunnivant, 10 Leigh 13.

86. Hopf v. State, 72 Tex. 281, 10 S. W. 589; Holmes v. Holloman, 12 Mo. 535.

87. Jauncey v. Thorne, 2 Barb.



c. *Circumstantial Evidence*.—The circumstances surrounding the execution of the will are admissible in evidence and may serve to establish or refute due execution,<sup>88</sup> even in the very face of the testimony of the subscribing witnesses.<sup>89</sup>

D. HANDWRITING OF WITNESS. — a. *When Provable*. — (1.) *In General*.—The handwriting of a subscribing witness may be proved<sup>90</sup> when it is shown that he is dead, insane, incompetent, non-

Ch. (N. Y.) 40; *In re Shapter's Estate*, 35 Colo. 578, 85 Pac. 688; *Welch v. Welch*, 9 Rich. L. (S. C.) 133.

"Where the Testator Subscribes or Acknowledges His Subscription Before the Witnesses Separately, and their attestation is, at different times, so that each witness can only testify as to his own share in the transaction, each must prove the perfect execution of the will." *Rogers v. Diamond*, 13 Ark. 474.

In Illinois, two of the subscribing witnesses must be called and the fact that the testimony of one only of the subscribing witnesses to a will meets the requirements of the statute is not sufficient, if the testimony of the other subscribing witness fails to cover one of the essential facts required to be established by the statute. *Hill v. Kehr*, 228 Ill. 204, 81 N. E. 848.

<sup>88.</sup> *Canada*.—*Crawford v. Curragh*, 15 U. C. C. P. 55.

*Alabama*.—*Woodroof v. Hundley*, 133 Ala. 395, 32 So. 570.

*Maine*.—*Barnes v. Barnes*, 66 Me. 286.

*New York*.—*Lewis v. Lewis*, 11 N. Y. 220; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *In re Wilcox's Will*, 59 Hun 627, 14 N. Y. Supp. 109; *In re Briggs' Will*, 47 App. Div. 47, 62 N. Y. Supp. 294.

*Tennessee*.—*Alexander v. Beadle*, 7 Coldw. 126.

*Vermont*.—*Dean v. Dean's Heirs*, 27 Vt. 746; *In re Clafin's Will*, 73 Vt. 129, 50 Atl. 815, 87 Am. St. Rep. 693.

The identity and integrity of the instrument executed and possession by the testatrix may be essential elements in such proof. *Smith's Estate*, 2 Pa. Co. Ct. 626.

<sup>89.</sup> *England*.—*Wright v. Sander-son*, 53 L. J., P. 49, 9 P. D. 149, 50 L. T. 769, 32 W. R. 560; *Wright v. Rogers*, 38 L. J., P. 67, L. R. 1

P. 678, 21 L. T. 156, 17 W. R. 833. *Colorado*.—*In re Shapter's Estate*, 35 Colo. 578, 85 Pac. 688.

*New York*.—*Trustees of Auburn Sem. v. Calhoun*, 25 N. Y. 422; *Jauncey v. Thorne*, 2 Barb. Ch. 40; *Peebles v. Case*, 2 Bradf. 226; *In re Sizer's Will*, 129 App. Div. 7, 113 N. Y. Supp. 210; *In re Duffy's Will*, 51 Misc. 543, 101 N. Y. Supp. 974. *Ohio*.—*In re Stacey*, 6 Ohio Dec. 501.

*South Carolina*.—*Pearson v. Wightman*, 1 Mill. 336.

*Wisconsin*.—*Will of Jenkins*, 43 Wis. 610; *Will of Meurer*, 44 Wis. 392.

"Even if the subscribing witnesses all swear that the will was not duly executed, the devisee may, notwithstanding, go into other evidence to prove its due execution. In all cases, however, where the witnesses clash in their statements, or deny their attestations, the evidence in favor of the will must be clear and full to substantiate it." *Rose v. Allen*, 1 Coldw. (Tenn.) 23. And see *Butler v. Benson*, 1 Barb. (N. Y.) 526.

<sup>90.</sup> *United States*.—*Robertson v. Pickrell*, 109 U. S. 608.

*Alabama*.—*Snider v. Burks*, 84 Ala. 53, 4 So. 225.

*District of Columbia*.—*Kelly v. Moore*, 22 App. Cas. 9.

*Iowa*.—*Allison v. Allison*, 104 Iowa 130, 73 N. W. 489; *Scott v. Hawk*, 107 Iowa 723, 77 N. W. 467.

*Maine*.—*Barnes v. Barnes*, 66 Me. 286.

*Massachusetts*.—*Nickerson v. Buck*, 12 Cush. 332, 344; *Ella v. Edwards*, 16 Gray 91.

*New York*.—*Jauncey v. Thorne*, 2 Barb. Ch. 40; *Lawrence v. Norton*, 45 Barb. 448.

*South Carolina*.—*Sampson v. White*, 1 McCord 74; *Hopkins v. Degraffenried*, 2 Bay 187.

resident,<sup>91</sup> or otherwise inaccessible.<sup>92</sup> The fact that the deposition of the witness could have been taken does not prevent proof of his handwriting.<sup>93</sup>

(2.) **One Witness Only Dead, Etc.**—The modern rule is to allow proof of the handwriting of a deceased or absent witness, although all of the other witnesses are not dead or inaccessible but could be produced in court.<sup>94</sup>

(3.) **Search for Absent Witness.**—To prove that a subscribing witness is dead, insane, inaccessible, or outside the jurisdiction of the court, the court may receive any relevant evidence<sup>95</sup> and if satisfied that a reasonably diligent search has been made,<sup>96</sup> and that he cannot be found, proof of handwriting may be admitted.

b. *How Provable.*—The method of proving the handwriting of

*Vermont.*—Dean *v.* Dean's Heirs, 27 Vt. 726.

*Virginia.*—Nallie *v.* Fenwick, 4 Rand. 585.

91. Swenarton *v.* Hancock, 22 Hun (N. Y.) 38; Harleston *v.* Corbett, 12 Rich. L. (S. C.) 604 (dead); Scott *v.* Herrell, 31 App. Cas. (D. C.) 45; Engles *v.* Bruington, 4 Yeates (Pa.) 345.

Under a statute which authorizes the handwriting of a witness who resides out of the state to be proved, it is held that mere absence of an attesting witness from the state, abroad on a journey or tour, does not authorize proof of the will by proving the handwriting of the testator and of the witness. To entitle such testimony to be given, the witness must reside out of the state. Stow *v.* Stow, 1 Redf. (N. Y.) 305.

92. Brown *v.* McBride, 129 Ga. 92, 58 S. E. 702.

93. Denny *v.* Pinney's Heirs, 60 Vt. 524, 12 Atl. 108; Allison *v.* Allison, 104 Iowa 130, 73 N. W. 489.

Although the statute authorized that the deposition of an absent witness may be taken, the proponent is not required to take it unless the testimony of the witness is absolutely necessary to prove the execution. Turner *v.* Turner, 1 Litt. (Ky.) 101.

New York Code Civ. Proc., § 2620, as amended by laws of 1888, ch. 508, which provides that where a subscribing witness is absent from the state his testimony may be taken by commission on the application of either party, is permissive and the

will may be admitted to probate without taking his testimony. Clark's Will, 75 Hun 471, 27 N. Y. Supp. 681.

When attesting witnesses are out of the jurisdiction the will may be proved by evidence of their handwriting, although the will might also be sent to them. Wilson *v.* Collum, 9 L. R. Ir. 150.

94. Snider *v.* Burks, 84 Ala. 53, 4 So. 225; Barnewall *v.* Murrell, 108 Ala. 366, 18 So. 831; Bowling *v.* Bowling, 8 Ala. 538.

95. Brown *v.* McBride, 129 Ga. 92, 58 S. E. 702.

96. Where fourteen years had elapsed since the execution of the will and it was shown that the directories of the city in which the will was executed had been searched for the name of a subscribing witness and that it could not be found, failure to produce the witness is satisfactorily accounted for. *In re Vivian's Appeal*, 74 Conn. 257, 50 Atl. 797.

The proper officer's return on a subpoena "not to be found" is sufficient evidence of their being out of the jurisdiction to let in proof of handwriting. Crockett *v.* Crockett, 19 Tenn. 95 (but it is not the only evidence of the fact).

**Witness Enticed Away by Contestant.**—See *In re Dates' Estate*, 58 Hun 608, 12 N. Y. Supp. 205.

**Thoroughness Required.**—The degree of diligence of search for the subscribing witnesses is the same which is required for a lost paper; it must be a straight, diligent and honest inquiry and search satisfactory

a testator or subscribing witness will be found fully treated elsewhere in this work.<sup>97</sup>

c. *What Signatures Must Be Proved.* — While the requirements as to what signatures must be proved vary greatly in different jurisdictions, the general rule may be said to be that it is sufficient if the handwriting of the testator and one of the attesting witnesses is proved,<sup>98</sup> although many cases hold that the handwriting of all the witnesses must be proved.<sup>99</sup> In rare instances, wills have been admitted to probate although the signatures of none of the witnesses could be established.<sup>1</sup>

d. *Weight as Evidence.* — The effect of proving the signature of a subscribing witness is to make such witness, to all intents and purposes, the same as a living witness<sup>2</sup> present in court, and the

to the court under the circumstances of the case. *Givin v. Green*, 10 Phila. (Pa.) 99. And see article "BEST AND SECONDARY EVIDENCE," Vol. II.

97. See article "HANDWRITING," Vol. VI.

98. "In all cases of contested wills, where there are subscribing witnesses, they must be produced, if to be found, within the meaning of the act of 1789. If not, evidence of their handwriting must next be resorted to. Where from the efflux of time or other circumstances, it is shown upon diligent inquiry, that the handwriting of one or more subscribing witnesses cannot be proved, that proof of the signature of one witness, and that of the testator, and lastly upon failure of proof of the signatures of all the witnesses, proof of the handwriting of the testator by two witnesses, will authorize the paper to be submitted to the jury, upon which they may find the fact of execution. In all cases depending on secondary evidence, the signature of the testator, though not absolutely essential, ought to be superadded to that of the subscribing witnesses." *Jones v. Arterburn*, 11 Humph. (Tenn.) 97.

In an *ex parte* proceeding to establish a *prima facie* will, proof of the signatures of the subscribing witnesses or proof of the signature of the testator is sufficient in Indiana. But where there is a contested issue involving not the *prima facie* but the real character of the paper, the signatures both of the testator and other subscribing witnesses must be

proved. *Morell v. Morell*, 157 Ind. 179, 60 N. E. 1092.

99. *Collins v. Nicols*, 1 Har. & J. (Md.) 399.

To prove the execution of a will it is not enough to account for the absence of the three subscribing witnesses and prove the handwriting of one only; but under such circumstances proof of the handwriting of all three of the witnesses and that of the testator should be made. *Jackson v. Luquere*, 5 Cow. (N. Y.) 221.

A will was refused probate where the sole surviving witness testified to his own and one of the other witness' signature, but did not remember the third at all. *Wooster v. Wooster*, 4 Rich. L. (S. C.) 409.

Where both of the subscribing witnesses are dead, proof of their signatures and that of the testatrix would make a *prima facie* case. *In re Tyler's Estate*, 121 Cal. 405, 53 Pac. 928.

1. Where the subscribing witnesses to a will were utter strangers to the testator and his family and could not be found, nor their handwriting proved, the court nevertheless admitted the will to probate where it appeared to be regularly executed on its face, upon the theory of a presumption that all things have been properly done. *In re Young*, 27 Ont. R. 698.

2. See *infra* E, *Farleigh v. Kelley*, 28 Mont. 421, 72 Pac. 756; *Sutton v. Sutton*, 5 Har. (Del.) 459; *Hobart v. Hobart*, 154 Ill. 610, 39 N. E. 581, 45 Am. St. Rep. 151; *Woodroof v. Hundley*, 133 Ala. 395,

weight to be given proof of his signature will vary according to the sort of person he is shown to have been.<sup>3</sup>

**E. CONTRADICTION AND IMPEACHMENT.** — *a. In General.* — A subscribing witness may be contradicted by the proponent as any other witness,<sup>4</sup> and since the law requires that he be called by the proponent, an exception to the general rule exists and the proponent is himself allowed to impeach him.<sup>5</sup> And where the handwriting of a deceased or absent subscribing witness is proved, such witness is to be treated as though present in court and may be contradicted or impeached by the contestant in accordance with the general rules governing these matters.<sup>6</sup>

32 So. 570; *Nickerson v. Buck*, 12 Cush. (Mass.) 332. And see *Hays v. Harden*, 6 Pa. St. 409.

3. "If the witness whose signature is thus proved is shown to have been an uneducated man, not accustomed to subscribe wills, and ignorant of the legal requisites to their due execution, the evidence afforded by the proof of his handwriting of a strict compliance with the requirements of the statute would be very slight. On the contrary, if the witness was in the habit of drawing and attending to the execution of wills, and familiar with the law upon the subject, his certificate that the requisite formalities were duly observed would be entitled to great weight. The evidence which such a certificate would afford would, in most cases, be sufficient to overcome the mere want of recollection of a living witness; and should the testimony of the latter amount to a positive denial, the relative weight of the conflicting proof would then depend upon the apparent integrity and intelligence of the witness and the circumstances surrounding the particular case." *Orser v. Orser*, 24 N. Y. 51.

4. If an attesting witness denies his attestation or will not swear that he saw the testator execute and publish his will, his handwriting may be proved and his testimony controverted. *Rose v. Allen*, 1 Coldw. (Tenn.) 23.

5. *Rash v. Rash*, 2 Har. (Del.) 448; *In re Moore's Will*, 109 App. Div. 762, 96 N. Y. Supp. 729, reversing 46 Misc. 537, 95 N. Y. Supp. 61; *Estate of Bogert*, 4 N. Y. Civ. Proc. 441; *Alexander v. Beadle*, 7 Coldw. (Tenn.) 126.

**Declarations of an attesting witness made out of court are admissible.** *In re Claffin's Will*, 73 Vt. 129, 50 Atl. 815, 87 Am. St. Rep. 693; *Colvin v. Warford*, 20 Md. 357; *Coles v. Coles*, L. R. 1 P. & D. (Eng.) 70.

**Testimony on Former Hearing, competent.** — *Cowden v. Reynolds*, 12 Serg. & R. (Pa.) 281; *Spoone-more v. Cables*, 66 Mo. 579.

6. *Townshend v. Townshend*, 9 Gill (Md.) 506; *Abraham v. Wilkins*, 17 Ark. 292; *Losee v. Losee*, 2 Hill (N. Y.) 609.

The effect of the statute providing for proof of the handwriting of an absent or deceased subscribing witness is to make such witness, to all intents and purposes, an active, living witness in court, giving testimony, as if under the sanctity of an oath; and it follows that in such a case the witness may be contradicted and impeached as an ordinary witness, and evidence as to his reputation for honesty and integrity is admissible. *Farleigh v. Kelley*, 28 Mont. 421, 72 Pac. 756.

**Contrary Rule in England.** — "It seems to have been determined in England, on full consideration, that where the execution of an instrument is proved by proving the handwriting of an attesting witness who is dead, it is not admissible to rebut the presumption of due execution which arises from the name of the subscribing witness having been placed on the instrument, by evidence of declarations of such subscribing witness tending to show that the instrument was a forgery. *Stobart v. Dryden*, 1 Mee. & W. 615. A contrary doctrine has been announced by several courts in the

b. *Effect*. — The sole effect which is to be given to either impeaching or contradictory evidence is to affect the credibility of the evidence; it is never allowed to operate as affirmative evidence of any fact.<sup>7</sup>

F. CROSS-EXAMINATION. — An attesting witness may be cross-examined upon the whole case.<sup>8</sup>

G. SUFFICIENCY OF TESTIMONY. — a. *Attesting Witnesses Contradicting Each Other*. — (1.) *In General*. — Where the testimony of attesting witnesses does not coincide the court will place more credit in that which tends to prove due execution, than in the opposing testimony.<sup>9</sup>

(2.) *Witness Who Contradicts Himself*. — In cases in which the testimony of the attesting witnesses is in conflict, the fact that one of them is testifying contrary to his previous declarations or testimony, justifies a finding in favor of the other.<sup>10</sup>

(3.) *Corroboration of Scrivener*. — The testimony of the scrivener<sup>11</sup> or of persons having knowledge of the facts<sup>12</sup> will sometimes determine which of two attesting witnesses is to be believed when there is contradictory testimony.

(4.) *Positive and Negative Testimony*. — It has been held that the positive testimony of one of the subscribing witnesses that the will was properly executed will prevail over the negative testimony of the other.<sup>13</sup>

(5.) *Non-Recollection of Witness*. — The non-recollection of the facts attending the execution of a will, by one witness, will not

United States. *McElwee v. Sutton*, 2 Bailey, 128; *Losee v. Losee, Exr.*, etc., 2 Hill, 609; *Reformed*, etc. v. Ten Eyck, 1 Dutch. 40; *Boyland v. Meeker*, 4 Dutch. 274; *Otterson et al v. Hofford et al*, 36 N. Y. 129; *Bott v. Wood*, 56 Miss. 136.

7. *In re Moore's Will*, 109 App. Div. 762, 96 N. Y. Supp. 729, reversing 46 Misc. 537, 95 N. Y. Supp. 61; *Stirling v. Stirling*, 64 Md. 138, 21 Atl. 273; *Thornton v. Thornton*, 39 Vt. 122, 152; *In re Claffin's Will*, 75 Vt. 19, 52 Atl. 1053, 58 L. R. A. 261.  
8. *O'Connell v. Dow*, 182 Mass. 541, 66 N. E. 788.

*Form of Interrogatory*. — An interrogatory in the deposition of a subscribing witness inquiring whether he would have signed the instrument except in the presence of the testatrix, and whether all the things mentioned in the attestation clause were complied with, is improper; as to ask a witness whether or not he would have done a certain thing except in a certain manner is mani-

festly not equivalent to inquiring of the witness whether he did do the act in that manner as it involves a mere conclusion of the witness and not a statement of a fact. *Greene v. Hitchcock*, 222 Ill. 216, 78 N. E. 614.

9. *In re Jones' Will*, 85 N. Y. Supp. 294.

*Partial Concurrence*. — See *Dayman v. Dayman*, 71 L. T. N. S. 699.

10. *Wyman v. Wyman*, 118 App. Div. 109, 103 N. Y. Supp. 64; *Senn v. Gruendling*, 218 Ill. 458, 75 N. E. 1020; *Estate of Motz*, 136 Cal. 558, 69 Pac. 294; *In re Beggans' Will*, 68 N. J. Eq. 572, 59 Atl. 874; *In re Rice's Estate*, 173 Pa. St. 298, 33 Atl. 1100.

11. *In re Menge's Will*, 13 Misc. 553, 35 N. Y. Supp. 493; *In re Cornell's Will*, 89 App. Div. 412, 85 N. Y. Supp. 920.

12. *In re Beggans' Will*, 68 N. J. Eq. 572, 59 Atl. 874.

13. *Tilden v. Tilden*, 13 Gray (Mass.) 110.

justify a finding against its execution as testified to by the other attesting witness.<sup>14</sup>

b. *Improbable Testimony*.—In some cases the improbable nature of the testimony may justify a contrary finding in regard to the facts of execution.<sup>15</sup>

H. WEIGHT OF TESTIMONY.—a. *In General*.—The testimony of subscribing witnesses is not entitled to controlling effect,<sup>16</sup> but they merely stand upon an equality with other witnesses<sup>17</sup> though their testimony is often entitled to great consideration from the fact of their superior opportunities for having knowledge of the facts.<sup>18</sup>

b. *Impeaching the Will*.—While a subscribing witness is competent to impeach the will<sup>19</sup> such testimony is received with caution and justly viewed with suspicion.<sup>20</sup>

14. *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y.) 158; *Newhouse v. Randolph*, 17 Barb. (N. Y.) 236; *M'Kee v. White*, 50 Pa. St. 354.

"The discrepancy in the testimony as to the time and place of execution of these two codicils is not sufficient to impeach their genuineness. A witness called to attest the execution of a will is prone not to have the details of the transaction indelibly impressed on his mind." *In re Dake's Will*, 98 App. Div. 629, 90 N. Y. Supp. 213.

15. Evidence of illiterate subscribing witnesses as to acts not affecting their interests when opposed to the probable acts of an educated man, no fraud being in question, is to be received with great caution. *Cooper v. Bockett*, 4 Moore P. C. 419, 13 Eng. Reprint 365.

Where one of the subscribing witnesses was dead and the other testifies that when he signed the will there was no attestation clause before the place where he signed his name, and even that there was no writing at all upon the paper which he signed except the signature of the testator and the other witness, the court felt justified from the appearance of the paper itself and from the improbability of such a state of facts in holding that the witness was mistaken, and held that the will was properly executed. *Lloyd v. Roberts*, 12 Moore P. C. 158, 14 Eng. Reprint 871.

16. *Schofield v. Thomas*, 236 Ill. 417, 86 N. E. 122; *In re Carll's Will*, 38 Misc. 471, 77 N. Y. Supp. 1036; *Estate of Bogert*, 4 N. Y. Civ. Proc.

441; *Webb v. Dye*, 18 W. Va. 376; *Orser v. Orser*, 24 N. Y. 51.

17. *Peebles v. Case*, 2 Bradf. (N. Y.) 226; *Abbott v. Abbott*, 41 Mich. 540, 2 N. W. 810.

**Importance Attached to Signature of Deceased Witness.**—"The evidence furnished of the regularity of the execution of a will by proving the signature of a deceased witness thereto, is strong or weak, according to the known character of the deceased witness, and his knowledge of what was requisite to the proper execution of such will." *Willis v. Mott*, 36 N. Y. 486.

18. *Rogers v. Diamond*, 13 Ark. 474 (the law regards the testimony of the subscribing witnesses to a will as the best evidence); *In re Higgins' Will*, 94 N. Y. 554; *Menge's Will*, 13 Misc. 553, 35 N. Y. Supp. 493.

19. *Marie v. Avart's Heirs*, 10 Mart. O. S. (La.) 25; *Boutheny v. Dreux*, 10 Mart. O. S. (La.) 639.

"Witnesses to an alleged will may, without impeaching the honesty of their own acts, testify that at the time the instrument was signed the same was not read and that both they and the alleged testatrix were told that its purpose was other than that of a testamentary act." *In re Cummin's Estate*, 20 Pa. Co. Ct. 575.

20. *Webb v. Dye*, 18 W. Va. 376; *Cheatham v. Hatcher*, 30 Gratt. (Va.) 56; *Lamberts v. Cooper*, 29 Gratt. (Va.) 61; *In re Tyler's Estate*, 121 Cal. 405, 53 Pac. 928; *Estate of Motz*, 136 Cal. 558, 69 Pac.

**5. Signing. — A. By TESTATOR. — a. Time of Signing.** — All the circumstances surrounding the execution of the will may be shown to prove that the signature of the testator was affixed to the will before the subscribing witnesses signed.<sup>21</sup>

**b. By Mark.** — It is now settled<sup>22</sup> that where a testator signed by mark his signature may still be proved by evidence of handwriting.<sup>23</sup> And such a signature may be sufficiently established by

294; *Barlaw v. Harrison*, 51 La. Ann. 875, 25 So. 378.

A statement by a subscribing witness as to the observance of the formalities which the law requires, made when the will was executed, should have greater weight than a contrary statement made at a later date. *In re Stacey*, 6 Ohio Dec. 501.

**21.** Where it appears that the testator was in the habit of carrying a fountain pen and used it as a matter of course, the circumstance that the writing of the will which was in his own handwriting and the signing of his name were done by the same pen and evidently with a pen different from that used by the witnesses, does not indicate that the signature was necessarily written at the time the body of the will was written. *In re Berdan's Will*, 65 N. J. Eq. 681, 55 Atl. 728.

The fact that the date of a will, the name of the testatrix and the names of the witnesses were written in a different ink from the body of the will, and the fact that it appears that the testatrix had the pen in her hand before the witnesses signed and handed it to them with the remark that it was not a very good pen, indicated that the testatrix had signed the paper before the witnesses signed and will outweigh their evidence to the effect that they did not remember whether she had signed the paper or not. *In re Sanderson's Will*, 9 Misc. 574, 30 N. Y. Supp. 848.

Proof by two subscribing witnesses that they at the request of the testator on different occasions and each when the other was not present, subscribed a paper acknowledged by him to be his will, might be deemed sufficient to raise the presumption that the instrument had then the signature of the tes-

tator were it not that the witnesses not only did not see the signature but the circumstances tend to raise the inference that if there had been a signature at the bottom it would have been seen, and it further appearing that the will was read over to one of the subscribing witnesses by the testator, who failed to state that it had his name signed to it. *Chisholm v. Ben*, 7 B. Mon. (Ky.) 408.

**22. Old Rule.** — "We have gone far enough in receiving the bare belief of a witness, founded upon a comparison of the writing in dispute, with some specimen of which he may have but a faint recollection. Where a mark, on inspection, appears to have nothing in its construction to distinguish it from the ordinary marks used by illiterate persons to authenticate their contracts, it is not the subject of this description of evidence." *Shinkle v. Crock*, 17 Pa. St. 159. And see *Cavett's Appeal*, 8 Watts & S. (Pa.) 21, 42 Am. Dec. 262.

**23.** *In re Kane's Will*, 20 N. Y. Supp. 123.

**Under New York Code of Civ. Proc., § 2620, which provides that** in case of the death of a subscribing witness the will may be established by proving the handwriting of the testator and that of the deceased witness, and also such circumstances as would be sufficient to prove the will on the trial of an action, where the testator signs the will by making a mark and one of the subscribing witnesses is dead, the making and the mark may be sufficiently proven by the subscribing witness. *In re Wilson's Will*, 76 Hun 1, 27 N. Y. Supp. 957 (reviewing precedents in the surrogate courts); *In re Hyland's Will*, 27 N. Y. Supp. 961, 58 N. Y. St. 798 (will supported by a complete at-

proof of the handwriting of the deceased subscribing witnesses,<sup>24</sup> or from the presence of a full attestation clause and every appearance of fairness on the face of the will.<sup>25</sup>

c. *By Another at Testator's Direction.* — The request and direction of a testator that another person should sign his will for him must be made out by clear and unequivocal evidence,<sup>26</sup> but it may be established by proof of his acts and conduct<sup>27</sup> except where a statute provides that the direction must be "expressly" given.<sup>28</sup>

d. *Acknowledgment.* — Proof of an acknowledgment of a will by the testator dispenses with proof that it was signed by him in the presence of the witnesses.<sup>29</sup>

e. *Parol Evidence.* — Parol evidence is inadmissible to aid a signature defective in law.<sup>30</sup>

**B. BY SUBSCRIBING WITNESS.** — a. *In General.* — Any compe-

testation clause). But see *In re Porter's Will*, 1 Misc. 262, 22 N. Y. Supp. 1062; *In re Reynolds*, 4 Dem. 68; *In re Walsh's Will*, Tuck. (N. Y.) 132; *Worden v. Van Gieson*, 6 Dem. (N. Y.) 237.

24. *Scott v. Hawk*, 107 Iowa 723, 77 N. W. 467; *In re Jones' Will*, 96 Wis. 427, 70 N. W. 685, 71 N. W. 883.

**Presumption From Attestation Clause.** — *Sullivan v. Sullivan*, 114 Mich. 189, 72 N. W. 135.

25. **Adoption of Mark.** — Where an instrument on its face purports to be signed by the testator by his mark and no witness testifies to seeing him affix the mark, the evidence was properly held to show an adoption of the mark by the testator as his signature. *Stephens v. Stephens*, 129 Mo. 422, 31 S. W. 792, 50 Am. St. Rep. 454.

**Value of Affixing Name to Mark.** See *Jackson v. Jackson*, 39 N. Y. 153.

26. *Pederson v. Christofferson*, 97 Minn. 491, 106 N. W. 958; *McCoy v. Conrad*, 64 Neb. 150, 89 N. W. 665.

27. *Haynes v. Haynes*, 33 Ohio St. 598, 31 Am. Rep. 579; *Walton v. Kendrick*, 122 Mo. 50, 27 S. W. 872, 25 L. R. A. 701.

**Acknowledgment as Evidence of Signing at Testator's Direction.** See *Walton v. Kendrick*, 122 Mo. 504, 27 S. W. 872, 25 L. R. A. 701.

28. Under the Nebraska Statute

which requires that the express direction of a testator to another to sign his name to a will for him must be proved, testimony of one of the subscribing witnesses to that effect, corroborated by the fact that the testator placed his hand upon the pen while his mark was being affixed, is sufficient. *In re Powers' Estate*, 79 Neb. 680, 113 N. W. 198; *Murry v. Hennessey*, 48 Neb. 608, 67 N. W. 470.

**In Pennsylvania.** — An express direction to sign testator's name to a will must be proved (under the earlier Pennsylvania statute) expressly or presumptively by the oaths or attestations of two witnesses. *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 567.

29. *Walton v. Kendrick*, 122 Mo. 504, 27 S. W. 872, 25 L. R. A. 701.

**Signing or Acknowledgment.** — In a state where it is sufficient for the testator to either sign in the presence of the witness or acknowledge his signature, testimony of the witness that the testator did one or the other of these acts, although he cannot remember which, is sufficient. *Brownfield v. Brownfield*, 43 Ill. 147.

30. *Patterson v. Ransom*, 55 Ind. 402.

**Seal May Be Shown by Parol.** Parol evidence is admissible to show that a scroll upon the paper was made by the direction of the testatrix as a seal. *Pollock v. Glassell*, 2 Gratt. (Va.) 440.



tent evidence may be used to show a signing by a person as an attesting witness.<sup>31</sup>

b. *Request by Testator.* — But slight evidence is required to show that an attesting witness signed at the request of the testator.<sup>32</sup> Such a request may be inferred from the acts of the testator,<sup>33</sup> and when made by another person in the presence of the testator, his mere silence proves that the request is made by his authority.<sup>34</sup>

c. *Presence of Testator.* — All the surrounding circumstances are

**31. See article "WRITTEN INSTRUMENTS."**

The fact that a subscribing witness signed under the other subscribing witness does not tend to prove the signature of the first witness, as under such circumstances the signature of a dead man would be of greater potency than a living witness. *In re Burbank's Will*, 104 App. Div. 312, 93 N. Y. Supp. 866, affirmed, 185 N. Y. 559, 77 N. E. 1183.

**Identification of Signature by Blind Attesting Witness.** — Where the subscribing witness testified positively to every fact necessary to show valid execution, but being more than seventy years of age he could no longer see to read and could not testify to his signature as a witness, but swore that he had seen the will in the surrogate's office and that he then read and recognized his signature as genuine, and there was no dispute as to the identity of the will produced and that which the witness had seen in the surrogate's office, its execution was sufficiently proved. *Jackson v. Thompson*, 6 Cow. (N. Y.) 178.

**Proof of Intention in Signing.** "It seems to be settled that if the testator asks a person who is competent to be a witness, but also is competent to take acknowledgments, to attest the will, and the person thus requested, instead of attesting the will in the usual way as a witness, affixes his certificate of acknowledgment thereto, the will is nevertheless sufficiently witnessed by him. The important fact is whether he signed as witness under circumstances rendering his attestations proper." *In re Hull's Will*, 117 Iowa 738, 89 N. W. 979.

**Mere Presence of Witness Not**

**Proof of Signing.** — *McCarn v. Rundall*, 111 Iowa 406, 82 N. W. 924.

**32.** *Skinner v. Lewis*, 40 Or. 571, 62 Pac. 523, 67 Pac. 951.

**33.** *Hughes v. Rader*, 183 Mo. 630, 82 S. W. 32.

**Evidence of Attesting Witness Not Controlling.** — *In re Nelson's Will*, 141 N. Y. 152, 36 N. E. 3; *Rutherford v. Rutherford*, 1 Denio (N. Y.) 33.

**34.** *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *In re Hull's Will*, 117 Iowa 738, 89 N. W. 979; *In re Nelson's Will*, 141 N. Y. 152, 36 N. E. 3; *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *Bundy v. McKnight*, 48 Ind. 502.

Where one of the witnesses said to the other "I have witnessed it and he wants you to witness it," it must be presumed that the witness acted in behalf of the testator in making the request. *In re Carey's Will*, 14 Misc. 486, 36 N. Y. Supp. 817.

Not even an act or motion indicating acquiescence by the testator in the request to the witness is necessary where it is made in his presence and he knows that the witnesses are signing in response to such request and makes no objection; for under such circumstances his silence is a sufficient indication that the request is by his authority. *In re Hull's Will*, 117 Iowa 738, 89 N. W. 979.

Probate of a will was allowed although the subscribing witnesses could not remember whether they were asked to sign by the testatrix or by the person who drew up the will in her presence, and where they also could not remember whether the testatrix herself declared the instrument to be her will, or whether the other person did so in her pres-

admissible to determine whether the witnesses signed in the presence of the testator.<sup>35</sup>

**6. Acknowledgment.**—It is well settled that the acknowledgment of his signature by a testator need not be made in express language,<sup>36</sup> but may be evidenced by his acts and conduct,<sup>37</sup> and is sufficiently shown where he presented his will to the witnesses with the signature in plain sight.<sup>38</sup>

**7. Publication.**—Publication of a will need not be made by an express declaration<sup>39</sup> but may be inferred from the acts and conduct of the testator,<sup>40</sup> though it has been held that he must make

ence. *In re Voorhis' Will*, 54 Hun 637, 7 N. Y. Supp. 596, *affirmed*, 125 N. Y. 765, 26 N. E. 935.

**35.** *Woodroof v. Hundley*, 133 Ala. 395, 32 So. 570; *Dewey v. Dewey*, 1 Metc. (Mass.) 349, 35 Am. Dec. 367.

**Ink of Different Color From That Used by Testator.**—*Mendenhall's Will*, 43 Or. 542, 72 Pac. 318, 73 Pac. 1033.

**Size of Room Important.**—*Stewart v. Stewart*, 56 N. J. Eq. 761, 40 Atl. 438, *affirmed*, 68 Atl. 1116.

**Experiments Permissible.**—*Healey v. Bartlett*, 73 N. H. 110, 59 Atl. 617.

**36.** *Illinois Masonic Orphans' Home v. Gracy*, 190 Ill. 95, 60 N. E. 194; *Gould v. Theological Sem.*, 189 Ill. 282, 59 N. E. 536.

**37.** *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *Allison v. Allison*, 46 Ill. 61, 92 Am. Dec. 237.

**Publication Is Not Sufficient Evidence.**—*Butler v. Benson*, 1 Barb. (N. Y.) 526.

**Will Signed by Another in Behalf of Testator.**—*Haynes v. Haynes*, 33 Ohio St. 598, 31 Am. Rep. 579; *Raudebaugh v. Shelley*, 6 Ohio St. 307; *Baskin v. Baskin*, 36 N. Y. 416; *Chaffee v. Baptist Church*, 10 Paige (N. Y.) 85.

**38.** *Jauncey v. Thorne*, 2 Barb. Ch. (N. Y.) 40.

The acknowledgment of his signature by the testator is sufficiently proved where it appears that he presented the will to the witnesses with the signature in plain sight; and although to complete the acknowledgment it must appear that the witness saw the signature, yet the mere fact that he cannot recollect seeing it will not defeat the will. *In re Stockwell's Will*, 17 Misc. 108, 40 N. Y. Supp. 734; *In re Lang's*

*Will*, 9 Misc. 521, 30 N. Y. Supp. 388.

Where it was possible for the witnesses to see the signature of the testator, his express declaration is not necessary to establish an acknowledgment. *In re Carll's Will*, 38 Misc. 471, 77 N. Y. Supp. 1036.

**Failure To Notice Signature Immaterial.**—*Matter of Laudy*, 161 N. Y. 429, 55 N. E. 914.

**39.** *California.*—*In re Johnson's Estate*, 152 Cal. 778, 93 Pac. 1015.

*Nebraska.*—*In re Ayer's Estate*, 120 N. W. 491.

*New Jersey.*—*Vernon v. Vernon*, 69 N. J. Eq. 759, 61 Atl. 409; *Robbins v. Robbins*, 50 N. J. Eq. 742, 26 Atl. 673; *Darnell v. Buzby*, 50 N. J. Eq. 725, 26 Atl. 676; *Swain v. Edmunds*, 53 N. J. Eq. 142, 32 Atl. 369.

*New York.*—*In re Carll's Will*, 38 Misc. 471, 77 N. Y. Supp. 1036; *Lane v. Lane*, 95 N. Y. 494.

*Vermont.*—*In re Clafin's Will*, 73 Vt. 129, 50 Atl. 815, 87 Am. St. Rep. 693.

**Holographic Will.**—Where the will propounded is holographic, evidence of its publication may be somewhat relaxed. *In re Moore's Will*, 109 App. Div. 762, 96 N. Y. Supp. 729, *reversing* 95 N. Y. Supp. 61.

**40.** *Vernon v. Vernon*, 69 N. J. Eq. 759, 61 Atl. 409; *In re Clark's Will* (N. J.), 52 Atl. 222; *In re Beckett*, 103 N. Y. 167, 8 N. E. 506.

**Reading Will in Presence of Testator To Be Considered.**—*McKinley v. Lamb*, 64 Barb. (N. Y.) 199; *In re Buel's Will*, 44 App. Div. 4, 60 N. Y. Supp. 385.

**Testimony of Subscribing Witnesses Not Controlling.**—*Trustees*

some affirmative sign and that it cannot be inferred from mere silence.<sup>41</sup>

**8. Admissibility in General.** — A. WHAT LAW GOVERNS. — The law of the forum governs in proving the execution of a will,<sup>42</sup> and the law in force when the will was made is to be applied in determining whether the will was properly executed,<sup>43</sup> although the mode of proof is governed by the law existing when the will is propounded.<sup>44</sup>

B. NECESSITY FOR FORMAL PROOF. — The formal proof of execution as provided for by law must be strictly made and it is not sufficient that the parties interested admit execution.<sup>45</sup>

C. RELEVANCY. — Any fact may be shown which tends in any appreciable degree to throw light upon the question as to whether the will was or was not executed by the decedent.<sup>46</sup>

D. HABIT OF WITNESS. — Testimony of an attesting witness as to his general habit in witnessing wills is admissible, although he has no recollection of the circumstances surrounding the transaction in question.<sup>47</sup>

E. EXPERIENCE OF TESTATOR. — The fact that a testator had had experience in executing wills,<sup>48</sup> that he wrote out a proper attestation clause himself,<sup>49</sup> and conducted the transaction in an intelligent manner,<sup>50</sup> all tend to show that the statutory formalities were met.

F. EXECUTION SUPERVISED BY ATTORNEY. — Where the testator

of *Auburn Sem. v. Calhoun*, 25 N. Y. 422.

41. *Manners v. Manners* (N. J.), 66 Atl. 583.

42. *Tevis v. Pitcher*, 10 Cal. 466.

43. *Jauncey v. Thorne*, 2 Barb. Ch. (N. Y.) 40.

44. *Jauncey v. Thorne*, 2 Barb. Ch. (N. Y.) 40.

45. *Williamson v. Williamson*, 17 Ont. R. 734; *Kennedy v. Upshaw*, 66 Tex. 442, 1 S. W. 308; *Estate of Hayden*, 149 Cal. 680, 87 Pac. 275.

46. **Place of Keeping.** — *Gould v. Theological Sem.*, 189 Ill. 282, 59 N. E. 536; *Succession of Hill*, 47 La. Ann. 329, 16 So. 819.

**Circumstances of Next of Kin Irrelevant.** — *Seguine v. Seguine*, 2 Barb. (N. Y.) 385.

**Probability of Execution Among Strangers.** — *In re McDermott's Estate*, 148 Cal. 43, 82 Pac. 842.

**Habits of Decedent Irrelevant.** *Snider v. Burks*, 84 Ala. 53, 4 So. 225.

**Age of Decedent.** — *McKinley v. Lamb*, 64 Barb. (N. Y.) 199.

**Unnatural Provisions Irrelevant.**

*McCommon v. McCommon*, 151 Ill. 428, 38 N. E. 145.

47. *Pate's Admr. v. Joe*, 3 J. J. Marsh. (Ky.) 113.

Attesting witness may testify that he never signed a will unless it was in the presence of other subscribing witnesses, and of the testator and at his request, and that he was satisfied that this was no exception to his usual course though he had no distinct recollection of the matter. *Barnes v. Barnes*, 66 Me. 286.

48. *Matter of Cottrell's Will*, 95 N. Y. 329; *Gould v. Theological Sem.*, 189 Ill. 282, 59 N. E. 536; *Reeves v. Lindsay*, Ir. R. 3 Eq. 509; *Mock v. Kaufman*, 82 N. Y. Supp. 310; *In re Clafin's Will*, 75 Vt. 19, 52 Atl. 1053, 58 L. R. A. 261.

49. *Wright v. Sanderson*, 53 L. J., P. 49, 9 P. D. 149, 50 L. T. 769.

50. "The conduct of the testator, both in the preparation of the codicil and in the calling together of his witnesses, shows an anxious and intelligent desire to do everything regularly. That fact strengthens the presumption." *Wright v.*

was himself an attorney<sup>51</sup> or had his will executed under the supervision of a capable lawyer,<sup>52</sup> this fact is given considerable importance, especially where the attorney also acted as an attesting witness;<sup>53</sup> and failure to have a will executed under such supervision is often commented upon.<sup>54</sup>

G. ADMISSION TO PROBATE. — The fact that a will has formerly been admitted to probate dispenses with formal proof of execution, where the issue is only raised after a long lapse of time and when the records of the original probate have been destroyed.<sup>55</sup>

H. PAROL EVIDENCE. — While parol evidence is admissible to show execution<sup>56</sup> no defect in the execution can be supplied by parol,<sup>57</sup> nor can evidence of the intention of the decedent be given.<sup>58</sup>

Sanderson, 53 L. J. P., 49, 9 P. D. 149, 50 L. T. 769.

51. O'Meagher v. O'Meagher, 11 L. R. Ir. 117; In Goods of Hindmarch, L. R. 1 P. 307, 36 L. J., P. 24, L. T. 391; Lloyd v. Roberts, 12 Moore P. C. 158, 14 Eng. Reprint 871; Estate of Bogert, 4 N. Y. Civ. Proc. 441; Orser v. Orser, 24 N. Y. 51; Worden v. Van Gieson, 6 Dem. (N. Y.) 237; In re Smith's Will, 61 Hun 101, 15 N. Y. Supp. 425; Wyman v. Wyman, 118 App. Div. 109, 103 N. Y. Supp. 64.

The mere fact that the decedent was a lawyer and had practiced in the state is not sufficient to justify the admission of a will to probate in the face of testimony of the subscribing witnesses against due execution, in the absence of proof that there was a proper attestation clause. *In re Purdy's Will*, 25 Misc. 458, 55 N. Y. Supp. 644.

52. *England*. — Wright v. Rogers, 38 L. J., P. 67, L. R. 1 P. 678, 21 L. T. 156, 17 W. R. 833.

*Michigan*. — *In re Sullivan's Will*, 114 Mich. 189, 72 N. W. 135.

*New Hampshire*. — Lane v. Hill, 68 N. H. 275, 44 Atl. 393, 73 Am. St. Rep. 591.

*New York*. — *In re Foley's Will*, 55 Misc. 162, 106 N. Y. Supp. 474; *In re Frey's Will*, 7 N. Y. Supp. 330, 26 N. Y. St. 425; *In re Nelson's Will*, 141 N. Y. 152, 36 N. E. 3; Woolley v. Woolley, 95 N. Y. 231; Matter of Kellum, 52 N. Y. 517; Newhouse v. Randolph, 17 Barb. 236; *In re Merriman*, 62 Hun 621, 16 N. Y. Supp. 738; *In re Sarasohn's Will*, 47 Misc. 535, 95 N. Y. Supp. 975 (refusing probate

where the testimony of subscribing witnesses did not prove will).

53. Adams v. Rodman, 102 Wis. 456, 78 N. W. 588, 759. Gable v. Rauch, 50 S. C. 95, 27 S. E. 555; Mairs v. Freeman, 3 Redf. (N. Y.) 181; Will of Humphreys, Tuck. (N. Y.) 142.

Where the subscribing witness who drew the will was an attorney, and testifies to its due execution, but the other witness fails to recollect that some of the necessary formalities were complied with, the will may still be regarded as sufficiently proved, the court remarking that lay witnesses frequently fail to notice and to remember the essential facts. *In re Babcock's Will*, 42 Misc. 235, 86 N. Y. Supp. 670.

54. *In re Balmforth's Will*, 50 Misc. 492, 113 N. Y. Supp. 934; Will of Hopper, Tuck. (N. Y.) 378.

55. Marshall v. Marshall, 42 S. C. 436, 20 S. E. 298, citing Prater v. Whittle, 16 S. C. 40; Rumph v. Hiott, 35 S. C. 444, 15 S. E. 235.

The probate of a will is *prima facie* sufficient evidence of its due execution, where the question is brought up on an appeal from a decree of the orphans' court confirming the report of an auditor making distribution of the property. *In re Amberson's Estate*, 204 Pa. St. 397, 54 Atl. 484. And see Folmar's Appeal, 68 Pa. St. 482.

56. Burge v. Hamilton, 72 Ga. 568; Hester v. Hester, 15 N. C. (4 Dev. L.) 228.

57. Plater v. Groome, 3 Md. 134; *In re McIntire*, 2 Hayn. & H. 339, 16 Fed. Cas. No. 8,823a.

58. Matter of Hewitt's Will, 91

**I. INSPECTION OF WILL.** — It is proper for an inspection of the alleged will to be made by the court or jury where the issue is upon its proper execution.<sup>59</sup>

**J. DISCOVERY.** — The general statutory provisions in relation to discovery and the examination of persons before trial<sup>60</sup> have been held to apply to actions involving the validity of wills,<sup>61</sup> and in some states express provision is made for such action.<sup>62</sup>

**9. Fraud.** — **A. BURDEN OF PROOF.** — The burden<sup>63</sup> of proving

N. Y. 261; *Warwick v. Warwick*, 86 Va. 596, 10 S. E. 843; *Patterson v. Ransom*, 52 Ind. 402; *Estate of Seaman*, 146 Cal. 455, 80 Pac. 700.

"For the purpose of determining whether a will has been properly executed, the intention of the testator in executing it is entitled to no consideration. For that purpose the court can consider only the intention of the legislature, as expressed in the language of the statute, and whether the will as presented shows a compliance with the statute." *Estate of Seaman*, 146 Cal. 455, 80 Pac. 700.

59. *Lucas v. Parsons*, 24 Ga. 640, 71 Am. Dec. 147; *In re Boardman's Will*, 20 N. Y. Supp. 60. See also *In re Wilcox*, 59 Hun 627, 14 N. Y. Supp. 109; *Gable v. Rauch*, 50 S. C. 95, 27 S. E. 555.

Refusal to allow counsel for the plaintiff to show the will to the jury on the argument is not reversible error, although there is no reason why it should not have been allowed. *Brownfield v. Brownfield*, 43 Ill. 147.

"Upon the trial of issues of fact, designed to impeach the validity of a will, that instrument must be in evidence before the jury, and, if not produced in the county court by the register of wills, the caveators, plaintiffs upon the record, ought to have coerced its production by a *subpoena duces tecum* directed to that officer." *Townshend v. Townshend*, 7 Gill (Md.) 10.

The proponent may introduce in evidence the paper which he is seeking to establish as the last will of the testatrix at the termination of the examination in chief of the three subscribing witnesses, although one of them testifies that the witnesses signed the will before the testatrix. *Kaufman v. Caughman*, 49 S. C. 159, 27 S. E. 16.

An attestation clause may be submitted to the jury to be considered by them upon the question of due execution. *Webb v. Dye*, 18 W. Va. 376.

**On Appeal** from judgment refusing probate of a will, the will itself may be transmitted to the appellate court. *Barnewall v. Murrell*, 108 Ala. 366, 18 So. 831 (applying 23rd rule of Practice).

60. See articles "DISCOVERY," Vol. IV; "EXAMINATION OF PARTIES BEFORE TRIAL," Vol. V.

61. *Richmond's Appeal*, 59 Conn. 226, 22 Atl. 82, 21 Am. St. Rep. 85.

62. *Matter of Baird*, 41 Hun (N. Y.) 89; *Matter of Hoyt*, 67 How. Pr. (N. Y.) 57; *In re Patterson's Will*, 18 N. Y. Supp. 367.

63. *Arkansas*. — *Guthrie v. Price*, 23 Ark. 396.

*Illinois*. — *Compher v. Browning*, 219 Ill. 429, 76 N. E. 678.

*Indiana*. — *Miller v. Coulter*, 156 Ind. 290, 59 N. E. 853.

*Kentucky*. — *King v. King*, 19 Ky. L. Rep. 868, 42 S. W. 347.

*Maryland*. — *Griffith v. Dffen-derffer*, 50 Md. 466.

*Pennsylvania*. — *Rees v. Stille*, 38 Pa. St. 138.

*South Carolina*. — *Kinloch v. Palmer*, 1 Mill 216.

*West Virginia*. — *McMechen v. McMechen*, 18 W. Va. 683.

The rule is perfectly well established that when a will is impeached on the ground of fraud, the parties who seek to establish it must remove or explain and so neutralize the facts out of which the supposition arose, and this rule is held to apply also to fraudulent acts in relation to the obtaining of probate. *Johnston v. Glasscock*, 2 Ala. 218.

**Falsity of Representations.** — *Torrey v. Blair*, 75 Me. 548.

fraud in the execution of a will or in securing its probate<sup>64</sup> is upon the contestant.

**There Is no Presumption** of fraud from the fact of relationship with the testator or from the fact that the suspected person is the principal beneficiary under the will.<sup>65</sup>

**B. DECLARATIONS.**—Declarations by the testator<sup>66</sup> are inadmissible<sup>67</sup> upon the issue of fraud unless a part of the *res gestae*<sup>68</sup> or offered merely to show the state of his mind.<sup>69</sup>

**The Admissibility** of such declarations is in all cases recognized by the courts in some jurisdictions.<sup>70</sup>

**C. ADMISSIBILITY OF EVIDENCE.**—*a. In General.*—As in all cases in which fraud is alleged<sup>71</sup> parol evidence<sup>72</sup> of all the surrounding circumstances is freely admitted,<sup>73</sup> and facts the relevancy of which is very slight may be considered for what they are worth.<sup>74</sup>

64. *Willms v. Plambeck*, 76 Neb. 195, 107 N. W. 248; *Renn v. Samos*, 33 Tex. 760.

65. *Griffith v. Diffenderffer*, 50 Md. 466; *Matter of Ely's Will*, 2 Hawaii 649.

66. **Declarations by Devisee.** Declarations of one of several devisees to the effect that the will was procured partially by showing to the testator the forged letters which turned away his affections from his nearest relatives, are admissible although such person was not a party to the record. *Brown v. Moore*, 6 Yerg. (Tenn.) 272.

67. *United States v. Throckmorton v. Holt*, 180 U. S. 552; *Smith v. Fenner*, 1 Gall. 170, 22 Fed. Cas. No. 13,046.

*Illinois.*—*Comphe v. Browning*, 219 Ill. 429, 76 N. E. 678; *Crumbaugh v. Owen*, 238 Ill. 497, 87 N. E. 312; *Dickie v. Carter*, 42 Ill. 376; *Massey v. Huntington*, 118 Ill. 80, 7 N. E. 269.

*Maryland.*—*Griffith v. Diffenderffer*, 50 Md. 466.

*Missouri.*—*McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506; *Spoone-more v. Cables*, 66 Mo. 579; *Gibson v. Gibson*, 24 Mo. 227.

*New Jersey.*—*Boylan v. Meeker*, 28 N. J. L. 274.

*New York.*—*Waterman v. Whitney*, 11 N. Y. 157, 52 Am. Dec. 71; *Jackson v. Kniffen*, 2 Johns. 31.

*West Virginia.*—*Couch v. Eastham*, 27 W. Va. 796, 55 Am. Rep. 346.

68. *Pratte v. Coffman*, 33 Mo. 71.

69. *Wombacher v. Barthelme*, 194 Ill. 425, 62 N. E. 800; *Comphe v. Browning*, 219 Ill. 429, 76 N. E. 678; *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *Canada's Appeal*, 47 Conn. 450; *Griffith v. Diffenderffer*, 50 Md. 466.

The testator's declarations and acts occurring after the execution of the will are admissible to show his knowledge of the testamentary character of the instrument and to dispel any possible claim of mistake or imposition. *In re Nelson's Will*, 141 N. Y. 152, 36 N. E. 3.

70. *Howell v. Barden*, 14 N. C. (3 Dev. L.) 442; *Lappe v. Gfeller*, 211 Pa. St. 462, 60 Atl. 1049; *Reel v. Reel*, 8 N. C. (1 Hawks) 248, 9 Am. Dec. 632. See *Turner v. Hand*, 3 Wall. Jr. 88, 24 Fed. Cas. No. 14,257.

71. See article "FRAUD," Vol. VI. **Fraud and Undue Influence Distinguishable.**—*Terry v. Buffington*, 11 Ga. 337.

72. *Webb v. Webb*, 7 T. B. Mon. (Ky.) 626; *Collins v. Hope*, 20 Ohio 492; *Iddings v. Iddings*, 7 Serg. & R. (Pa.) 111, 10 Am. Dec. 450.

73. *Harrison v. Rowan*, 3 Wash. C. C. 580, 11 Fed. Cas. No. 6,141; *Stuke v. Glaser*, 223 Ill. 316, 79 N. E. 105; *M'Ninch v. Charles*, 2 Rich. L. (S. C.) 229; *Davis v. Calvert*, 5 Gill & J. (Md.) 269, 25 Am. Dec. 282; *Beaubien v. Cicotte*, 12 Mich. 459; *Kenyon v. Ashbridge*, 35 Pa. St. 157.

74. "Secrecy and contrivance may undoubtedly be badges of fraud

b. *Source of Property*. — The source from which the property disposed of by the will came into the decedent's possession may be shown<sup>76</sup> as well as the reasonableness of the provisions of the will.<sup>76</sup>

c. *Fraudulent Representations*. — Any fraudulent representations by reason of which the testator was induced to provide for a person in his will, may be shown.<sup>77</sup>

d. *Character*. — It has been held admissible to introduce evidence of the good<sup>78</sup> or bad<sup>79</sup> character of the person alleged to have perpetrated the fraud.

10. *Undue Influence*. — The question of undue influence is treated elsewhere.<sup>80</sup>

11. *Forgery*. — A. BURDEN OF PROOF. — On the issue of forgery of the decedent's signature, the burden of proof of the genuineness of the signature is upon the proponent of the will,<sup>81</sup> but proof

in the execution as well of wills as of other instruments; but when the circumstances of that character can be clearly traced to the mind or wishes of the testator himself, they cannot be received as having any tendency to impeach his testamentary dispositions." *Coffin v. Coffin*, 23 N. Y. 9, 80 Am. Dec. 235.

On the issue of fraud it is incompetent for the contestants to introduce evidence to show the jovial manner of the proponent of the will on the day of the burial of the deceased. *Jameson v. Hall*, 37 Md. 221.

Where there is a material variance between the will and the written memorandum of instructions given to the scrivener by the agent of the testatrix, this fact is rendered insignificant where the scrivener assumes all responsibility for the variance although the will was read over in the presence of the agent. *Griffith v. Diffenderffer*, 50 Md. 466.

*Intention To Execute a Will*. See *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220.

*In Illinois*. — On the question whether there was any fraud in obtaining a will, testimony of other parties than the subscribing witnesses may be heard. *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *Andrews v. Black*, 43 Ill. 256. (Although in Illinois only the subscribing witnesses can testify to its execution).

75. *Glover v. Hayden*, 4 Cush. (Mass.) 580; *Patterson v. Patter-*

*son*, 6 Serg. & R. (Pa.) 55; *Griffin v. Working Women's Home Assn.*, 151 Ala. 597, 44 So. 605; *Cumby v. Bryan* (Tex. Civ. App.). 28 S. W. 56.

76. *Ross v. Christman*, 23 N. C. (1 Ired. L.) 209. And see *Franklin v. Belt*, 130 Ga. 37, 60 S. E. 146.

77. While ordinarily a false reason given for a legacy will not of itself serve to destroy it, the rule is otherwise where any fraud has been practiced from which it may be presumed that the provision would not have been made if the testator had known of the fraud. *Tilby v. Tilby*, 2 Dem. (N. Y.) 514 (the fact that the supposed wife of the testator, recognized in his will, already had a husband living); *Wilkinson v. Joughin*, 35 L. J., Ch. 684, L. R. 2 Eq. 319, 12 Jur. (N. S.) 330, 14 L. T. 394; *Kennell v. Abbott*, 4 Ves. 802, 31 Eng. Reprint 416; *In re Webb's Will*, 33 N. Y. Supp. 968.

*No Presumption of Knowledge of Facts*. — *Moore v. Heineke*, 119 Ala. 627, 24 So. 374.

78. *Hannah v. Anderson*, 125 Ga. 407, 54 S. E. 131.

79. *Nushear v. Arnold*, 13 Serg. & R. (Pa.) 323.

80. See article "UNDUE INFLUENCE," Vol. XIII.

81. *Fox v. McDonald's Succession*, 18 La. Ann. 419; *Griffin v. Working Women's Home Assn.*, 151 Ala. 597, 44 So. 605.

*Holographic Will*. — *Succession of Gaines*, 38 La. Ann. 123.

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is required to be made only by a preponderance of the evidence.<sup>82</sup>

B. DECLARATIONS. — a. *Of Testator*. — Declarations of the testator as to whether he had a will or expressing satisfaction with his will, or stating how he had left his property, are commonly admitted where it is claimed that the alleged will was a forgery, as corroborative<sup>83</sup> of other evidence,<sup>84</sup> although there are many respectable authorities which refuse to admit them.<sup>85</sup>

b. *Of Other Persons*. — Declarations of the subscribing witnesses who are alleged to have committed the forgery are inadmissible, in their own behalf,<sup>86</sup> as are the declarations of the proponent.<sup>87</sup>

C. ADMISSIBILITY OF EVIDENCE. — a. *In General*. — Any evidence is admissible though only slightly relevant, which tends in any way to throw light upon the issue.<sup>88</sup>

b. *Feelings of Testator*. — Evidence tending to show the state of the feelings of the alleged testator toward those accused of com-

**Probate.** — *Green v. Hewett* (Tex. Civ. App.), 118 S. W. 170.

**Absence of Motive Immaterial.** *In re Simcox's Estate*, 11 Pa. Co. Ct. 545.

**Persons Who Committed the Forgery Need Not Be Designated.** *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336.

**82.** *McBee v. Bowman*, 89 Tenn. 132, 14 S. W. 481; *Barlaw v. Harrison*, 51 La. Ann. 875, 25 So. 378; *Beebe v. McFaul*, 125 Iowa 514, 101 N. W. 267.

Where the issue is forgery the proponent must establish the genuineness of the signature, and the burden of proof is upon him to prove to the satisfaction of the court that the signature was a forgery. *In re Burtis' Will*, 43 Misc. 437, 89 N. Y. Supp. 441, citing *Howland v. Taylor*, 53 N. Y. 627.

**No Presumption of Innocence.** *Outlaw v. Hurdle*, 46 N. C. (1 Jones' L.) 150.

**83.** *Huppe v. Byers*, 60 Md. 381.

**84.** *United States*. — *Turner v. Hand*, 3 Wall. Jr. 88, 24 Fed. Cas. No. 14,257.

*New Jersey*. — *Davis v. Elliott*, 58 N. J. Eq. 473, 36 Atl. 1092 (declarations that a will had been made); *Boylan v. Meeker*, 15 N. J. Eq. 310 (expressed intentions shown).

*New York*. — *Taylor Will Case*, 10 Abb. Pr. (N. S.) 300.

*North Carolina*. — *Kirby v. Kirby*, 44 N. C. (Barb. L.) 454.

*Pennsylvania*. — *Swope v. Donnelly*, 190 Pa. St. 417, 42 Atl. 882, 70 Am. St. Rep. 637.

*Texas*. — *Johnson v. Brown*, 51 Tex. 65 (but see *Kennedy v. Upshaw*, 64 Tex. 411).

*Vermont*. — *In re Barney's Will*, 71 Vt. 217, 44 Atl. 75 (expressions of satisfaction with his will).

**85.** *Throckmorton v. Holt*, 180 U. S. 552; *Leslie v. McMurtry*, 60 Ark. 301, 30 S. W. 33.

**86.** *Farleigh v. Kelley*, 28 Mont. 421, 72 Pac. 756.

**Declarations as Res Gestae of Production of the Will.** — On the issue of forgery, evidence of a statement made by a subscribing witness, who was accused of the forgery and who had possession of the instrument, to a justice of the peace to whom he delivered it, is admissible as part of the *res gestae* concerning its first production. *Dolan v. Meehan* (Tex. Civ. App.), 80 S. W. 99.

**87.** Where it is alleged that a will was forged through the agency of the proponent, declarations of the proponent were inadmissible in his behalf to establish the genuineness of the instrument in question. *Stocksdale v. Cullison*, 35 Md. 322.

**88.** *Succession of Gaines*, 38 La. Ann. 123 (alleged physical incapacity of the testator at the date of the instrument is an element to be considered); *Kennedy v. Upshaw*, 64 Tex. 411; *Gurley v. Armentraut*, 6 Ohio C. C. (N. S.) 156; *Dolan v. Meehan* (Tex. Civ. App.), 80 S. W.



mitting the forgery<sup>89</sup> or those to whom legacies were left<sup>90</sup> is admissible.

c. *Alibi*. — It may be shown that the decedent had never been in the town in which the will purported to be executed<sup>91</sup> or was not there on the date of the will<sup>92</sup>

d. *Manner of Signing*. — Courts are as apt to draw one conclusion as another from the apparent care exercised in making the signature,<sup>93</sup> signing the whole or part of the name,<sup>94</sup> or apparent similarities,<sup>95</sup> or tracings.<sup>96</sup>

e. *Motive*. — Evidence tending to show a motive for the alleged forgery is admissible.<sup>97</sup>

f. *Manner of Discovery*. — Where the explanation of the way in which the alleged will was discovered is unnatural, this may be considered.<sup>98</sup>

g. *Delay in Producing Will*. — The delay in producing a will is a suspicious circumstance to be considered.<sup>99</sup>

h. *Other Matters*. — The cases referred to in the notes illustrate various other matters which courts have considered in passing upon this issue.<sup>1</sup>

i. *Handwriting*. — Proof of handwriting may of course be re-

99. And see article "FORGERY," Vol. V.

On the issue of forgery, the fact that one of the alleged attesting witnesses subsequently devises property purporting to be devised by the alleged will is also an important circumstance. *Clark v. Ellis*, 16 Ky. L. Rep. 434, 28 S. W. 148.

89. *Kennedy v. Upshaw*, 66 Tex. 442, 1 S. W. 308.

90. *Succession of Gaines*, 38 La. Ann. 123.

On the issue of forgery, the fact that property was devised to a legatee in regard to whom the testator had entertained no kindly feeling may be shown. *Dolan v. Meehan* (Tex. Civ. App.), 80 S. W. 99.

91. *Risse v. Gasch*, 43 Neb. 287, 61 N. W. 616.

92. *In re Gould's Will*, 15 N. Y. St. 784.

93. On the issue of forgery of the testator's mark, the court refused to attach any significance to the fact that great care was apparently exercised in making the mark. *Davis v. Elliott*, 55 N. J. Eq. 473, 36 Atl. 1092.

94. *In re Williams' Will*, 19 N. Y. Supp. 778, 46 N. Y. St. 791.

In *Risse v. Gasch*, 43 Neb. 287, 61 N. W. 616, the fact that the alleged

will was not signed in the way the decedent ordinarily signed his name was an important circumstance upon which it was held that the will propounded was a forgery.

95. *In re Rice's Will*, 81 App. Div. 223, 81 N. Y. Supp. 68.

96. On the issue of forgery where the alleged signature appears on its face to have been retouched and overwritten, this fact is not very strong evidence of the forgery since it is highly improbable that a forger would have done such an act. *Wright v. Flynn*, 69 N. J. Eq. 753, 61 Atl. 973.

In the case of *Skillman v. Lanehart* (N. J.), 67 Atl. 182, the fact that the signature appeared to be traced was held to be a strong circumstance indicating forgery.

97. *Kennedy v. Upshaw*, 64 Tex. 411, reversed on other points, 66 Tex. 442, 1 S. W. 308; *In re Daily's Will*, 7 N. Y. Supp. 259, 25 N. Y. St. 1020.

98. *In re McDermott's Estate*, 148 Cal. 43, 82 Pac. 842; *Succession of Gaines*, 38 La. Ann. 123.

99. *Clark v. Ellis*, 16 Ky. L. Rep. 434, 28 S. W. 148; *Green v. Terwilliger*, 56 Fed. 384.

1. *Illinois*. — *Doran v. Mullen*, 78 Ill. 342 (mistake in dates).

sorted to.<sup>2</sup> The rules governing this matter are fully discussed elsewhere in this work.<sup>3</sup>

j. *Other Forgeries*.—Evidence of other forgeries committed by the person charged with the act in question is inadmissible.<sup>4</sup>

12. *Date*.—Although the date upon the face of a will is *prima facie* the date upon which it was executed, parol evidence is admissible to prove that it was really executed upon some other date,<sup>5</sup> or to show upon what date a will which has no date was executed.<sup>6</sup>

13. *Lapse of Time*.—A. IN GENERAL.—The lapse of a considerable length of time will authorize the court to make every presumption in favor of the due execution of a will<sup>7</sup> and direct evidence will not be required,<sup>8</sup> since it is not to be expected that the witnesses will retain a vivid recollection of such matters.<sup>9</sup>

B. ANCIENT WILLS.—A will over thirty years old is admissible without other proof of execution as an ancient will<sup>10</sup> if valid upon

*Kentucky*.—Clark v. Ellis, 16 Ky. L. Rep. 434, 28 S. W. 148 (property devised of which testator was not sole owner).

*Michigan*.—Lamb v. Lippincott, 115 Mich. 611, 73 N. W. 887 (not suspicious that will is written only on one side of sheet of paper).

*Montana*.—Farleigh v. Kelley, 28 Mont. 421, 72 Pac. 756 (acts showing conspiracy).

*New York*.—In re Burtis' Will, 107 App. Div. 51, 94 N. Y. Supp. 961 (intention of decedent as to disposal of property).

*Pennsylvania*.—McGeary v. McGeary, 3 Atl. 22 (fact that woman mentioned in will as wife was not).

*Texas*.—Dolan v. Meehan (Tex. Civ. App.), 80 S. W. 99 (will not drawn by personal attorney of decedent); Kennedy v. Upshaw, 66 Tex. 442, 1 S. W. 308 (value of testator's estate); Johnson v. Brown, 51 Tex. 65 (fact that testator left unfinished will, inadmissible).

2. Griffin v. Working Women's Home Assn., 151 Ala. 597, 44 So. 605.

**Expert Evidence Admissible.** Savage v. Bowen, 103 Va. 540, 49 S. E. 668; Wright v. Flynn, 69 N. J. Eq. 753, 61 Atl. 973.

3. See article "HANDWRITING," Vol. VI.

4. Franklin v. Franklin, 90 Tenn. 44, 16 S. W. 557.

5. Wright v. Wright, 5 Ind. 389; Reffell v. Reffell, 35 L. J., P. 121,

L. R. 1 P. 139, 12 Jur. (N. S.) 910, 14 L. T. 705.

*Prima facie* the date on a will is the true date on which the will was executed, and this is true although the date is the only part of the will which is not in the handwriting of the testator. Patterson v. English, 71 Pa. St. 454.

**Correct Date of Prior Will Referred to May Be Shown.**—Whiteman v. Whiteman, 152 Ind. 263, 53 N. E. 225.

6. Deakins v. Hollis, 7 Gill & J. (Md.) 311.

7. In re Briggs' Will, 47 App. Div. 47, 62 N. Y. Supp. 294.

**After Twenty-five Years.** Cheeney v. Arnold, 18 Barb. (N. Y.) 434.

8. Nicholson v. Myers, 3 Dem. (N. Y.) 193; Marshall v. Marshall, 42 S. C. 436, 20 S. E. 298; Verdier v. Verdier, 8 Rich. L. (S. C.) 135.

**Will Forty Years Old.**—Welty v. Welty, 8 Md. 15.

**Will Offered Eleven Years After Death of Alleged Testator.**—Transue v. Brown, 31 Pa. St. 92.

9. Jauncey v. Thorn, 2 Barb. Ch. (N. Y.) 40; Mock v. Kaufman, 82 N. Y. Supp. 310. And see In re Sears' Estate, 33 Misc. 141, 68 N. Y. Supp. 363.

10. Illg v. Garcia, 92 Tex. 251, 47 S. W. 717; Orange v. Pickford, 3 Drew. 463, 27 L. J. Ch. (Eng.) 808, 4 Jur. (N. S.) 649.

**Lost Will.**—Fetherly v. Waggoner, 11 Wend. (N. Y.) 599.

its face,<sup>11</sup> even though some of the attesting witnesses are still alive.<sup>12</sup> There are cases holding that possession must be shown to have been had under it<sup>13</sup> for the full thirty years<sup>14</sup> in order to render it admissible.

**14. Duplicate Wills.**—There is no presumption that a will was executed in duplicate<sup>15</sup> and the declarations of the testator have been held inadmissible to prove this fact,<sup>16</sup> but where it appears that duplicate copies<sup>17</sup> were really executed, only one of the papers need be proved.<sup>18</sup>

**15. Holographic Wills.**—A. IN GENERAL.—The testamentary nature of an instrument in the handwriting of the decedent will usually appear upon the face of the instrument,<sup>19</sup> and though the statutory formalities for the execution of this class of wills must be strictly complied with,<sup>20</sup> yet the courts look upon them with favor and do not ask for the same amount of proof that is required

**11.** A will cannot be admitted as an ancient will unless it appears to be valid upon its face. *Meegan v. Boyle*, 19 How. (U. S.) 130, 149.

**12.** *Jackson v. Christman*, 4 Wend. (N. Y.) 277; *Doe v. Burdett*, 4 Ad. & El. 1, 31 E. C. L. 1.

**13.** *Georgia*.—*Jordan v. Cameron*, 12 Ga. 267.

*New York*.—*Jackson v. Thompson*, 6 Cow. 178; *Jackson v. Christman*, 4 Wend. 277; *Jackson v. Luquere*, 5 Cow. 221.

*Pennsylvania*.—*Shaller v. Brand*, 6 Bin. 435, 6 Am. Dec. 482.

*South Carolina*.—*Duncan v. Beard*, 2 Nott & McC. 400; *King v. Ferguson*, 2 Nott & McC. 588; *Eubanks v. Harris*, 1 Spear 171.

In *Jackson v. Laroway*, 3 Johns. Cas. (N. Y.) 283, a will was admitted as an ancient will, although there was no possession under it, where such circumstances were shown as to afford the presumption that it was genuine. (Kent, J. dissenting).

**Order of Proof.**—See *Staring v. Bowen*, 6 Barb. (N. Y.) 109.

**14.** Possession under a will must have continued for the full term of thirty years commencing from the death of the testator, to entitle the will to proof as an ancient will. *Staring v. Bowen*, 6 Barb. (N. Y.) 109; *Jackson v. Blanshan*, 3 Johns. (N. Y.) 292.

**15.** *O'Neill v. Farr*, 1 Rich. L. (S. C.) 80.

**16.** *Atkinson v. Morris*, 66 L. J., P. 17 (1897) P. 40, 75 L. T. 440, 45 W. R. 203.

**17.** If two testamentary papers are executed at the same time, and contain different provisions, both must be proved and admitted to probate. *Crossman v. Crossman*, 95 N. Y. 145.

**18.** *Crossman v. Crossman*, 95 N. Y. 145.

**19.** *Estate of Camp*, 134 Cal. 233, 66 Pac. 227.

**20.** *In re Eldred's Will*, 109 App. Div. 777, 96 N. Y. Supp. 435.

Absence of a date from a paper alleged to be a holographic will is a fact of considerable importance. *Young v. Wark*, 76 Miss. 829, 25 So. 660.

**Signature Must Be proved.**—*Lucas v. Brooks*, 23 La. Ann. 117.

In *Louisiana* two witnesses must prove the handwriting, but if the will is contested their testimony may be supplemented and strengthened by the production of original writings and the evidence of experts. *Succession of Roth*, 31 La. Ann. 315. And declarations of the decedent are inadmissible. *Succession of Eubanks*, 9 La. Ann. 147. But this provision of the *Louisiana* code is regarded as directory only, and therefore the contents of a lost holographic will have been allowed to be proved by secondary evidence. *Succession of Clark*, 11 La. Ann. 124; *Gaines v. Hennan*, 23 How. (U. S.) 553.

where the will appears on its face to have been intended to be executed in a more formal manner.<sup>21</sup>

**B. FINDING AMONG VALUABLE PAPERS.** — In those states which require a holographic will to be produced from among the valuable papers of the decedent there is an inference that a holographic will, found among the testator's valuable papers, was placed there by himself.<sup>22</sup> As to what are valuable papers no fixed test is to be applied,<sup>23</sup> but the question is to be determined by the facts of each individual case.<sup>24</sup>

**C. DEPOSIT AS A WILL.** — Under some statutes it is sufficient if it is shown that the instrument was deposited by the decedent with some person, as a will.<sup>25</sup>

**16. Nuncupative Wills.** — **A. NOT FAVORED.** — Nuncupative wills are not favored by the law,<sup>26</sup> and clear and satisfactory proof that

**21.** *Pena v. New Orleans*, 13 La. Ann. 86, 71 Am. Dec. 506.

**Place of Discovery Important.** *State v. Ames*, 23 La. Ann. 69.

**Disguised Handwriting Immaterial.** — *Hannah v. Peake*, 2 A. K. Marsh. (Ky.) 133.

**Finished Instrument.** — Where a holographic will is presented for probate and is written upon different sheets of paper which appear to have been written with different pens and with different ink, this fact does not amount to proof that the will was written at different dates and was not a complete and connected instrument. *Estate of Taylor*, 126 Cal. 97, 58 Pac. 454.

**22.** *Sawyer v. Sawyer*, 52 N. C. (7 Jones L.) 134.

**23.** In *Winstead v. Bowman*, 68 N. C. 170, the court states that the phrase "among the valuable papers and effects" does not necessarily mean among the most valuable, but has an unfixed and varying meaning to be applied in consideration of all the circumstances.

**24.** The fact that a holographic will was found in an iron safe in a drawer sufficiently shows that it was kept among the testator's other valuable papers, although the nature of the papers among which it was found does not appear. *Harper v. Harper*, 148 N. C. 453, 62 S. E. 553.

In a jurisdiction where it is necessary to prove that a holographic will was found among the valuable papers of the deceased, the fact that the writing was in a book containing

valuable papers, memorandum of his moneys, etc., that it had been kept in a box in a table within his reach, which contained his deeds and account books, and that when this box had been moved out several weeks before his death he had caused the book itself to be brought to him and retained in his immediate possession, sufficiently show that he regarded it as a valuable paper. *In re Sheppard's Will*, 128 N. C. 54, 38 S. E. 27.

To determine whether an alleged holographic will was found among the valuable papers of the testator, a witness may testify that he himself sometimes had valuable papers kept in the same place for him by the testator. *Harper v. Harper*, 148 N. C. 453, 62 S. E. 553.

In *Regan v. Stanley*, 79 Tenn. 316, a holographic will propounded was in a diary found among the decedent's books of account, and the will was admitted to probate, it being held that it was found among his valuable papers. And see *Chaney v. Bryan*, 16 Lea (Tenn.) 63.

**25.** See *St. John's Lodge v. Callender*, 26 N. C. (4 Ired. L.) 335; *Marr v. Marr*, 2 Head (Tenn.) 303.

**Declarations of Person With Whom Deposited, Inadmissible.** *St. John's Lodge v. Callender*, 26 N. C. (4 Ired. L.) 335.

**26.** *Gould v. Safford*, 39 Vt. 498; *O'Callaghan v. O'Brien*, 116 Fed. 934; *Mitchell v. Vickers*, 20 Tex. 377; *Dorsey v. Sheppard*, 12 Gill & J. (Md.) 192, 37 Am. Dec. 77.

"Nuncupative wills, except those

they were properly made in strict conformity with statutory provisions is required.<sup>27</sup>

**B. NUMBER OF WITNESSES REQUIRED.**—While in the absence of statute but one witness is required to prove the making of the will<sup>28</sup> the statutes usually require proof by two<sup>29</sup> or even three<sup>30</sup> witnesses.

**C. CONCURRENCE OF TESTIMONY.**—The witnesses offered to prove the execution or dispositions of the will must substantially agree in their testimony.<sup>31</sup>

**D. SUFFICIENCY OF EVIDENCE.**—The various witnesses must testify to the same declaration of the decedent relied upon as his will,<sup>32</sup> and while no particular form of declaration by the decedent or request to the witnesses<sup>33</sup> is required, the intention that the words spoken shall operate as his will must clearly appear.<sup>34</sup>

**E. IN LOUISIANA.**—In Louisiana two classes of nuncupative wills are recognized.

**A Nuncupative Will by Public Act** must contain upon its face a

of soldiers and sailors in the active military or naval service of the government, have never been looked upon with favor by the courts, and proof of such wills is required in strict conformity with the statute authorizing them." *Godfrey v. Smith*, 73 Neb. 756, 103 N. W. 450.

<sup>27.</sup> *Alabama*.—*Johnston v. Glasscock*, 2 Ala. 218.

*Georgia*.—*Scales v. Thornton's Heirs*, 118 Ga. 93, 44 S. E. 857.

*Illinois*.—*Isham v. Bingham*, 126 Ill. App. 513; *Weir v. Chidester*, 63 Ill. 453.

*Indiana*.—*Pierce v. Pierce*, 46 Ind. 86.

*Maryland*.—*Dorsey v. Sheppard*, 12 Gill & J. 192, 37 Am. Dec. 77.

*Mississippi*.—*Andrews v. Andrews*, 48 Miss. 220; *Sadler v. Sadler*, 60 Miss. 251.

*North Carolina*.—*Bundrick v. Haygood*, 106 N. C. 468, 11 S. E. 423.

*Pennsylvania*.—*Megary's Estate*, 25 Pa. Super. 243; *Wiley's Estate*, 187 Pa. St. 82, 40 Atl. 980, 67 Am. St. Rep. 569.

*Tennessee*.—*Smith v. Thurman*, 2 Heisk. 110.

*Texas*.—*Mitchell v. Vickers*, 20 Tex. 377.

*Washington*.—*In re Miller's Estate*, 47 Wash. 253, 91 Pac. 967.

*Wisconsin*.—*Bronson v. Bronson*, 1 Chand. 136.

<sup>28.</sup> *Gould v. Safford*, 39 Vt. 498.

<sup>29.</sup> *Matter of Grossman*, 75 Ill.

App. 224; *Weeden v. Bartlett*, 6 Munf. (Va.) 123; *Portwood v. Hunter*, 6 B. Mon. (Ky.) 538. See *O'Callaghan v. O'Brien*, 116 Fed. 934; *Johnston v. Glasscock*, 2 Ala. 218; *O'Neill v. Smith*, 33 Md. 569.

<sup>30.</sup> *Mitchell v. Vickers*, 20 Tex. 377; *Godfrey v. Smith*, 73 Neb. 756, 103 N. W. 450.

<sup>31.</sup> *Mitchell v. Vickers*, 20 Tex. 377.

If the two witnesses required to establish a nuncupative will do not agree as to a certain particular bequest, it cannot be established; but the remaining bequests will be allowed. *Portwood v. Hunter*, 6 B. Mon. (Ky.) 538.

<sup>32.</sup> A nuncupative will must be proved by two witnesses, and where each of the witnesses swears to similar declarations but made on different occasions by the decedent, the will cannot be established. *Weeden v. Bartlett*, 6 Munf. (Va.) 123.

<sup>33.</sup> *In re Grossman*, 75 Ill. App. 224.

<sup>34.</sup> *Godfrey v. Smith*, 73 Neb. 756, 103 N. W. 450.

**Declarations of General Intent Insufficient.** In an action to establish a nuncupative will, repeated declarations of the deceased that it was his intention to leave his property to the defendant are insufficient to establish the actual making of such a will. *McGee v. McCants*, 1 McCord (S. C.) 517.

recital or a compliance with the statutory formalities,<sup>35</sup> and such recital is sufficient proof of the facts<sup>36</sup> unless extrinsic evidence is introduced that the course as recited was not followed.<sup>37</sup>

**Nuncupative Will by Private Act** need not contain a recital of compliance with the statutory formalities.<sup>38</sup>

**17. Lost Wills.**—Proof of the execution of lost wills is treated in a subsequent portion of this article.<sup>39</sup>

**18. Foreign Wills.**—The method of establishing the due execution of foreign wills is also treated in another section.<sup>40</sup>

**19. Degree of Proof.**—The general rule that applies in other civil actions, that a preponderance of the evidence is sufficient to prove an issue, applies to cases involving the due execution of wills,<sup>41</sup> although loose statements are to be found in a few cases to the effect that proof must be made beyond a reasonable doubt.<sup>42</sup>

**20. Sufficiency of Evidence.**—Courts are prone to accept any theory advanced which is consistent with the validity of the will,<sup>43</sup> and while substantial compliance must be shown with the statutory

**35.** Succession of Dorries, 37 La. Ann. 833; *Weick v. Henne*, 41 La. Ann. 1153, 5 So. 528; Succession of Vollmer, 40 La. Ann. 593, 4 So. 254.

**36.** *Keller v. McCalot*, 12 Rob. (La.) 639.

**37.** Where a will in nuncupative form by public act is presented for probate, the notary and the subscribing witnesses are competent to prove the observance or non-observance of the formalities required by law. Succession of Theriot, 114 La. 611, 38 So. 471.

**Presence of Witnesses Presumed.** *Pizerot v. Meuillon*, 3 Mart. O. S. (La.) 114.

**Actual, Parol Dictation Must Be Shown.**—Succession of Theriot, 114 La. 611, 38 So. 471.

**Non-Recollection of Witnesses Will Not Overcome Recitals.**—Succession of Young, 11 La. Ann. 65.

**Degree of Proof To Overcome Recital.**—Succession of Cauvien, 46 La. Ann. 1412, 16 So. 309.

**38.** *Graves v. Graves*, 10 La. Ann. 210.

**39.** See *infra*, XIV, 3.

**40.** See *infra*, XVIII, 2 D, b.

**41.** *Dean v. Dean's Heirs*, 27 Vt. 726 (fair balance of proof is all that is necessary to prove the execution of the will); *Snider v. Burks*, 84 Ala. 53, 4 So. 225 (evidence such as

is reasonably sufficient to satisfy the minds of the jury); *Ewing v. McIntyre*, 141 Mich. 506, 104 N. W. 787; *In re Tyler's Estate*, 121 Cal. 405, 53 Pac. 928.

**Reasonable Certainty Required.** *Rider v. Legg*, 51 Barb. (N. Y.) 260; *Everitt v. Everitt*, 41 Barb. (N. Y.) 385.

**Effect of Unreasonable Provisions.** The burden of proving a will is on the party setting it up; but the fact that the alleged will is unreasonable in its provisions although competent evidence on the question whether it is the testator's will, imposes on the party setting it up no new or special burden. *Barker v. Comins*, 110 Mass. 477.

**42.** *Burke v. Nolan*, 1 Dem. (N. Y.) 436. *Contra*, *Brown v. Walker* (Miss.), 11 So. 724.

**Proof Beyond Reasonable Doubt.** *In re Lissauer's Estate*, 5 N. Y. Supp. 260, 22 N. Y. St. 877; *Trustees of Auburn Sem. v. Calhoun*, 25 N. Y. 422.

**Satisfactory and Convincing Proof.**—*Howland v. Taylor*, 53 N. Y. 627; *In re Hitchler's Will*, 25 Misc. 365, 55 N. Y. Supp. 642.

**43.** *Woodroof v. Hundley*, 133 Ala. 395, 32 So. 570. And see *Rees v. Rees*, L. R. 3 P. & D. 84; *Barnewall v. Murrell*, 108 Ala. 366, 379, 18 So. 831.

requirements,<sup>44</sup> the evidence required will vary with the circumstances of each case.<sup>45</sup>

**21. Submission to Jury.**—Where the parties to a will contest are entitled to a jury trial, the court has the same power to direct a verdict as in other cases and need not submit every case to the jury.<sup>46</sup>

**22. Weight of Decree on Appeal.**—The decree in a will case stands in the same position as a verdict in other civil actions and will not be set aside unless clearly against the weight of evidence.<sup>47</sup>

## VIII. REVOCATION.

**1. Burden of Proof.**—A. IN GENERAL.—The burden rests upon

44. *Lewis v. Lewis*, 11 N. Y. 220.

45. Clearness of proof of execution varies with each case, "depending much upon age, capacity and other circumstances." *Sutton v. Sutton*, 5 Har. (Del.) 459.

"That evidence does not go to the extent of a full disclosure of all that must have occurred in a given transaction, such as the execution of a will, is no ground for its entire rejection if it is supported and strengthened by circumstances and reasonably founded presumptions such as to lead the mind to conclusions which concur with legal principles and human experience." *In re Foley's Will*, 55 Misc. 162, 106 N. Y. Supp. 474.

**Source of Evidence Immaterial.** *Hesterburg v. Clark*, 166 Ill. 241, 46 N. E. 734, 57 Am. St. Rep. 135.

46. *Snodgrass v. Smith*, 42 Colo. 60, 94 Pac. 312; *In re Shell's Estate*, 28 Colo. 167, 63 Pac. 413; *Purdy v. Hall*, 134 Ill. 298, 25 N. E. 645; *Teckenbrock v. McLaughlin*, 209 Mo. 533, 108 S. W. 46; *Beresford v. Stanley*, 9 Ohio Dec. 134; *Snodgrass v. Smith*, 42 Colo. 60, 94 Pac. 312.

47. *California*.—*In re Johnson's Estate*, 152 Cal. 778, 93 Pac. 1015; *Estate of Keegan*, 139 Cal. 123, 72 Pac. 828.

*Illinois*.—*Entwistle v. Meikle*, 180 Ill. 9, 54 N. E. 217; *Smith v. Henline*, 174 Ill. 184, 51 N. E. 227; *Piper v. Andricks*, 209 Ill. 564, 71 N. E. 18; *Calvert v. Carpenter*, 96 Ill. 63; *Slingloff v. Bruner*, 174 Ill. 561, 51 N. E. 772; *Johnson v. Johnson*, 187 Ill. 86, 58 N. E. 237.

*Kentucky*.—*Floore v. Green*, 26

Ky. L. Rep. 1073, 83 S. W. 133 (noting the change in the law as under a former statute).

*Missouri*.—*Crossan v. Crossan*, 169 Mo. 631, 70 S. W. 136.

*Pennsylvania*.—*In re Rice's Estate*, 3 Pa. Dist. 262.

**Lapse of Time.**—Where a will has been admitted to probate and the contest is made many years later, the decree of the court of probate will not be set aside without clear proof, and there is no presumption of law against the validity of disputed words in a codicil which was alleged to have been altered subsequent to the execution of the will. *Wilton v. Humphreys*, 176 Mass. 253, 57 N. E. 374.

**Decree of Even More Weight Than in Ordinary Actions.**—

"Where on an issue *devisavit vel non*, a judgment has been entered on a verdict against the will, there is a judicial determination by the trial judge independent of the finding of the jury, that the verdict ought to stand. In such a case the jury is not alone responsible, the court also is responsible; and if after the case has been fully developed, the court, in view of the whole evidence, considers it not sufficient to sustain the material facts, it is bound to set aside the verdict. The result of this is that in order to reverse such a judgment, the laboring oar is on the appellant in a stronger sense than is commonly applicable to a disappointed suitor." *Robinson v. Robinson*, 203 Pa. St. 400, 53 Atl. 253.

the person who alleges that a will, duly executed, was subsequently revoked by the testator.<sup>48</sup>

**B. REVOCATION BY SUBSEQUENT LOST WILL.**—Where it is claimed that a will subsequently executed, which cannot be found, revoked a prior will either expressly or by implication, the party alleging this has the burden of proving not only the execution of the lost will,<sup>49</sup> but its revocatory nature.<sup>50</sup>

**2. Presumptions.**—**A. FROM DISAPPEARANCE OF WILL.**—*a. Will in Possession of Decedent.*—A will last seen and known to have been in the possession of the decedent, which cannot be found after his death, will be presumed to have been destroyed by him and with an intention of revoking it,<sup>51</sup> since the law always pre-

48. *Benson v. Benson*, 40 L. J. P. 1, L. R. 2 P. 172, 23 L. T. 709, 19 W. R. 190; *Johnston v. Johnston*, 1 Phill. 447, 4 Eng. Ecc. 141; *Throckmorton v. Holt*, 180 U. S. 552, 584; *Estate of Olmsted*, 122 Cal. 224, 54 Pac. 745; *In re Wood's Will*, 11 N. Y. Supp. 157, 32 N. Y. St. 286.

Where there is no direct issue as to the revocation or cancellation of a will, it is error to charge that one of the essential facts to be established by the proponent is that the will had not been revoked, or canceled. *Brown v. Walker* (Miss.), 11 So. 724.

Although Art. 1904, Texas Rev. Stat. 1895, requires that the proponent establish among other things that the will offered has not been revoked, no direct evidence to show this is necessary. The will having been established as duly executed, and having been produced, unattended by any circumstance which casts suspicion upon it, the presumption of the continuity of the status applies, and makes a *prima facie* case as against a revocation. *McElroy v. Phink*, 97 Tex. 147, 76 S. W. 53, 77 S. W. 1025, *reversing* (Tex. Civ. App.) 74 S. W. 61. And see *Woodruff v. Hundley*, 127 Ala. 640, 29 So. 98, 85 Am. St. Rep. 145.

**Marginal Revocation.**—Where a will had certain revocatory words written upon its margin, but it was alleged that these words were forged, the revocation was not a cancellation technically nor even a mutilation, and therefore needed no explanation upon the part of the propounder of the will; and after he had offered the will and proved its execution the burden of proving a revocation was

upon the contestant. *In re Shelton's Will*, 143 N. C. 218, 55 S. E. 705.

49. *Mairs v. Freeman*, 3 Redf. (N. Y.) 181; *Jones v. Murphy*, 8 Watts & S. (Pa.) 275.

50. *England.*—*Berthon v. Berthon*, 18 L. T. 301, 16 W. R. 673; *Cutto v. Gilbert*, 9 Moore P. C. 131, 14 Eng. Reprint 247.

*Iowa.*—*In re Dunahugh's Will*, 130 Iowa 692, 107 N. W. 925.

*Kansas.*—*Caeman v. VanHarke*, 33 Kan. 333, 6 Pac. 620.

*Kentucky.*—*Muller v. Muller*, 108 Ky. 511, 56 S. W. 802.

*Michigan.*—*Cheever v. North*, 106 Mich. 390, 64 N. W. 455.

*Nebraska.*—*Williams v. Miles*, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151, 110 Am. St. Rep. 431, 62 L. R. A. 383.

*New Hampshire.*—*Lane v. Hill*, 68 N. H. 275, 44 Atl. 393, 73 Am. St. Rep. 591.

51. *England.*—*Rickards v. Mumford*, 2 Phill. 23, 4 Eng. Ecc. 170; *Loxley v. Jackson*, 3 Phill. 126; *Sugden v. Lord St. Leonards*, 17 Moak 154; *Cutto v. Gilbert*, 9 Moore P. C. 131, 14 Eng. Reprint 247; *Worgent v. Hollings*, 4 Hagg. Ecc. 245; *Welch v. Phillips*, 1 Moore P. C. 299, 12 Eng. Reprint 828; *Brown v. Brown*, 8 El. & Bl. 876, 92 E. C. L. 875; *Allan v. Morrison*, (1900) App. Cas. 604.

*United States.*—*Throckmorton v. Holt*, 180 U. S. 552; *Southworth v. Adams*, 11 Biss. 256, 22 Fed. Cas. No. 13,194 (discussing the nature of the presumption).

*Alabama.*—*Snider v. Burks*, 84 Ala. 53, 4 So. 225.



sumes in favor of the innocence of an act, and any other inference

*Connecticut.*—*In re Johnson's Will*, 40 Conn. 587.

*Delaware.*—*Dawson v. Smith*, 3 Houst. 92, 335.

*Georgia.*—*Collins v. Collins*, 29 Ga. 509; *Scott v. Maddox*, 113 Ga. 795, 39 S. E. 500.

*Illinois.*—*Stetson v. Stetson*, 200 Ill. 601, 66 N. E. 262, 61 L. R. A. 258; *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837; *Boyle v. Boyle*, 153 Ill. 228, 42 N. E. 140.

*Indiana.*—*McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336.

*Iowa.*—*Thomas v. Thomas*, 129 Iowa 159, 105 N. W. 403; *McCarn v. Rundall*, 111 Iowa 406, 82 N. W. 924.

*Kentucky.*—*Steele v. Price*, 5 B. Mon. 58; *Mercer v. Mackin*, 14 Bush 434; *Minor v. Guthrie*, 9 Ky. L. Rep. 113, 4 S. W. 179.

*Louisiana.*—*Fuentes v. Gaines*, 25 La. Ann. 85.

*Massachusetts.*—*Davis v. Sigourney*, 8 Met. 487; *Newell v. Holmes*, 120 Mass. 280.

*Michigan.*—*Ewing v. McIntyre*, 141 Mich. 506, 104 N. W. 787; *Cheever v. North*, 106 Mich. 390, 64 N. W. 455.

*Missouri.*—*Hamilton v. Crowe*, 175 Mo. 634, 75 S. W. 389; *Beaumont v. Keim*, 50 Mo. 29.

*Nebraska.*—*Williams v. Miles*, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151, 110 Am. St. Rep. 431, 62 L. R. A. 383.

*New Hampshire.*—*Lane v. Hill*, 68 N. H. 275, 44 Atl. 393, 73 Am. St. Rep. 591.

*New Jersey.*—*In re Willitt's Estate*, 46 Atl. 519.

*New York.*—*Holland v. Ferris*, 2 Bradf. 334; *Matter of Nichols*, 40 Hun 387; *Knapp v. Knapp*, 10 N. Y. 276; *Hard v. Ashley*, 88 Hun 103, 34 N. Y. Supp. 583; *Collyer v. Collyer*, 110 N. Y. 481, 18 N. E. 110, 6 Am. St. Rep. 405; *Hatch v. Sigman*, 1 Dem. 519; *Betts v. Jackson*, 6 Wend. 173; *Hammersley v. Lockman*, 2 Dem. 524; *Bulkley v. Redmond*, 2 Bradf. 281; *Idley v. Bowen*, 11 Wend. 227; *In re Kennedy's Will*, 167 N. Y. 163, 60 N. E. 442; *Schultz v. Schultz*, 35 N. Y. 653; *Holland v. Ferris*, 2 Bradf. 334; *In re Will of Clark*, 1 Tuck. 445.

*Ohio.*—*In re Wiswell's Will*, 7 Ohio N. P. 564; *Behrens v. Behrens*, 47 Ohio St. 323, 25 N. E. 209, 21 Am. St. Rep. 820.

*North Carolina.*—*In re Hedgepeth's Will*, 63 S. E. 1025.

*Oregon.*—*In re McCoy's Estate*, 49 Or. 579, 90 Pac. 1105; *In re Miller's Will*, 49 Or. 452, 90 Pac. 1002.

*Pennsylvania.*—*In re Foster's Will*, 13 Phila. 567; *Gardner v. Gardner*, 177 Pa. St. 218, 35 Atl. 558; *Fallon's Estate*, 214 Pa. St. 584, 63 Atl. 889; *Deaves' Estate*, 140 Pa. St. 242, 21 Atl. 395; *Stewart's Estate*, 149 Pa. St. 111, 24 Atl. 174; *Foster's Appeal*, 87 Pa. St. 67, 30 Am. Rep. 340; *Jones v. Murphy*, 8 Watts & S. 275; *Baptist Church v. Robbarts*, 2 Pa. St. 110; *Gfeller v. Lappe*, 208 Pa. St. 48, 57 Atl. 59.

*South Carolina.*—*Durant v. Ashmore*, 2 Rich. L. 184; *Legare v. Ashe*, 1 Bay 464.

*South Dakota.*—*Starkweather v. Bell*, 13 S. D. 475, 83 N. W. 566.

*Tennessee.*—*Brown v. Brown*, 10 Yerg. 84; *Allen v. Jeter*, 6 Lea 672.

*Texas.*—*McElroy v. Phink*, 97 Tex. 147, 76 S. W. 753, 77 S. W. 1025, reversing (Tex. Civ. App.), 74 S. W. 61.

*Vermont.*—*Minkler v. Minkler*, 14 Vt. 125.

*Virginia.*—*Appling v. Eades*, 1 Gratt. 286; *Shacklett v. Roller*, 97 Va. 639, 34 S. E. 492.

*Wisconsin.*—*In re Valentine's Will*, 93 Wis. 45, 67 N. W. 12; *Gavitt v. Moulton*, 119 Wis. 35, 96 N. W. 395.

**Basis of Presumption.**—See *Betts v. Jackson*, 6 Wend. (N. Y.) 173.

**Character of Presumption.**—See *In re Hopkins' Will*, 35 Misc. 702, 72 N. Y. Supp. 415.

**Conflicting Presumptions.**—*McElroy v. Phink*, 97 Tex. 147, 76 S. W. 753, 77 S. W. 1025, reversing (Tex. Civ. App.) 74 S. W. 61. But see *In re Marsh*, 45 Hun (N. Y.) 107; *In re Colbert's Estate*, 31 Mont. 461, 78 Pac. 971, 80 Pac. 248; *In re Kennedy's Will*, 167 N. Y. 163, 60 N. E. 442.

**Mode of Destruction Immaterial.** *Bulkley v. Redmond*, 2 Bradf. (N. Y.) 281.

would involve a finding of a wrongful or fraudulent destruction of the will by a third person.<sup>52</sup>

b. *Will in Possession of Third Person.*—But when it appears that the will was last in the custody or possession of some third person, this presumption does not arise.<sup>53</sup>

c. *Proof of Search for Will.*—Before the presumption will arise, proof must be made of a search for the will and it must be shown that it was not known to be in existence at time of testator's death.<sup>54</sup>

d. *Nature of Presumption.*—These presumptions are commonly called presumptions of fact, merely,<sup>55</sup> and in no case are they conclusive.<sup>56</sup> But they stand in the place of affirmative evidence<sup>57</sup>

52. *In re Blymeyer's Will*, 7 Ohio N. P. 591.

"The very ground upon which the rule is based, that where a will is traced to the possession of the testator, and it cannot be found after his death, the presumption is that the testator himself revoked it, is, that the law will presume that an innocent, rather than a criminal, act has been done. Hence, in such a case, the law will presume that the will was destroyed by the testator, which would be an innocent act, rather than that it was destroyed by the heirs at law, even though they might have an interest so to do, and might, by reason of their close relations to the testator, have the best of opportunities of so doing; because, if they did it, their act would be a criminal one, which the law will not presume, but will require to be established by satisfactory evidence. See *Knapp v. Knapp*, 10 N. Y. 276." *Bauskett v. Keitt*, 22 S. C. 187. And see *Allan v. Morrison*, (1900) App. Cas. (Eng.) 604.

53. *In re Harris' Estate*, 10 Wash. 555, 39 Pac. 148; *Jones v. Murphy*, 8 Watts & S. (Pa.) 275; *In re Hedgepeth's Will* (N. C.), 63 S. E. 1025; *Collagan v. Burns*, 57 Me. 449; *Dawson v. Smith*, 3 Houst. (Del.) 335; *Snider v. Burks*, 84 Ala. 53, 4 So. 225.

**Burden of Proof of Re-Tracing it Into Decedent's Possession.**—*In re Miller's Will*, 49 Or. 452, 90 Pac. 1002.

**Third Person Presumed To Have Lost It.**—*McElroy v. Phink*, 97 Tex. 147, 76 S. W. 753, 77 S. W. 1025, reversing (Tex. Civ. App.) 74 S. W. 61.

54. *In re Blymeyer's Will*, 7 Ohio (N. P.) 591.

"The court had occasion to remark in *Podmore v. Whotton*, 3 Sw. & Tr. at p. 451; 33 L. J. (P. M. & A.) at p. 144: 'A material question of fact has to be decided in this case before any presumption arises on either side; and it is this, Was the will found at the decease of the testatrix or not? If it was found at her death, and in an un-mutilated state, then she did not revoke it. It was not so found, then there is room and foundation for the revocation which the law will presume in the absence of testimony to rebut it. In most cases, the solution of this question presents no difficulty, for the depositories of the deceased are duly searched by those whose good faith is not impugned, and who vouch for the fact one way or another.'" *Finch v. Finch*, 36 L. J., P. 78, L. R. 1 P. 371, 16 L. T. 268, 15 W. R. 797.

55. *Minkler v. Minkler*, 14 Vt. 125; *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151, 110 Am. St. Rep. 431, 62 L. R. A. 383; *Durant v. Ashmore*, 2 Rich. L. (S. C.) 184; *Matter of Johnson's Will*, 40 Conn. 587; *Hutson v. Hartley*, 72 Ohio St. 262, 74 N. E. 197.

56. *Sugden v. Lord St. Leonards*, 45 L. J., P. 49, 1 P. D. 154, 34 L. T. 369, 24 W. R. 479; *Southworth v. Adams*, 11 Biss. 256, 22 Fed. Cas. No. 13,194; *Matter of Page*, 118 Ill. 576, 8 N. E. 852, 59 Am. Rep. 395; *In re Ladd's Will*, 60 Wis. 187, 18 N. W. 734; *Shacklett v. Roller*, 97 Va. 639, 34 S. E. 492; *Foster's Appeal*, 87 Pa. St. 67, 30 Am. Rep. 340.

57. *McIntosh v. Moore*, 22 Tex. Civ. App. 22, 53 S. W. 611.

and the proof to overthrow them must be clear and satisfactory.<sup>58</sup>

**e. Facts Rebutting.**—(1.) **In General.**—Evidence to strengthen or rebut the presumption of destruction or cancellation will be allowed to take a wide range,<sup>59</sup> and any fact or circumstance bearing upon the question is admissible.<sup>60</sup>

The presumption that a will last seen in the possession of the testator but not found upon his decease stands in the absence of proof by the proponents from which it may be fairly interred that the will was in existence at the time of his death. *In re Kennedy's Will*, 53 App. Div. 105, 65 N. Y. Supp. 879.

<sup>58.</sup> *In re Colbert's Estate*, 31 Mont. 461, 78 Pac. 971, 80 Pac. 248; *Eckersley v. Platt*, 36 L. J., P. 7, L. R. 1 P. 281, 15 L. T. 327, 15 W. R. 232; *Michell v. Low*, 213 Pa. St. 526, 63 Atl. 246.

A charge that where there was no corroborating circumstances the presumption that the loss of the will is due to the act of the testator rather than to other causes belongs to the lowest order of proof and has no other effect than that of obligating the party who denies it to establish his case by some affirmative evidence, is properly refused as invading the province of the jury. *Bauskett v. Keitt*, 22 S. C. 187.

**Less Proof Required Where Parties Agree.**—In *Goods of Berry*, 65 L. T. 763.

<sup>59.</sup> The allegation involves the issue of fraud, and the conduct of the interested persons may be inquired into. *Gfeller v. Lappe*, 208 Pa. St. 48, 57 Atl. 59.

**Feeling of Testator Toward Alleged Suppressor Relevant.**—*Brown v. Brown*, 10 Yerg. (Tenn.) 84.

<sup>60.</sup> *Behrens v. Behrens*, 47 Ohio St. 323, 25 N. E. 209, 21 Am. St. Rep. 820; *Durant v. Ashmore*, 2 Rich. L. (S. C.) 184; *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151, 110 Am. St. Rep. 431, 62 L. R. A. 383.

"As bearing upon the issue of revocation or no revocation evidence is admissible as to the firm and positive character and tenacity of purpose of the testator, the deliberation with which the will was made, the short period of time be-

tween the making of the will and the time when the key of the trunk passed out of his possession, his physical weakness in that short interval, his expressions of purpose after the will was made consistent with its provisions and inconsistent with the intention to die intestate, his repeatedly expressed wish that Summerville, who had drawn his will, would come and make changes in it . . . together with the fact that he had a large sum undisposed of by the will; the absence of any evidence of any change in the circumstances of any of his relatives after the will was made, making it improbable that he would so radically change his mind as to destroy his will, together with the acts or suspicious conduct of those who surrounded him and whose interests would be subserved by intestacy." *Gardner v. Gardner*, 177 Pa. St. 218, 35 Atl. 558.

**Suspicious Conduct of Servant May Be Shown.**—*Battyll v. Lyles*, 4 Jur. (N. S.) 718.

**Physical Incapacity of Testator.** *Scoggins v. Turner*, 98 N. C. 135, 3 S. E. 719; *Gardner v. Gardner*, 177 Pa. St. 218, 35 Atl. 558. But see *Bauskett v. Keitt*, 22 S. C. 187 (calling attention to fact that testator could order its destruction by another person).

**Acquiescence in Statement of Third Person That He Has a Will.** *In re Fallon's Estate*, 214 Pa. St. 584, 63 Atl. 889.

**Knowledge of Circumstances by Personal Attorney.**—The testimony of a person who had drawn several wills for the decedent to the effect that not more than a month or two before the decedent's death the decedent ordered him to destroy all of the wills and that he was never ordered to make a new one, greatly strengthens the presumption that a will which cannot be found was de-

(2.) **Opportunity of Interested Person To Destroy It.** — The mere fact that a person to whose interest it would be to destroy the will had access to the papers of the decedent and an opportunity to destroy the will, is not sufficient to rebut the presumption,<sup>61</sup> although it is a suspicious fact to be considered in connection with the other circumstances in the case.<sup>62</sup>

(3.) **Insanity of Testator.** — In case a testator subsequently becomes insane and his will cannot be found after his death there is no presumption that he destroyed the will, while sane, with a revocatory intent.<sup>63</sup>

(4.) **Habits of Testator.** — The careless<sup>64</sup> or methodical<sup>65</sup> habits of the testator may be shown.

(5.) **Changes in Situation of Family.** — Any change in the situation of any of the members of the family of the decedent<sup>66</sup> or in his feeling towards any of them,<sup>67</sup> may be shown.

stroyed by the testator. *Michell v. Low*, 213 Pa. St. 526, 63 Atl. 246.

**Belief of Testator in Existence of Will.** — *Mann v. Balfour*, 187 Mo. 290, 86 S. W. 103.

61. *Gavitt v. Moulton*, 119 Wis. 35, 96 N. W. 395; *Bauskett v. Keitt*, 22 S. C. 187; *McElroy v. Phink*, 97 Tex. 147, 76 S. W. 753, 77 S. W. 1025, reversing (Tex. Civ. App.) 74 S. W. 61; *In re Barnes' Will*, 70 App. Div. 523, 75 N. Y. Supp. 373.

The fact that the testator gave his keys to his wife during his last illness and to that extent she had access and control over his papers and will will not prevent the presumption arising that canceling lines in his will were placed there by himself, where she testifies that she did not alter the will. *Home of the Aged v. Bantz*, 107 Md. 543, 69 Atl. 376.

62. *Ewing v. McIntyre*, 141 Mich. 506, 104 N. W. 787; *Gardner v. Gardner*, 177 Pa. St. 218, 35 Atl. 558; *Sugden v. Lord St. Leonards*, 45 L. J., P. 49, 1 P. D. 154, 34 L. T. 369, 24 W. R. 479.

"A will which had been in the testator's custody could not be found in his depositories after his death, but there was evidence of declarations recognizing its existence up to within three weeks of his death; there was no evidence of any change of intention during those three weeks, and the only person who was interested in an intestacy had access to and made a search in

the depositories before they were searched by any other person. Coupling these facts with the non-appearance of the person interested in an intestacy, the court refused to presume that the will had been revoked, and granted probate of the draft." *Finch v. Finch*, 36 L. J., P. 78, L. R. 1 P. 371, 16 L. T. 268, 15 W. R. 797.

63. *Sprigge v. Sprigge*, 38 L. J., P. 4, L. R. 1 P. 608, 19 L. T. 462. See *Allan v. Morrison* (1900) App. Cas. 604.

**In Virginia** the rule seems to be otherwise. *Shacklett v. Roller*, 97 Va. 639, 34 S. E. 492.

64. Evidence that the testator was careless in keeping his papers, that he remained unconscious for several days immediately before his death, and that his papers were scattered around the room when found, is sufficient to rebut the presumption that he himself destroyed a lost will. *Gavitt v. Moulton*, 119 Wis. 35, 96 N. W. 395.

65. *In re Fallon's Estate*, 214 Pa. St. 584, 63 Atl. 889.

66. *Thomas v. Thomas*, 129 Iowa 159, 105 N. W. 403; *Betts v. Jackson*, 6 Wend. (N. Y.) 173; *Loxley v. Jackson*, 3 Phill. 126, 4 Eng. Ecc. 375.

67. *Gfeller v. Lappe*, 208 Pa. St. 48, 57 Atl. 59; *Spencer's Appeal*, 77 Conn. 638, 60 Atl. 289.

**Relations Existing Before Will Was Made.** — Evidence as to the relations existing between the tes-

(6.) **Desire To Leave a Will.**—The fact that the decedent had a strong desire to leave a will and not to die intestate tends to rebut the presumption.<sup>68</sup>

(7.) **Nature of Provisions.**—The naturalness and reasonableness of the provisions made by the will is also to be considered.<sup>69</sup>

B. FROM DISCOVERY WITH CANCELING MARKS.—a. *In General.* In a similar manner, where the will is discovered with canceling marks upon it,<sup>70</sup> or in a mutilated condition,<sup>71</sup> there is a presump-

tator and the proponent and his other relatives *before* the will is relevant only in rebuttal of testimony by the heirs tending to show that the testator had always been on affectionate terms with them. *Spencer's Appeal*, 77 Conn. 638, 60 Atl. 289.

68. *Foster's Appeal*, 87 Pa. St. 67, 30 Am. Rep. 340; *Brown v. Brown*, 10 Yerg. (Tenn.) 84.

**Fact That Decedent Knew His Property Would Escheat.**—The presumption that a will last in the possession of the testator, which cannot be found after his decease, has been destroyed by him with the intention of revoking it may be rebutted by evidence that the testator was aware that unless he had a will his property would go to the Crown, that he was an experienced man of business and that he had spoken of its existence a short time before his death. *Stewart v. Walker*, 6 Ont. L. 495.

69. "It is obvious that where a will, shown to have been in the custody of a testator, is missing at the time of his death, the question whether it is probable that he destroyed it must depend largely upon what was contained in the instrument. Was it one arrived at after mature deliberation; did it deal with the interests of the whole of his family, carefully arranging the dispositions which he would make in favor of the several members of it, or was it the hasty expression of a passing dissatisfaction with some one or more of them?" *Sugden v. Lord St. Leonards*, 45 L. J., P. 49, 1 P. D. 154, 34 L. T. 369, 24 W. R. 479.

70. **Every Act of Cancellation** is *prima facie* evidence of revocation. *Cutler v. Cutler*, 130 N. C. 1, 40 S. E.

689, 57 L. R. A. 209; *Wolfe v. Bollinger*, 62 Ill. 368; *Bethel v. Moore*, 19 N. C. (2 Dev. & B.) 311; *Frear v. Williams*, 7 Baxt. (Tenn.) 550; *Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460.

**Signature Erased and Rewritten.**

Where a will is found carefully preserved with the original signature erased but a new signature written over the original, there is no presumption that the erasure was made with an intention to revoke, or that the restoration was done after the execution. *In re Wood's Will*, 11 N. Y. Supp. 157, 32 N. Y. St. 286.

**Rule In Georgia.**—"As a general rule the burden is on the person attacking the paper offered for probate as a will to sustain the grounds of his attack, but by express provision of our statute where a will has been canceled or obliterated in a material part a presumption of revocation arises, and the burden is on the propounder to show that no revocation was intended. Civ. Code par. 3343." *McIntyre v. McIntyre*, 120 Ga. 67, 47 S. E. 501. See also *Howard v. Hunter*, 115 Ga. 357, 11 S. E. 638; *Cutler v. Cutler*, 130 N. C. 1, 40 S. E. 689, 57 L. R. A. 209.

71. *Handy v. State*, 7 Har. & J. (Md.) 442.

If a testator cuts or tears off his signature, the law will presume that it was done with an intention to revoke the will. *Youse v. Forman*, 5 Bush (Ky.) 337; *Smock v. Smock*, 11 N. J. Eq. 156.

"In the absence of any evidence to the contrary, the mere cutting off eight lines at the beginning of the document does not show an intention to revoke the whole will. It may be said that the object of tearing off the first part was to destroy the statement that it was the last will and

tion that the marks were placed there by the testator himself with the intention of canceling the will.<sup>72</sup> The propositions laid down in treating of the previous presumption are equally true of this one.<sup>73</sup>

b. *Place of Discovery*.—For this presumption to arise it must appear that the will was found in its canceled condition among the papers of the decedent.<sup>74</sup>

c. *Time of Discovery*.—The will must have been discovered soon after the death of the testator or its whereabouts in the meantime satisfactorily explained.<sup>75</sup>

d. *Facts Rebutting*.—The presumed intention of the testator to revoke his will may be rebutted by any relevant evidence.<sup>76</sup>

testament of the deceased, which is a material averment, but the force of that observation depends very much, if not entirely, upon the consideration whether there was anything else of moment or importance in that part of the will destroyed, which the testator might have wished to revoke." In the Goods of Woodward, 40 L. J., P. 17, L. R. 2 P. 206, 24 L. T. 40, 19 W. R. 448.

72. *England*.—Bell v. Fothergill, L. R. 2 P. 148, 23 L. T. 323; Boughey v. Moreton, 2 Lee Ecc. 532; Moore v. De la Torre, 1 Phill. 375, 4 Eng. Ecc. 109; Moore v. Moore, 1 Phill. 375.

*California*.—Estate of Olmsted, 122 Cal. 224, 54 Pac. 745. *In re Wikman's Estate*, 148 Cal. 642, 84 Pac. 212.

*Indiana*.—Woodfill v. Patten, 76 Ind. 575, 40 Am. Rep. 269.

*Georgia*.—McIntyre v. McIntyre, 120 Ga. 67, 47 S. E. 501.

*Kentucky*.—Steel v. Price, 5 B. Mon. 58.

*Maine*.—Collagan v. Burns, 57 Me. 449.

*New Jersey*.—Hilyard v. Wood, 71 N. J. Eq. 214, 63 Atl. 7. *In re White*, 25 N. J. Eq. 501; Smock v. Smock, 11 N. J. Eq. 156.

*New York*.—*In re Wood's Will*, 11 N. Y. Supp. 157, 32 N. Y. St. 286. *In re Philips' Will*, 64 Hun 635, 19 N. Y. Supp. 13.

*North Carolina*.—Bethell v. Moore, 19 N. C. (2 Dev. & B.) 311; Cutler v. Cutler, 132 N. C. 190, 43 S. E. 630; Bennett v. Sherrod, 25 N. C. 3 Ired. L.) 303, 40 Am. Dec. 410.

*Ohio*.—Crosby v. Crosby, 10 Ohio

C. C. (N. S.) 57. *In re Estate of Jones*, 2 Ohio Dec. 409.

*Pennsylvania*.—Baptist Church v. Robbarts, 2 Pa. St. 110.

Where the signature to a will had been cut out but later pasted on again, the presumption still exists that the original cutting was done by the testator with an intention of revoking his will. Bell v. Fothergill, L. R. 2 P. 148, 23 L. T. 323.

**Discovery With Seal Absent.** Stevens v. Stevens, 72 N. H. 360, 56 Atl. 916.

73. See *supra*, VIII, 2, A.

74. Throckmorton v. Holt, 180 U. S. 552; Hitchings v. Wood, 2 Moore P. C. 355, 447, 12 Eng. Reprint 1041. *In re Hopkins' Will*, 35 Misc. 702, 72 N. Y. Supp. 415.

"The fact that the will was not shown to have been in the testator's possession, or was not found among his papers after his decease in the condition in which it was presented for probate, assuming that upon the evidence of mutilation of the will could be found, upon all the authorities leaves no basis for the presumption of revocation." Stevens v. Stevens, 72 N. H. 360, 56 Atl. 916.

75. Bennett v. Sherrod, 25 N. C. (3 Ired. L.) 303, 40 Am. Dec. 410; *In re Hopkins' Will*, 35 Misc. 702, 72 N. Y. Supp. 415.

76. Bates v. Holman, 3 Hen. & M. (Va.) 502.

**Habitual Method of Mutilation.** The fact that it is shown that it was the customary habit of the testator to mutilate important papers in the same way is strong evidence to show that it was his intention to revoke his will when he cut off his name

C. FROM KNOWLEDGE OF LOSS. — The fact that a testator knows of the destruction of his will and makes no effort to replace it raises a presumption after the lapse of a reasonable length of time, that he intends it to stand revoked.<sup>77</sup>

D. PLACE OF DISCOVERY. — No presumption of an intention to revoke arises from the mere fact that a will was discovered among waste papers.<sup>78</sup>

E. LEAD PENCIL CANCELLATIONS. — Although some cases seem to hold that there is a presumption that cancellations made with a lead pencil were intended to be deliberative only,<sup>79</sup> the better view and that supported by the weight of authority is that they are presumed to have been made with completed intention, and represent the final wish of the testator.<sup>80</sup>

F. SUBSEQUENT WILL SUPPRESSED. — Where a subsequent will is suppressed or spoliated by a party there is a presumption that it contained clauses either expressly or impliedly revoking an earlier will.<sup>81</sup>

G. AUTHORITY OF THIRD PERSON. — There is no presumption

and the seal. *Smock v. Smock*, 11 N. J. Eq. 156.

Where the issue is whether a will was canceled by the testator or not, an earlier will may be introduced in evidence, which was admittedly canceled by the testator, to show the manner in which he was likely to make the cancellation. *Irish v. Smith*, 8 Serg. & R. (Pa.) 573, 11 Am. Dec. 648.

77. *Parsons v. Balson* (Wis.), 109 N. W. 136; *Steele v. Price*, 5 B. Mon. (Ky.) 58.

Where the will produced was mutilated by vermin and it appeared likely that the signature to the will had also been torn off, and it also appeared that the testator knew of the condition of the instrument some time before his decease, the question whether there has been a revocation is one for the jury since the facts warrant an inference that the testator intended that the instrument should stand revoked. *Cutler v. Cutler*, 130 N. C. 1, 40 S. E. 689, 57 L. R. A. 209.

78. *Succession of Blakemore*, 43 La. Ann. 845, 9 So. 496.

The putting of the will among waste papers whether intentionally or not does not even raise a presumption that it was the intention of the testator by this act to revoke the testament. *Succession of Hill*, 47 La.

Ann. 329, 16 So. 819; *State v. Ames*, 23 La. Ann. 72.

79. See the discussion of this question in *Tomlinson's Estate*, 133 Pa. St. 245, 19 Atl. 482, 19 Am. St. Rep. 637.

80. *McIntyre v. McIntyre*, 120 Ga. 67, 47 S. E. 501; *Townshend v. Howard*, 86 Me. 285, 29 Atl. 1077; *Woodfill v. Patten*, 76 Ind. 575, 40 Am. Rep. 269; *LaRue v. Lee*, 63 W. Va. 388, 60 S. E. 388; *Hilyard v. Wood*, 71 N. J. Eq. 214, 63 Atl. 7. In *Estate of Tomlinson*, 133 Pa. St. 245, 19 Atl. 482, 19 Am. St. Rep. 637, the court says: "A will wholly written in lead pencil is as valid as if written in ink, and the cancellation of legacies in lead pencil though in a will written in ink may be as final and conclusive as to the intent of testator as if made in ink."

**Facts Strengthening Presumption.** *Hilyard v. Wood*, 71 N. J. Eq. 214, 63 Atl. 7.

**Facts May Rebut This Presumption.** — *In re Frothingham's will* (N. J.), 71 Atl. 695.

81. *Jones v. Murphy*, 8 Watts & S. (Pa.) 275.

Where the inference is permissible that a revoking will is being suppressed, the law will prevent the perpetration of a fraud by permitting a presumption to supply the suppressed proof of its revocatory char-

that a third person was authorized by a testator to cancel his will.<sup>82</sup>

**H. WILL, EXECUTED IN DUPLICATE.** — Where a will has been executed in duplicate there is a presumption that the testator in destroying the copy in his possession intended to revoke the will.<sup>83</sup>

**3. Declarations.** — **A. OF TESTATOR.** — **a. In General.** — There is irreconcilable conflict in the cases upon the question whether declarations of the testator made before or after the execution of the will are admissible to prove its revocation.<sup>84</sup> By far the greater weight of authority holds them admissible<sup>85</sup> in corroboration of

acter. *Estate of Lambie*, 97 Mich. 49, 56 N. W. 223.

**Facts Which Must First Be Shown.** — Before the presumption arises that a second will which has been destroyed or suppressed by an interested party contained provisions inconsistent with the first will and effectually revoked it, it must appear satisfactorily that a later will actually existed at the testator's death and there must be evidence of spoliation by some of the parties claiming under the former will. *Caeman v. VanHarke*, 33 Kan. 333, 6 Pac. 620.

<sup>82.</sup> *In re Hopkins' Will*, 35 Misc. 702, 72 N. Y. Supp. 415.

<sup>83.</sup> See *Crossman v. Crossman*, 95 N. Y. 145; *O'Neill v. Farr*, 1 Rich. L. (S. C.) 80.

"When it is said that a presumption of intent to revoke arises from the testator's act of destroying that copy of a will executed in duplicate which is within his reach, it is not to be inferred that a presumption *juris et de jure* is meant. The presumption referred to is not an irrebuttable conclusion of law. It is a mere inference of fact." *Managle v. Parker* (N. H.), 71 Atl. 637.

**Both Copies in Testator's Possession.** — Where the will is executed in duplicate, if the testator destroys one of the duplicates and this is the only one in his possession an intent to revoke is to be presumed; but if he was possessed of both copies and destroys one the presumption is weaker; and if he alters one and then destroys it, retaining the other entire, the presumption is still weaker, and some cases assert that there is no presumption in such a case. *Snider v. Burks*, 84 Ala. 53, 4 So. 225.

**One Copy Lost.** — Whether there was a presumption of revocation

where one of the original copies cannot be found was discussed in *Hurton v. Hurton*, 113 Mich. 634, 71 N. W. 1078.

**Presumption as to Which Copy Is Propounded For Probate.** — It appearing on the contested probate of a will that the testator executed the will in duplicate, keeping one copy and giving the other to his wife, and it not appearing what the wife did with her copy, and it not being shown that the wife's copy ever went back to the possession of the testator, the inference is that the will sought to be probated is the copy retained by the testator, and no presumption of revocation based on the fact that he destroyed the copy retained by him can arise. *Snider v. Burks*, 84 Ala. 53, 4 So. 225.

<sup>84.</sup> "There are few questions in the law upon which authorities are more hopelessly in conflict than upon the admissibility of the declarations of a deceased testator in support or in rebuttal of a supposed revocation of a testamentary paper. It has engaged the attention and elicited the logic of the greatest jurists who have adorned the bench of this or any country. Against the admissibility of such evidence are to be found the names of Kent and Story and Livingston, and in favor of it those of Walworth and Ruffin and Lumpkin and Cooley." *McElroy v. Phink*, 97 Tex. 147, 76 S. W. 753, 77 S. W. 1025, quoting from *Tucker v. Whitehead*, 59 Miss. 594.

<sup>85.</sup> *England.* — *Sugden v. Lord St. Leonards*, 45 L. J., P. 49, 1 P. D. 154, 34 L. T. 372.

*Connecticut.* — *In re Spencer's Appeal*, 77 Conn. 638, 60 Atl. 289.

*Georgia.* — *McIntyre v. McIntyre*, 120 Ga. 67, 47 S. E. 501; *Patterson v. Hickey*, 32 Ga. 156 (but see *Kimsey*



other evidence,<sup>86</sup> though there are many cases to the contrary.<sup>87</sup>

**Revocation by Parol** can never be shown by the declarations of the

*v. Allison*, 120 Ga. 413, 47 S. E. 899); *Burge v. Hamilton*, 72 Ga. 568.

*Illinois*.—*In re Page's Will*, 118 Ill. 576, 8 N. E. 852, 59 Am. Rep. 395.

*Indiana*.—*McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336.

*Maryland*.—*Hoppe v. Byers*, 60 Md. 381.

*Massachusetts*.—*Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322; *Lane v. Moore*, 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 430.

*Michigan*.—*Harring v. Allen*, 25 Mich. 505; *Ewing v. McIntyre*, 141 Mich. 506, 104 N. W. 787.

*Nebraska*.—*Clark v. Turner*, 50 Neb. 290, 69 N. W. 843, 38 L. R. A. 433; *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151, 110 Am. St. Rep. 431, 62 L. R. A. 383.

*New Jersey*.—*Davis v. Elliott*, 55 N. J. Eq. 473, 36 Atl. 1092.

*New York*.—*Matter of Marsh*, 45 Hun 107.

*Oregon*.—*In re McCoy's Estate*, 49 Or. 579, 90 Pac. 1105. *In re Miller's Will*, 49 Or. 452, 90 Pac. 1002.

*Pennsylvania*.—*Swope v. Donnelly*, 190 Pa. St. 417, 42 Atl. 882, 70 Am. St. Rep. 637.

*Tennessee*.—*Morris v. Swaney*, 7 Heisk. 591.

*Washington*.—*In re Harris' Estate*, 10 Wash. 555, 39 Pac. 148.

*Wisconsin*.—*Gavitt v. Moulton*, 119 Wis. 35, 96 N. W. 395.

**Under the North Carolina Statute**, Revisal 1905, § 3115, requiring that a revocation of a will by a writing shall be entirely in the testator's handwriting or be attested as in the case of the execution of a will, evidence of declarations of the testator after the date of the purported revocation on the margin of the will tending to show that he did not write the alleged revocation are admissible. *In re Shelton's Will*, 143 N. C. 218, 55 S. E. 705.

**86.** *Stevens v. Stevens*, 72 N. H. 360, 56 Atl. 916; *Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460.

In commenting upon the statement in *Lane v. Hill*, 68 N. H. 275, 44 Atl. 393, the declarations of the testator are admissible in corrobora-

tion of direct evidence bearing on the fact in issue. The court said: "How much direct evidence there must be to furnish a support for this testimony whether the direct evidence may be contradicted and overborne by this excepted hearsay, or whether this class of evidence is to be used only by the producer of 'direct evidence' tending to support his contention are questions not necessary nor considered in that case." *Managle v. Parker* (N. H.), 71 Atl. 637.

**87. Inadmissible Unless Part of Res Gestae.**—*United States v. Throckmorton* v. Holt, 180 U. S. 552.

*Arkansas*.—*Leslie v. McMurtry*, 60 Ark. 301, 30 S. W. 33.

*Colorado*.—*Glass v. Scott*, 14 Colo. App. 377, 60 Pac. 186.

*Kansas*.—*Caeman v. Van Harke*, 33 Kan. 333, 6 Pac. 620.

*New Jersey*.—*Gordon's Case*, 50 N. J. Eq. 397, 26 Atl. 268.

*New York*.—*In re Burbank's Will*, 104 App. Div. 312, 93 N. Y. Supp. 836, affirmed, 185 N. Y. 559, 77 N. E. 1183; *In re Kennedy's Will*, 167 N. Y. 163, 60 N. E. 442; *Waterman v. Whitney*, 11 N. Y. 157; *Jackson v. Kniffen*, 2 Johns. 31; *s. c.*, 6 Cow. 382; *Hammersley v. Lockman*, 2 Dem. 524; *In re Hopkins' Will*, 35 Misc. 702, 72 N. Y. Supp. 415; *Eighmy v. People*, 79 N. Y. 546; *Horn v. Pullman*, 72 N. Y. 269; *Marx v. McGlynn*, 88 N. Y. 357; *Sanford v. Ellithorp*, 95 N. Y. 48.

*Wisconsin*.—*In re Valentine's Will*, 93 Wis. 45, 67 N. W. 12; *Will of Ladd*, 60 Wis. 187, 18 N. W. 734.

"The mere declarations of the testator, as to his intentions to do or not to do any particular act, or to make any alterations in his will, is not of itself evidence to revoke or destroy it. Even supposing that under the statute of wills, the fraudulent suppression or prevention of a revocation, is equivalent in point of law to an actual revocation (see 1 Fonbl. Eq. 199, London Ed. 1799, cites 5 Vin. 521, pl. 31; *Vane v. Fletcher*, 1 P. Wms. 352), still it must be proved, not by mere declara-

testator,<sup>88</sup> but the intent with which the act of destruction was done may be shown.<sup>89</sup>

b. *Lost Wills*. — (1.) *In General*. — To strengthen or rebut<sup>90</sup> the presumption that a will which cannot be found or which is found canceled was revoked by the testator, declarations of the testator are commonly admitted.<sup>91</sup> Some jurisdictions will admit them for

tions, but by acts done or attempted to be done, and suppressed by fraud, violence, circumvention or threats. No such proof is offered, and mere naked declarations cannot be permitted to control or annul solemn instruments." Smith *v.* Fenner, 1 Gall. 170, 22 Fed. Cas. No. 13,046.

88. *England*. — Atkinson *v.* Morris, L. R. (1897) P. D.

*Alabama*. — Slaughter *v.* Stephens, 81 Ala. 418, 2 So. 145; Woodroof *v.* Hundley, 133 Ala. 395, 32 So. 570.

*Kentucky*. — Toebe *v.* Williams, 80 Ky. 661.

*Louisiana*. — Succession of Hill, 47 La. Ann. 329, 16 So. 819.

*New York*. — *In re* Hammond's Will, 4 N. Y. Supp. 456.

*North Carolina*. — *In re* Venable's Will, 127 N. C. 344, 37 S. E. 465.

*Pennsylvania*. — Lewis *v.* Lewis, 2 Watts & S. 455.

*Tennessee*. — Marr *v.* Marr, 2 Head 303. And see Stevens *v.* Stevens, 72 N. H. 360, 56 Atl. 916 (inadmissible where they represent mere conclusions of testator).

**Physical Act**. — Declarations of the testator are not evidence by which the physical act of destruction of a will might be proved. Managle *v.* Parker (N. H.), 71 Atl. 637; citing Stevens *v.* Stevens, 72 N. H. 360, 56 Atl. 916.

89. Smiley *v.* Gambill, 2 Head (Tenn.) 164.

Declarations of the testator in conversation with his counsel, made after the page of a will which had been torn and destroyed had been restored, were held admissible upon the question of the intention with which the page was originally torn, and to determine whether the entire will had been revoked. Coghlin *v.* Coghlin, 79 Ohio 71, 85 N. E. 1058.

The declarations of the testator while in the act of pasting together the torn fragments of his will, stating the reasons and purpose of his action

and evidencing his then intention and so far negating the inference arising from the condition of the will are properly received as part of the *res gestae*. Collagan *v.* Burns, 57 Me. 449.

90. Gurley *v.* Armentraut, 6 Ohio C. C. (N. S.) 156; Keen *v.* Keen, L. R. 3 P. D. (Eng.) 105.

"But where a legal presumption is raised upon the decease of the testator, that he destroyed his last will and testament in the statutory mode with the intention of revoking it, it is obvious, that while the declarations of the testator may be admitted as evidence towards rebutting the presumption of such destruction and revocation before his death, they may with equally good reason be received as evidence to support and strengthen that presumption." Behrens *v.* Behrens, 47 Ohio St. 323, 25 N. E. 209, 21 Am. St. Rep. 820.

91. *England*. — Homerton *v.* Hewett, 25 L. T. N. S. 854; Whitley *v.* King, 11 L. T. N. S. 342; Davis *v.* Davis, 2 Addams 223; Colvin *v.* Frazer, 2 Hagg. 266.

*Alabama*. — Weeks *v.* McBeth, 14 Ala. 474.

*Connecticut*. — Matter of Johnson's Will, 40 Conn. 587; Spencer's Appeal, 77 Conn. 638, 60 Atl. 289.

*Illinois*. — Matter of Page, 118 Ill. 576, 8 N. E. 852, 59 Am. Rep. 395; Boyle *v.* Boyle, 158 Ill. 228, 42 N. E. 140.

*Indiana*. — McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336.

*Kentucky*. — Chisholm *v.* Ben, 7 B. Mon. 408.

*Maine*. — Collagan *v.* Burns, 57 Me. 449, 465.

*Michigan*. — Lawyer *v.* Smith, 8 Mich. 411, 7 Am. Dec. 460.

*Missouri*. — Rule *v.* Maupin, 84 Mo. 589; Thompson *v.* Ish, 99 Mo. 170; Hamilton *v.* Crowe, 175 Mo. 634, 75 S. W. 389.

such a purpose which would not admit them generally,<sup>92</sup> though in most cases the courts fail to distinguish between the various purposes for which they are offered.

(2.) **Revocation by Subsequent Will.**—Where it is claimed that a will was revoked by a subsequent will, which cannot be produced, declarations of the testator are generally<sup>93</sup> held admissible to

*New York.*—*Betts v. Jackson*, 6 Wend. 173.

*North Carolina.*—*Cutler v. Cutler*, 132 N. C. 190, 43 S. E. 630; *In re Shelton's Will*, 143 N. C. 218, 55 S. E. 705; *Reel v. Reel*, 8 N. C. (1 Hawks) 248, 9 Am. Dec. 632; *Howell v. Barden*, 14 N. C. (3 Dev. L.) 442; *Patterson v. Wilson*, 101 N. C. 594, 8 S. E. 341.

*Ohio.*—*Behrens v. Behrens*, 47 Ohio St. 323, 25 N. E. 209, 2 Am. St. Rep. 820; *Gurley v. Armentraut*, 6 Ohio C. C. (N. S.) 156.

*Pennsylvania.*—*In re Foster's Will*, 13 Phila. 567; *Yountd v. Yountd*, 3 Grant Cas. 140; *Gardner v. Gardner*, 177 Pa. St. 218, 35 Atl. 558; *Gfeller v. Lappe*, 208 Pa. St. 48, 57 Atl. 59.

*South Carolina.*—*Bauskett v. Keitt*, 22 S. C. 187; *Durant v. Ashmore*, 2 Rich. L. 184. See *Buchanan v. Anderson*, 70 S. C. 454, 50 S. E. 12.

*Tennessee.*—*Smiley v. Gambill*, 2 Head 164; *Brown v. Brown*, 10 Yerg. 84.

*Texas.*—*Tynan v. Paschal*, 27 Tex. 286, 84 Am. Dec. 619; *McElroy v. Phink*, 97 Tex. 147, 76 S. W. 753, 77 S. W. 1025, *reversing* (Tex. Civ. App.) 74 S. W. 61.

*Virginia.*—See *Shacklett v. Roller*, 97 Va. 639, 34 S. E. 492.

*Wisconsin.*—*Gavitt v. Moulton*, 119 Wis. 35, 96 N. W. 395.

*Contra.*—*In re Burbank's Will*, 104 App. Div. 312, 93 N. Y. Supp. 866, *affirmed*, 185 N. Y. 559, 77 N. E. 1183.

"The declarations of the testatrix to the effect that she believed the will to be still in the custody in which she had placed it, and that it was a valid and unrevoked testamentary document, were competent to rebut any inference of revocation arising from its loss. . . . Declarations to sustain an alleged revocation of a will shown to be in exist-

ence and uninjured stand upon a different ground, and are governed by a different rule. *In re Marsh's Will*, 45 Hun 107." *In re Cosgrove's Will*, 31 Misc. 422, 65 N. Y. Supp. 570 (but compare the New York cases cited in the previous notes).

"Her declarations upon the subject of the existence or non-existence of the will, and its custody, up to or within a short time previous to her death, are competent evidence to rebut such presumption, and to show that she died in the belief that the will was still in existence, as a valid disposition of her estate." *In re Steinke's Will*, 95 Wis. 121, 70 N. W. 61.

**Failure To Express Discontent.** Where the will of a testatrix cannot be found, the fact that previous to her death she expressed no discontent with her will as she had drawn it is evidence tending to rebut the presumption that she had destroyed the will. *Scoggins v. Turner*, 98 N. C. 135, 3 S. E. 719.

**92.** *In re Valentine's Will*, 93 Wis. 45, 67 N. W. 12.

"When the declarations of an alleged testator consist, in effect, of the naked assertion that he has made a will, or that he has revoked one that is proved to have been executed, they are generally excluded; and we think such action is proper, for the reason that such declarations are merely statements of a legal conclusion and not a statement of the facts from which that conclusion should be deduced. But where a will duly executed cannot be produced, and its last custodian has been some person other than the testator, his declaration that he had destroyed the will for the purpose of revoking it stands upon a different ground." *McElroy v. Phink*, 97 Tex. 147, 76 S. W. 753, 77 S. W. 1025.

**93.** Where a memorandum state-

prove<sup>94</sup> the revocatory nature of the subsequent will, if relevant.<sup>95</sup>

c. *Principle Examined.* — The courts refusing to admit such declarations do so upon the theory that they are a violation of the hearsay rule.<sup>96</sup> Courts admitting them either boldly create a new exception to the hearsay rule,<sup>97</sup> or argue that from such declarations the state of the testator's mind can be inferred and from that an inference may properly be drawn as to the act itself.<sup>98</sup>

ment was attached to a will to the effect that the will was useless since a new will had been made, the court considered it doubtful whether such memorandum could be received in evidence to show an intention to revoke the will where it was claimed that a second document had this effect. *Hellier v. Hellier*, L. R. 9 P. D. 237.

94. *Whitney v. Hanington*, 36 Colo. 407, 85 Pac. 84.

*Admissible in Corroboration.* — *In re Lambie's Estate*, 97 Mich. 49, 56 N. W. 223; *In re Hope's Appeal*, 48 Mich. 518, 12 N. W. 682.

*Res Gestae Declarations.* — *Mars-ton v. Marston*, 17 N. H. 503, 43 Am. Dec. 611.

*Execution Must Be First Shown.* *Allen v. Jeter*, 6 Lea (Tenn.) 672.

*Sufficiency of Declarations.* — Evidence that a subsequent will had been made and afterwards stolen from the testator without any proof of its contents, and proof of his declaration after the will was stolen that he would die intestate and leave his estate to be distributed according to law, is not sufficient evidence to prove a revocation of the former will. *Hylton v. Hylton*, 1 Gratt. (Va.) 161. See also *In re Dake's Will*, 75 App. Div. 403, 78 N. Y. Supp. 29.

95. Where it is claimed that a will was revoked by a later one, statements of the testator made at the execution of the later will as to his having made other wills and that he wanted young men to sign as witnesses, were held immaterial. *In re Brown's Will* (Iowa), 120 N. W. 667.

96. *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71.

*Reasons for Rule.* — "Nothing can be founded upon a more insecure basis. The will is, according to law, of an ambula-

tory character. No one except the testator has any rights in it whatsoever. No other person can have any rights in it until the testator is dead. He may change it at pleasure, and human experience has shown that wills are almost always destroyed secretly. It seems to us that the better line of authorities is to the effect that such declarations are not admissible at all unless they are a part of the *res gestae*, and are introduced simply to show the mental condition of the testator when he did the thing which is being inquired into; that is, either when he executed the will or when he destroyed it. If any other rule is followed, it may result in this: A testator makes a will in the presence of witnesses. It is executed with all the formalities of law. These witnesses remember its contents. Other witnesses see it. The testator has expressed himself at various times as being satisfied with it. Then he secretly destroys it. In order that such will be admitted to probate after the death of the testator, it would only be necessary to have these different witnesses testify to the facts touching its execution, etc., and thus the intention of the testator as to the disposal of his property would be thwarted. It would impose upon a testator the necessity of revoking his will with as much publicity as that with which he created it, and the clause of the statute which provides that a testator may revoke his will by destroying it might be made nugatory in a given instance." *In re Colbert's Estate*, 31 Mont. 461, 78 Pac. 971, 80 Pac. 248.

97. *Sugden v. Lord St. Leonards*, 45 L. J., P. 49, 1 P. D. 154, 34 L. T. 372; *In re Shelton's Will*, 143 N. C. 218, 55 S. E. 705.

98. *Spencer's Appeal*, 77 Conn.

d. *Weight*. — The declarations of the testator are usually received with caution<sup>99</sup> by the courts and such weight given them as is warranted by the facts of the particular case.<sup>1</sup>

B. OF OTHER PERSONS. — The declarations of persons other than the testator are generally held inadmissible where the issue is the revocation of his will.<sup>2</sup>

4. **Admissibility of Evidence.** — A. PAROL EVIDENCE. — A revocation can never be made by parol,<sup>3</sup> but extrinsic evidence is always admissible to aid in determining whether an act was performed with the intent of operating as a revocation.<sup>4</sup>

638, 60 Atl. 289; *In re Valentine's Will*, 93 Wis. 45, 67 N. W. 12; *Harring v. Allen*, 25 Mich. 505.

"A statement by a testator that he has altered his mind as to the disposition of his property, and that he has therefore destroyed his will, although it may not be evidence of the fact of the destruction of the will, is evidence of intention, from which the fact of destruction may be inferred, there being other circumstances leading to the same conclusion." *Keen v. Keen*, L. R. 3 P. & D. (Eng.) 105.

Declarations of the testator are admissible to show the intention with which he destroyed a duplicate copy of the will in his possession, since the state of mind of the testator before and after cancellation of a will is relevant in inferring the intent at the time of cancellation; and the evidence of his declaration is evidence of his state of mind at that time. *Managle v. Parker* (N. H.), 71 Atl. 637.

99. *Appling v. Eades*, 1 Gratt. (Va.) 286; *McBeth v. McBeth*, 11 Ala. 596.

1. General declarations of the testator that he intended to benefit his wife by will are not sufficient to rebut the presumption that the testator cut off the signature of his will with an intention of revoking it. *Bell v. Fothergill*, L. R. 2 P. (Eng.) 148, 23 L. T. 323.

Declarations of the testator to the effect that his will still exists and disclosing the place where it can be found, made shortly before his decease, will not overcome the presumption arising from the production of the will in a mutilated state. *Smock v. Smock*, 11 N. J. Eq. 156.

A general allusion in a letter found in the same box with testator's will and a conversation with the executor therein named shortly before the testator's death will not overcome the presumption that the will found with the seal torn off was intended to be revoked. *In re White*, 25 N. J. Eq. 501.

Declarations of the testator to the effect that he had kept his will will not overcome the presumption that the will which cannot be found had been revoked by him, where such declarations were proved by persons who had a strong interest in establishing the will. *Thomas v. Thomas*, 129 Iowa 159, 105 N. W. 403.

2. *Boyle v. Boyle*, 158 Ill. 228, 42 N. E. 140; *McMillan v. McDill*, 110 Ill. 47; *Campbell v. Campbell*, 138 Ill. 612, 28 N. E. 1080; *McElroy v. Phink*, 97 Tex. 147, 76 S. W. 753, 77 S. W. 1025, *reversing* (Tex. Civ. App.), 74 S. W. 61.

Where it is sought to establish and probate the contents of an alleged lost will, the declaration of an heir of the decedent to the effect that she had destroyed the original is not admissible unless the declarant be a party to the proceeding as it is mere hearsay. *Scott v. Maddox*, 113 Ga. 795, 39 S. E. 500 (on the issue of revocation).

**Insufficient at Any Rate.** — *Clingan v. Micheltree*, 31 Pa. St. 25.

3. *Barnewall v. Murrell*, 108 Ala. 366, 18 So. 831; *Woodroof v. Hundley*, 133 Ala. 395, 32 So. 570.

**Declarations Cannot Effectuate a Revocation.** — See *supra*, VIII, 3, A.

4. *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y.) 158.

**Question of Revocation Arising From the Equivocal Act of Testator.**

B. EXECUTION OF SUBSEQUENT WILL. — *a. In General.* — The mere execution of a subsequent will does not tend to show a revocation of an earlier will,<sup>5</sup> but proof of the contents<sup>6</sup> of the later will is admissible to show an actual revocation, and all the surrounding circumstances may also be shown.<sup>7</sup>

*b. Formal Recitals.* — The formal recital in a subsequent will that it is the testator's last will and testament does not of itself prove a revocation of an earlier will.<sup>8</sup>

*c. Weight and Sufficiency of Evidence.* — The evidence must be clear and satisfactory where it is sought to prove a revocation of a will by a later will which is not produced.<sup>9</sup>

C. SUBSEQUENT UNPROBATED WILL. — To show that a will has been revoked by a subsequent will, the latter may be introduced in evidence though it is not offered for probate and never has been probated.<sup>10</sup> The rule is different in Massachusetts.<sup>11</sup>

*Betts v. Jackson*, 6 Wend. (N. Y.) 173.

**Motive Immaterial.** — Where the revocation of a will is an undisputed fact, evidence as to the reason why it was made is immaterial. *Scoggins v. Turner*, 98 N. C. 135, 3 S. E. 719.

5. *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151, 110 Am. St. Rep. 431, 62 L. R. A. 383. And see *Nelsen v. McGiffert*, 3 Barb. Ch. (N. Y.) 158.

6. *Lane v. Hill*, 68 N. H. 275, 44 Atl. 393, 73 Am. St. Rep. 591.

**Subsequent Will Destroyed by Testator Before His Death.** — Oral evidence of the contents of a will intentionally destroyed by the testator is inadmissible to show that by its terms a prior will was revoked, since as the will was destroyed before the testator's death the revocation never became effective. *Bates v. Hacking*, 28 R. I. 523, 68 Atl. 622, 14 L. R. A. (N. S.) 937. And see the cases dealing with the subject of "Revival," *infra*, XI.

7. *Estate of Bryan*, L. R. (1907) P. D. (Eng.) 125.

8. *Cutto v. Gilbert*, 9 Moore P. C. 131, 14 Eng. Reprint 247; *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151, 110 Am. St. Rep. 431, 62 L. R. A. 383.

9. *Cutto v. Gilbert*, 9 Moore P. C. 131, 14 Eng. Reprint 247; *Berthon v. Berthon*, 18 L. T. N. S. 301; *In re Noyes' Will*, 61 Vt. 14, 17 Atl. 743.

**Uncontradicted Evidence.** — Where

it was claimed that a will which had been destroyed revoked an earlier will, the court remarked: "The fact that the proponent was unable to contradict the testimony of other witnesses as to particular facts did not entitle them to have such statements accepted as true. From the very nature of the case the proponent could not produce contradictory evidence on the particular facts in question." *In re Brown's Will* (Iowa), 120 N. W. 667.

**Revocation by Codicil.** — *Padelford's Estate*, 7 Pa. Dist. 331.

**Date.** — Where it is claimed that a will was revoked by a subsequent will, the proof must be clear and convincing as to the date of the alleged subsequent will. *In re Williams' Will*, 34 Misc. 748, 70 N. Y. Supp. 1055.

10. *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y.) 158; *Stevens v. Hope*, 52 Mich. 65, 17 N. W. 698; *Rudy v. Ulrich*, 69 Pa. St. 177, 89 Am. Rep. 238; *Barksdale v. Hopkins*, 22 Ga. 332; *In re Cunningham*, 38 Minn. 169, 36 N. W. 269.

**Unprobated Will as evidence in general**, see *infra*, XVIII, 2, C.

11. Evidence of the execution of a later will with its revocatory clause is inadmissible to oppose the probate of an earlier will where the revocatory writing has never been established as a will by the probate court. *Laughton v. Aikins*, 1 Pick. (Mass.) 535; *Stickney v. Hammond*, 138 Mass. 116; *Sewall v. Robbins*, 139

**5. By Act of Person Other Than Testator. — Number of Witnesses.** Two witnesses are required in some jurisdictions to show that a will was revoked and destroyed by the act of some person other than the testator and at his express direction.<sup>12</sup>

**6. Implied Revocations. — A. BASIC PRESUMPTION.** — The basis of all revocations implied by law is the presumption that arises upon a radical change in the social and family relations of a testator taking place, there has also been a change in his testamentary intentions evidenced by a will which was executed before such changes occurred.<sup>13</sup> But where a statute specifies what changes in condition will work an implied revocation other changes will be given no effect.<sup>14</sup>

**B. CONCLUSIVENESS OF PRESUMPTION.** — It has been held that the presumption arising under these statutes is conclusive, and in effect becomes a rule of law and not of evidence.<sup>15</sup> The general view, however, is to the contrary.<sup>16</sup>

**C. ADMISSIBILITY OF EXTRINSIC EVIDENCE.** — Whether the presumption can be rebutted only by what appears upon the face of

Mass. 164, 29 N. E. 650. But this rule is deemed inapplicable when the later will is itself incapable of being admitted to probate by reason of its having been lost or destroyed so that its whole contents cannot be clearly proved. In such case the revocatory clause being shown it is admissible in evidence in opposition to the probate of a former will. *Wallis v. Wallis*, 114 Mass. 510.

**Will Refused Probate.** — Where the court has refused to admit a second instrument to probate either upon the merits or merely because no one appeared or offered evidence to establish it, such instrument is inadmissible to prove the revocation of an earlier will. *Stickney v. Hammond*, 138 Mass. 116.

**12.** *Bulkley v. Redmond*, 2 Bradf. (N. Y.) 281.

**In Alabama** by the express terms of § 4265 of the Code of 1896, proof that a will was revoked by being burned, torn, canceled or obliterated by any other person other than the testator must be shown by at least two witnesses, and the direction of the testator to such person to perform the act must also be so shown. *Wilson v. Bostick*, 151 Ala. 536, 44 So. 389.

**13.** *Durfee v. Risch*, 142 Mich. 504, 105 N. W. 1114; *Padelford's Estate*, 7 Pa. Dist. 331; *Havens v.*

*Van Den Burgh*, 1 Denio (N. Y.) 27; *Yerby v. Yerby*, 3 Call (Va.) 334.

**14.** Where the statute specifies that the subsequent marriage of a person and birth of issue work an implied revocation, other changes in social relations or moral duties of a person will not be held sufficient to establish a revocation. *Verdier v. Verdier*, 8 Rich. L. (S. C.) 135.

**15.** "The doctrine that a revocation from marriage and the birth of a child is presumptive only, was overruled in the Exchequer Chamber in the case of *Marston v. Roe* (8 Ad. & El. 14). The court held such revocation was the result of a rule of law, and wholly independent of the intent of the testator, and therefore, no evidence was admissible to show a counter intent. But the court limits the application of the rule to a case, where the testator, at the time of making the will, had no children by a former marriage. It does not apply, therefore, to the case under consideration, for here the testator had children by a former marriage, to whom by his will his estate is given." *Wheeler v. Wheeler*, 1 R. I. 364.

**16.** *Miller v. Phillips*, 9 R. I. 141; *Wheeler v. Wheeler*, 1 R. I. 364. And see cases cited in the succeeding note.

the will<sup>17</sup> or whether extrinsic evidence is admissible for this purpose<sup>18</sup> depends largely upon the wording of the particular statute.

**D. PRETERMITTED HEIR.** — a. *Burden of Proof.* — The question as to which person has the burden of proving the intentional omission of a child from a will is determined largely from the wording of the particular statute involved.<sup>19</sup>

b. *Parol Evidence.* — The question of whether parol evidence is admissible to aid in determining whether the omission of a child was intentional is also largely dependent upon the wording of the statute.<sup>20</sup> Under a statute which allows the heir to take unless it appears that the omission was intentional, parol evidence is generally held admissible.<sup>21</sup> But where the statute requires the fact

17. *Ellis v. Darden*, 86 Ga. 368, 12 S. E. 652; *Marston v. Doe*, 8 Ad. & El. 14, 35 E. C. L. 303.

18. *Havens v. Van Den Burgh*, 1 Denio (N. Y.) 27; *Wheeler v. Wheeler*, 1 R. I. 364; *Padelford's Estate*, 7 Pa. Dist. 331.

"Under the provisions of the revised statutes, evidence is admissible to show the situation of the testator's property at the time of making his will, and the changes which took place therein afterward, for the purpose of enabling the court to determine, as a question of law, whether a devise of real estate was revoked, or a specific legacy was adeemed, either wholly or in part, by a partial or total destruction or change of the subject matter of the devise or bequest. Parol evidence of an actual intent to revoke a devise or bequest, which revocation could not be implied by the court from a mere knowledge of the different situations of the testator's family and property at the time of making his will and afterwards, is however wholly inadmissible." *Adams v. Winne*, 7 Paige Ch. (N. Y.) 97.

19. **Burden on Heir.** — Under a statute which provides that if "it shall appear that such omission was not intentional but was made by mistake or accident," etc., it is held that the burden of proof is upon the person claiming as a pretermitted heir to show that his omission from the will was unintentional and the result of accident or mistake. *Brown v. Brown*, 71 Neb. 200, 98 N. W. 718.

**Burden on Person Claiming That Omission Was Intentional.** — Under

a statute relating to pretermitted heirs which reads "unless it appears," the burden of proof is on those claiming that the omission of a child from the will was intentional. *Ramsdill v. Wentworth*, 106 Mass. 320.

**Provision for, Presumed.** — Where a will purports to dispose of all of the testator's property, there is a presumption that a person is provided for therein who would otherwise have a claim as a pretermitted heir. *Willard v. Darrah*, 168 Mo. 360, 68 S. W. 1023, 90 Am. St. Rep. 468.

20. **California.** — *Matter of Garand*, 35 Cal. 336 (inadmissible).

**Missouri.** — **Inadmissible.** — *Bradley v. Bradley*, 24 Mo. 311 (distinguishing Massachusetts statute which has the additional provision in it, "unless it shall appear that such omission was intentional and not occasioned by any mistake or accident").

**Washington.** — See *Hill v. Hill*, 7 Wash. 409, 35 Pac. 360 (evidence inadmissible); *Morrison v. Morrison*, 25 Wash. 466, 65 Pac. 779. And see the cases cited in succeeding notes of this section.

21. *Buckley v. Girard*, 123 Mass. 8 (intelligence of the testatrix and her relations to her husband and children); *Coulam v. Doull*, 4 Utah 267, 9 Pac. 568; *Lorieu v. Keller*, 5 Iowa 196, 68 Am. Dec. 696; *Converse v. Wales*, 4 Allen (Mass.) 512; *Whittamore v. Russell*, 80 Me. 297, 14 Atl. 197, 6 Am. St. Rep. 200.

**Leading Case.** — Under a statute which provides that where the tes-



to appear from the will, parol evidence of intention is inadmissible,<sup>22</sup> though the surrounding circumstances are in some cases admitted.<sup>23</sup>

**7. Dependent Relative Revocation.**—The doctrine of dependent relative revocation is also based upon a presumed intention<sup>24</sup> and

tator has omitted to provide for a child in his will the child shall be entitled to inherit, "unless it shall appear that such omission was intentional and not occasioned by any mistake or accident," it is held that extrinsic evidence is admissible to show whether such child was intentionally omitted since the statute contains no limitation as to the form or mode of proof. *Wilson v. Fosket*, 6 Met. (Mass.) 400.

**Same Rule Where Statute Is "If It Shall Appear."**—Under a statute which provides that "when any testator shall omit to provide in his will for any of his children, and it shall appear that such omission was not intentional but was made by mistake or accident," etc., it was held that whether the omission was intentional or unintentional was a question of fact which could be established by parol testimony. *Brown v. Brown*, 71 Neb. 200, 98 N. W. 718; *citing Stebbins v. Stebbins*, 94 Mich. 304, 54 N. Y. 159; *Moon v. Evans' Estate*, 69 Wis. 667, 35 N. W. 20.

**22.** *Sandon v. Sandon*, 123 Wis. 603, 101 N. W. 1089 (declarations of the testator are inadmissible).

New York Rev. Stats. (1st ed.) pt. 2, ch. 6, tit. 1, § 43, provides that if after the making of any will disposing of the testator's whole estate he marries and have issue such will shall be deemed revoked unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, or mentioned therein so as to show an intention not to make such provision, and no other evidence is admissible to rebut the presumption of such revocation. It was held in *In re Rossignot's Will*, 50 Misc. 231, 100 N. Y. Supp. 623, that evidence to show the death of the legatee under such a will, the result of which was to leave the will which on its face disposed of all of the property of

the testator ineffective as to the legacy left to such legatee, was inadmissible.

**23.** *Peet v. Peet*, 229 Ill. 341, 82 N. E. 376, 13 L. R. A. (N. S.) 780; *Chace v. Chace*, 6 R. I. 407, 78 Am. Dec. 446.

Under the Kentucky statute which provides that where an after born child is not provided for or mentioned, the will, except so far as it provides for the payment of debts, shall be construed as if the devise and bequests in it had been limited to take effect in the event that the child shall die under the age of 21 years, unmarried and without issue. It is held that in such a case a revocation by operation of law is provided for and the revocation does not depend upon the intention of the testator, and therefore parol evidence of the surrounding circumstances is inadmissible; but the will must be construed from what appears on its face. *Knut v. Knut*, 22 Ky. L. Rep. 972, 58 S. W. 583.

**24.** "It is a doctrine of presumed intention, and has grown up as a result of an effort which courts always make to arrive at the real intention of the testator. Some of the cases appear to go to extreme lengths in the application of this doctrine, and seem to defeat the very intention at which they were seeking to arrive. The doctrine, as we understand it and are willing to apply it, is this: The mere fact that the testator intended to make a new will, or made one which failed of effect, will not alone, in every case, prevent a cancellation or obliteration of a will from operating as a revocation. If it is clear that the cancellation and the making of the new will were parts of one scheme, and the revocation of the old will was so related to the making of the new as to be dependent upon it, then if the new will be not made, or if made is invalid, the old will, though canceled,

it will be applied whenever the surrounding circumstances show that in this way the real intention of the testator can best be carried out.<sup>25</sup>

## IX. ALTERATIONS.

**1. Presumptions.** — **A. OLD RULE.** — Many of the older cases recognize a weak<sup>26</sup> presumption to the effect that an alteration in a will was made subsequently to its execution,<sup>27</sup> on the ground that a testator could revoke or alter his will at any time, and that there

should be given effect, if its contents can be ascertained in any legal way. But if the old will is once revoked, — if the act of revocation is completed, — as if the will be totally destroyed by burning and the like, or if any other act is done which evidences an unmistakable intention to revoke, though the will be not totally destroyed, the fact that the testator intended to make a new will, or made one which cannot take effect, counts for nothing." *McIntyre v. McIntyre*, 120 Ga. 67, 47 S. E. 501.

**25.** In the Goods of McCabe, 42 L. J., P. 79, L. R. 3 P. 94, 29 L. T. 249; *Estate of Olmsted*, 122 Cal. 224, 54 Pac. 745; *Wolke v. Bollinger*, 62 Ill. 368.

**Declarations Admissible.** — Where the issue was one of dependent relative revocation, the declarations of the testator made at the time when he destroyed his will were held admissible to show that the revocation was conditional upon the execution of a subsequent will. *Powell v. Powell*, 35 L. J., P. 100, L. R. 1 P. 209, 14 L. T. 800. But where such declarations were made later in the day, this fact was held not to be sufficiently made out. In the Goods of Weston, 38 L. J., P. 53, L. R. 1 P. 633, 20 L. T. 330.

**26.** In the Goods of Duffy, Ir. R. 5 Eq. 506.

"A will contained several unattested interlineations, most of them of single words, each of which was required to complete the sentence to which it belonged. They were apparently written with the same ink and at the same time as the rest of the will, but at the time of execution the body of the will was covered up by the testatrix, so that the witnesses could not see whether

the interlineations were there or not. The court held that it was not bound to presume that these interlineations were made after execution, and included them in the probate." In the Goods of Cadge, 37 L. J., P. 15, L. R. 1 P. 543, 17 L. T. 484.

**27.** *Greville v. Tylee*, 7 Moore P. C. 320, 13 Eng. Reprint 904; *Moore v. Moore*, Ir. R. 6 Eq. 166; *Doe v. Palmer*, 16 Q. B. 747, 20 L. J., Q. B. 367, 15 Jur. 836, 16 Ad. & Bl. 747, 71 E. C. L. 747; *Home of the Aged v. Bantz*, 107 Md. 543, 69 Atl. 376; In the Goods of Horsford 44 L. J., P. 9, L. R. 3 P. 211, 31 L. T. 553; *Toebbe v. Williams*, 80 Ky. 661.

**Unnoted Alterations.** — "The common practice to note at the foot of a will about to be executed any alteration, in such a manner as that the execution by the testator and the attestation by the witnesses may include and recognize them as theretofore made, will, I think, justify a presumption that unnoted and unattested alterations were made after execution. So I shall assume, without deciding, that upon the production of the paper in dispute before the court, with a plainly apparent alteration, a presumption was at once raised that such alteration had been made by Miss Ward after its execution." *Ward v. Wilcox*, 64 N. J. Eq. 303, 51 Atl. 1094, *affirmed*, 65 N. J. Eq. 397, 54 Atl. 1125.

**Interlineations.** — A distinction has been taken between interlineations and alterations in a will since interlineations are generally used merely to complete an imperfect sentence, and therefore there is less reason for indulging the inference that they were made after the execution of the instrument, *In re*

was a presumption against its fraudulent alteration.<sup>28</sup> Upon the other hand, some cases held that where the alteration was fair upon its face<sup>29</sup> the presumption was that it was innocently made at a time when it could take effect<sup>30</sup> and that the burden of proving that the alteration was made subsequent to execution of the will was upon the contestant.<sup>31</sup>

Goods of Cadge, 37 L. J., P. 15 L. R. 1 P. 543, 17 L. T. 484.

28. "By the provisions of section 21 of the English wills act (1 Vict. c. 26), it is provided that no obliterations, interlineation, or other alteration made in any will after execution shall have and effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as is required for the execution of the will; and the manner in which this may be done is particularly set forth in that section. In cases arising upon wills made before as well as after the adoption of that act, the English courts held that, where alterations are apparent upon the face of the will, the presumption is that they were made after execution. A distinction is made between such alterations in wills and in other documents, on the ground that an alteration of the latter after execution involves either fraud or crime, and no presumption of either can be made, while a testator may alter his will at his pleasure without committing either fraud or crime. *Shallcross v. Palmer*, 16 Q. B. 747; *Cooper v. Bockett*, 4 Moore P. C. 419; *Greville v. Tylee*, 7 Moore P. C. 320; *Tatum v. Catomore*, 16 Q. B. 745." *Ward v. Wilcox*, 64 N. J. Eq. 303, 51 Atl. 1095, *affirmed*, 65 N. J. Eq. 397, 54 Atl. 1125.

29. **Attention Not Fair Upon Its Face.**—*In re Dwyer's will*, 29 Misc. 382, 61 N. Y. Supp. 903.

30. "The rule as to an alteration or an erasure in the will is, I think, that if it is material, and if there are any suspicious or doubtful circumstances growing out of the mode of the alteration, the ink in which it was made, and that it was not noted at the bottom, then the presumption is that it was made after execution; but it is for

the court to decide whether, under all the circumstances, it was made before or after. *Crossman v. Crossman*, 95 N. Y. 145; *In re Carver's Estate*, 3 Misc. Rep. 567, 23 N. Y. Supp. 753; *In re Barber's Will*, 92 Hun 489, 37 N. Y. Supp. 235. If, however, the alteration is fair upon the face of the instrument, there would seem to be no presumption that it was made after execution, although it be entirely unexplained. *Crossman v. Crossman*, *supra*; *In re Voorhees' Will*, 6 Dem. Sur. 162; *In re Wood (Sur.)* N. Y. Supp. 157." *In re Dwyer's Will*, 29 Misc. 382, 61 N. Y. Supp. 903.

"Clearly, in ordinary cases, the alteration ought not to raise a presumption against the instrument, because the law never presumes wrong. The question as to the time of the alteration is, in the last instance, one for the jury. It is, like any other fact in the case, to be settled by the trier or triers of the facts. Generally the instrument should be given in evidence, and in a jury case should go to the jury, upon ordinary proof of its execution, leaving the parties to such explanatory evidence of the alteration as they may choose to offer. If there is neither intrinsic nor extrinsic evidence as to when the alteration was made, it is to be presumed, if any presumption is said to exist, that the alteration was made before or at the time of the execution of the instrument." *Scott v. Thrall (Kan.)* 95 Pac. 563.

31. *In re Barber's Will*, 92 Hun 489, 37 N. Y. Supp. 235.

Where the will propounded has the names of the testator and two of the three subscribing witnesses torn off, the mutilation must be accounted for by the proponent. *Barber v. Bell*, 49 Ala. 284.

Where a will is offered for probate with the signature of the tes-

**B. MODERN RULE.**—There is a marked tendency at the present time to repudiate all presumptions and treat the question as a simple question of fact<sup>32</sup> with the burden of proof upon the proponent to show that the instrument as presented is the same and is in the same condition as when executed.<sup>33</sup>

**2. Admissibility of Evidence.**—**A. IN GENERAL.**—Both intrinsic and extrinsic evidence may be considered to determine at what time alterations in a will were made.<sup>34</sup>

**B. DECLARATIONS.**—Declarations of the testator made prior to the execution of his will are admissible to aid in determining whether alterations were made before or after its execution,<sup>35</sup>

tator obliterated, the burden of proof is upon the proponent to show the cause and manner of the obliteration. *Baptist Church v. Robbarts*, 2 Pa. St. 110.

**32.** *O'Connell v. Dow*, 182 Mass. 541, 66 N. E. 788; *Van Buren v. Cockburn*, 14 Barb. (N. Y.) 118; *Wilton v. Humphreys*, 176 Mass. 253, 57 N. E. 374; *Ely v. Ely*, 6 Gray (Mass.) 439; *Webster v. Yorty*, 194 Ill. 408, 62 N. E. 907. See *Ward v. Wilcox*, 64 N. J. Eq. 303, 51 Atl. 1094, *affirmed*, 65 N. J. Eq. 397, 54 Atl. 1125.

**33. Rule Stated.**—"It used to be sometimes said that an alteration (i. e., by erasure or interlineation), if apparent on the face of an instrument, placed on the offering party the burden of explanation by evidence. It was also (but inconsistently) said by some one that the alteration was to be presumed innocent—i. e., made before execution—unless particular circumstances of suspicion were apparent. For wills, again, it was sometimes maintained that by exception alterations should be presumed to have been made after execution. But the modern tendency is to avoid stating the problem in the form of such rules with exceptions, and, in particular, to abandon the so-called presumption against fraud and in favor of innocence, by which the alteration of a deed is presumed to have been made before execution; and to raise no genuine presumption in that regard. The first burden would thus be determined by the pleadings; and the question would usually go to the jury, upon all the evidence, whether the party claim-

ing a specific tenor for the document has proved his case, although the second burden—i. e., of producing evidence—might be shifted by particular circumstances, under the ruling of the judge as to a sufficiency of evidence or a presumption." 4 *Wigmore on Evidence*, 3569, §2525. *Scott v. Thrall* (Kan.), 95 Pac. 563.

**34.** *Moore v. Moore*, Ir. R. 6 Eq. 166; *Wilton v. Humphreys*, 176 Mass. 253, 57 N. E. 374; *Van Buren v. Cockburn*, 14 Barb. (N. Y.) 118.

**Intrinsic Evidence.**—*Van Buren v. Cockburn*, 14 Barb. (N. Y.) 118.

**Appearance of Will.**—*Webster v. Yorty*, 194 Ill. 408, 62 N. E. 907.

**Dates Attached to Alterations.** In the *Goods of Adamson*, L. R. 3 P. 253.

**Alteration Should Be Noted in Attestation Clause.**—*Hesterberg v. Clark*, 166 Ill. 241, 46 N. E. 734, 57 Am. St. Rep. 135. And see *Crossman v. Crossman*, 95 N. Y. 145 (noting alteration shifts burden of proof).

**Alteration of Will Prior to Republication by Codicil.**—Although a will as originally executed may have been altered by the testator after that execution, yet if republished by codicil by being referred to therein and annexed thereto it is made valid thereby and it may be proved by extrinsic evidence that the alteration was made before the codicil. *Burge v. Hamilton*, 72 Ga. 568.

**35.** *Moore v. Moore*, Ir. R. 6 Eq. 166; *Doe v. Palmer*, 16 Q. B. 747, 20 L. J. Q. B. 367, 15 Jur. 836, 16 Ad. & Bl. 747, 71 E. C. L. 747.

**Evidence Too Remote.**—"If an

though declarations made subsequently have been held inadmissible.<sup>36</sup>

**3. Apparent Alterations.**—Under a statute which provides that an attempted alteration shall be of no effect if the original words are apparent, artificial methods of rendering the words legible cannot be resorted to, where they would alter the face and appearance of the instrument.<sup>37</sup>

## X. REPUBLICATION.

**1. In General.**—Republication of a will may be made and proved by parol evidence,<sup>38</sup> and it has been held that the same evidence is required to establish a republication that is required to prove a publication.<sup>39</sup>

**2. By Codicil.**—Proof of the execution of a codicil which republishes a will is sufficient proof of the execution of the will,<sup>40</sup> the only question in these cases being whether the codicil refers to the particular will in question.<sup>41</sup>

offer is in substance to show by a previous declaration of the testator in regard to the disposition of his property by a will then existing, that he understood the will in a way which would make it improbable that he would refer to it as he did in the codicil as it was finally written, the judge, in the exercise of his discretion, may well hold, in view of other facts, that the evidence is too remote." *Wilton v. Humphreys*, 176 Mass. 253, 57 N. E. 374.

**36.** *Doe v. Palmer*, 16 Q. B. 747, 20 L. J., Q. B. 367, 15 Jur. 836, 16 Ad. & Bl. 747, 71 E. C. L. 747.

**37.** *In the Goods of Horsford*, 44 L. J., P. 9, L. R. 3 P. 211, 31 L. T. 553.

If experts using magnifying glasses can decipher the words erased, or can by holding a paper to the light read the words over which pasters are placed, this is sufficient and it will be held that such words are apparent on the face of the instrument itself. *Finch v. Combe*, 63 L. J., P. 113, (1894) P. 191, 6 R. 545, 70 L. T. 695.

**Removing Pastors.**—Where words are obliterated by having paper pasted over them, it was held that the court could not remove the pasted paper in order to read the words. *In the Goods of Horsford*,

44 L. J., P. 9, L. R. 3 P. 211, 31 L. T. 553.

**38.** "That there may be parol republication of a will since the act of 1833 was decided in *Campbell v. Jameson*, 6 Barr. 498." *In re Smith's Will*, 9 Phila. (Pa.) 362.

**Declarations of Testator Admissible.**—*Wallace v. Blair*, 1 Grant Cas. (Pa.) 75.

In the case of *Battle v. Speight*, 32 N. C. (10 Ired. L.) 459, the court expresses a doubt as to whether a republication of the will can be proved by parol evidence of the declarations of the testator merely, and says that in all events the evidence in such a case must be clear and undisputed.

**39.** *Musser v. Curry*, 3 Wash. C. C. 481, 17 Fed. Cas. No. 9,973.

The proof of a written republication of a will must be the same as the proof required to establish the will. *In re Smith's Will*, 9 Phila. 362.

**40.** *Hubbard's Estate v. Hubbard*, 99 Ill. App. 555, affirmed, 198 Ill. 621, 64 N. E. 1038; *Hobart v. Hobart*, 154 Ill. 610, 39 N. E. 581, 45 Am. St. Rep. 151; *Hill v. Kehr*, 228 Ill. 204, 81 N. E. 848.

**41.** The fact that a codicil is written upon the same piece of paper as a purported will and that no other will is produced may be considered as tending to identify the

## XI. REVIVAL.

1. **At Common Law.**—The destruction of a will at common law raised the conclusive presumption that a former undestroyed will was intended to be revived.<sup>42</sup> This was not the rule of the ecclesiastical courts<sup>43</sup> nor is it the rule in England at the present time,<sup>44</sup> though it is still sometimes applied in the courts of the United States.<sup>45</sup>

2. **Modern Rule.**—As a general rule, the question of revival is today regarded as a question of fact,<sup>46</sup> free from presumptions,<sup>47</sup> to solve which parol evidence of the surrounding circumstances is admissible.<sup>48</sup>

## XII. INCORPORATION BY REFERENCE.

1. **Burden of Proof.**—The burden is upon the person seeking to incorporate a writing to show that it was in existence at the date of the will.<sup>49</sup>

2. **Parol Evidence.**—A. TO IDENTIFY.—The reference in the

purported will as the one referred to by the codicil. *In re Plumel's Estate*, 151 Cal. 77, 90 Pac. 192.

Where the term "my will" was used in a codicil and it did not appear but that there was only one testamentary writing of the decedent in existence at the time, the publication of the codicil operates as a republication of the will; and so far as the formalities of the execution of the will are concerned they are sufficiently proved by proof establishing that the codicil was executed in accordance with law. *Matter of Nisbet*, 5 Dem. (N. Y.) 286 (citing cases).

42. *Rudisill's Exr. v. Rodes*, 29 Gratt. (Va.) 147; *Bates v. Hacking*, 28 R. I. 523, 68 Atl. 622 14 L. R. A. (N. S.) 937 (adopting the common law rule and containing an exhaustive citation and discussion of the authorities).

43. *Moore v. Moore*, 1 Phill. 406, 4 Eng. Ecc. 123.

44. *Wood v. Wood*, L. R. 1 P. & D. (Eng.) 309.

45. *Stetson v. Stetson*, 200 Ill. 601, 66 N. E. 262, 61 L. R. A. 258 (citing cases *pro* and *con*).

46. *Colvin v. Warford*, 20 Md. 357, 393.

47. *Williams v. Miles*, 73 Neb. 193, 102 N. W. 482, 105 N. W. 181, 106 N. W. 769.

48. *Boudinot v. Bradford*, 2 Dall. (U. S.) 266; *Lawson v. Morrison*, 2 Dall. (U. S.) 286; *Lane v. Hill*, 68 N. H. 275, 44 Atl. 393, 73 Am. St. Rep. 591; *Pickens v. Davis*, 134 Mass. 252; *Cheever v. North*, 106 Mich. 390, 64 N. W. 455; *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322.

The fact that the testator in canceling his last will intended to revive the former will which he then left uncanceled, may be sufficiently proved by the testimony given by a single witness. *Williams v. Williams*, 142 Mass. 515, 8 N. E. 424.

**Declarations of Testator.**—"It is true, that it may not be proper to prove the direct act of cancellation, destruction or revocation in this manner. But when there is other evidence of an act of revocation, and when the question of the revival of an earlier will depends upon the intention of the testator, which is to be gathered from facts and circumstances, his declarations, showing such intention, whether prior, contemporaneous or subsequent, may be proved in evidence." *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322.

49. *Singleton v. Tomlinson*, 3 App. Cas. (Eng.) 404.

will to the instrument sought to be incorporated must be so clear and definite as to of itself identify the extrinsic instrument,<sup>50</sup> and parol evidence is inadmissible to render certain an indefinite description.<sup>51</sup> But parol evidence may always be resorted to to apply the description used to the extrinsic instrument.<sup>52</sup>

B. TO PROVE EXISTENCE. — Parol evidence is inadmissible to prove the existence of the instrument sought to be incorporated at the date of the will.<sup>53</sup>

### XIII. CONTENTS OF WILL.

The general rules of best and secondary evidence apply to wills,<sup>54</sup> and the will itself is the best evidence of its own contents.<sup>55</sup>

### XIV. LOST WILLS.

#### 1. Burden of Proof. — The burden rests upon the proponent

50. *Bryan's Appeal*, 77 Conn. 240, 58 Atl. 748, 107 Am. St. Rep. 36, 68 L. R. A. 353; *Bailey v. Bailey*, 52 N. C. (7 Jones' L.) 44; *In re Young's Estate*, 123 Cal. 337, 55 Pac. 1011.

51. *In re Young's Estate*, 123 Cal. 337, 55 Pac. 1011; *Tuttle v. Berryman*, 94 Ky. 553, 23 S. W. 345.

52. *In re Bresler's Estate* (Mich.), 119 N. W. 1104; *In re Shillaber*, 74 Cal. 144, 15 Pac. 453, 5 Am. St. Rep. 433.

In *In re Plumel's Estate*, 151 Cal. 77, 90 Pac. 192, in speaking of the admission of parol evidence to incorporate by reference another paper, the court remarked: "But it is to be remembered that no reference, however explicit on its face, can identify a separate paper without the production of evidence to show that the particular paper offered does correspond to the descriptive particulars named in the will." The court explains and distinguishes the case of *In re Young*, 123 Cal. 337, 55 Pac. 1011. And see also *Brown v. Clark*, 77 N. Y. 369.

"The result of the authorities both before and since the late act, appears to be, that when there is a reference in a duly-executed testamentary instrument to another testamentary instrument by such terms as to make it capable of identification, it is necessarily a subject for parol evidence, and that when the

parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the instrument, it is no objection to it that, by possibility, circumstances might have existed in which the instrument referred to could not have been identified." *Allen v. Maddock*, 2 Moore P. C. 427, 14 Eng. Reprint 757.

53. In the Goods of *Sunderland*, 35 L. J., P. 82, L. R. 1 P. 198, 14 L. T. 741, 14 W. R. 971; *The University College v. Taylor*, L. R. (1908) P. D. 140.

54. See article "BEST AND SECONDARY EVIDENCE," Vol. II, p. 271.

55. *In re Jones' Estate*, 130 Iowa 177, 106 N. W. 610; *Thomasson v. Driscoll*, 13 Ga. 253; *McNear v. Roberson*, 12 Ind. App. 87, 39 N. E. 896; *Fronty v. Wood*, 1 Hill L. (S. C.) 165.

In a will contest where the destruction of the will last executed has not been proved, nor its absence explained, evidence relative to its character and contents is not primary, but secondary, and inadmissible for the purpose of showing revocation of a writing previously executed and set up as the last will. The best and secondary evidence rule is especially applicable to the cases of wills. *Minor v. Guthrie*, 9 Ky. L. Rep. 113, 4 S. W. 179.

Until the loss of a revoked will is shown testimony of a witness

of a lost will to prove its execution,<sup>56</sup> its existence unrevoked at the time of the testator's death<sup>57</sup> or its fraudulent destruction prior thereto,<sup>58</sup> its loss or accidental<sup>59</sup> destruction subsequent to his death<sup>60</sup> and its contents.<sup>61</sup>

**2. Presumptions.** — The presumption that a will which is lost was destroyed by the testator with the intention of revoking it has been fully discussed in an earlier portion of this article.<sup>62</sup>

**Spoliation.** — In cases in which the will is shown to have been fraudulently destroyed or withheld, the ordinary presumptions against the spoliator of an instrument will be indulged.<sup>63</sup>

**3. Execution.** — A. IN GENERAL. — Statutory provisions relating to the proof of wills are commonly held to apply also to wills which cannot be produced in court,<sup>64</sup> and in cases in which the subscribing witnesses are deceased their signatures must be proved by persons who saw them attached to the will<sup>65</sup> or they must be proved by

as to its contents is inadmissible. *In re Smith's Will*, 61 Hun 101, 15 N. Y. Supp. 425.

**56.** *Southworth v. Adams*, 11 Bliss, 256, 22 Fed. Cas. No. 13,194; *In re Miller's Will*, 49 Or. 452, 90 Pac. 1002.

Upon the question of the due execution of a lost instrument the burden of proof is upon those who wish to propound it; and the fact that these persons took no immediate steps and made no inquiry during the lifetime of the widow of the decedent is a strong circumstance to be considered. *Harris v. Knight*, 15 P. D. 170, 16 L. T. 507.

**57.** *California.* — *In re Johnson's Estate*, 152 Cal. 778, 93 Pac. 1015.

*Georgia.* — See *Moseley v. Evans*, 72 Ga. 203.

*New York.* — *In re Kennedy's Will*, 167 N. Y. 163, 60 N. E. 442; *Perry v. Perry*, 66 Hun 629, 21 N. Y. Supp. 133; *In re Barnes' Will*, 70 App. Div. 523, 75 N. Y. Supp. 373; *Kahn v. Hoes*, 14 Misc. 63, 35 N. Y. Supp. 273.

*Ohio.* — *Gibson v. Gibson*, 6 Ohio C. C. (N. S.) 269.

*Washington.* — *In re Harris' Estate*, 10 Wash. 555, 39 Pac. 148.

**58.** *In re Kennedy's Will*, 167 N. Y. 163, 60 N. E. 442.

**59.** The mere proof of the loss or destruction of a will does not, as a matter of course, let in the party to give secondary evidence of its contents. He must also show that it was done mistakenly or acci-

dentally and must rebut every inference of a fraudulent design. *Wyckoff v. Wyckoff*, 16 N. J. Eq. 401.

**60.** *In re Hedgepeth's Will* (N. C.), 63 S. E. 1025; *In re Miller's Will*, 49 Or. 452, 90 Pac. 1002.

**61.** *In re Hedgepeth's Will* (N. C.), 63 S. E. 1025; *Southworth v. Adams*, 11 Bliss. 256, 22 Fed. Cas. No. 13,194.

**62.** See *supra*, VIII, 2, A.

**63.** See article "SPOLIATION." Vol. XI.

In a case where it is alleged that a will which cannot be found was fraudulently suppressed, it would be allowable to solve all doubts and adopt every presumption against the parties suppressing the instrument, and this might supply the absence of other proof. But in the case of a mere casual loss of a will the rules of evidence are not relaxed. *Marston v. Marston*, 17 N. H. 503, 43 Am. Dec. 611.

**64.** *Matter of Page*, 118 Ill. 576, 8 N. E. 852, 59 Am. Rep. 395.

**65.** After testator's death his will was destroyed but its contents were proved by two credible witnesses, and declarations of the testator to the effect that he had made the will were given; but probate was denied on the ground of failure to prove execution, since both of the subscribing witnesses were dead and proof could not be made of their handwriting. *In re Halstead's Will*, 51 Misc. 542, 101 N. Y. Supp. 971.



such secondary evidence as it is possible to produce.<sup>66</sup>

B. DECLARATIONS. — Declarations of the testator are admissible to prove the execution of a lost will.<sup>67</sup>

C. SUFFICIENCY OF EVIDENCE. — The execution of a lost will must be proved by as clear and satisfactory evidence<sup>68</sup> as though the will itself were produced in court,<sup>69</sup> except in cases in which there is evidence of spoliation or suppression by an interested person.<sup>70</sup> The same rules apply as apply to other lost instruments<sup>71</sup> and the question depends upon the facts of each case.<sup>72</sup>

66. When owing to the nature of the case "direct proof of the execution of a will cannot be adduced, resort may be had to secondary evidence, which, however, must be sufficient to establish with reasonable certainty all the facts which must concur in the valid execution of a will." *Tynan v. Paschall*, 27 Tex. 286, 84 Am. Dec. 619.

"On no subject, perhaps, are statutes so strict in requiring a writing executed and attested in certain forms as in the case of wills, and, while it is firmly established that a lost will may be proved of secondary evidence, the courts have always required such evidence to be direct, clear and convincing." *Clark v. Turner*, 50 Neb. 290, 69 N. W. 843, 38 L. R. A. 433.

67. *Mann v. Balfour*, 187 Mo. 290, 86 S. W. 103 (in corroboration). *Contra*, *Grant v. Grant*, 1 Sandf. Ch. (N. Y.) 235; *In re Goods of Ripley*, 1 Sw. & Tr. 68, 4 Jur. N. S. (Eng.) 342.

"When a person dying, leaves an instrument duly executed as a will, and intended to operate as such,—and it is afterwards lost or destroyed, it is only by other evidence oral or written that proof of it can be made. Evidence of the execution and loss being made in this case, objections to the admission of the letter written by testatrix in which she speaks of having made her will and of those present when she did so, and to oral testimony of its contents, cannot be sustained." *Conoly v. Gayle*, 61 Ala. 116.

In the absence of all proof that a will had ever been executed and where the alleged will had never been seen by the witness, evidence of the declarations of the testator to the effect that he had executed a will

and the statement of its contents is inadmissible. *Clark v. Morton*, 5 Rawle (Pa.) 235, 28 Am. Dec. 667.

68. *Davenport v. Davenport*, 67 N. J. Eq. 320, 58 Atl. 535.

"The rule of law applicable to the decision of the case upon the evidence is the one stated by Chancellor Green in *Wyckoff v. Wyckoff* (1863) 16 N. J. Eq. 401, and is (page 405): 'That the will may be established upon satisfactory proof of the destruction of the instrument and of its contents and substance. Whether the proof be by one witness or by many, it must be clear, satisfactory, and convincing.' This rule was declared in a case where the execution and the destruction of the will were not contested, and the question was as to the proof of the contents; but the same principle is applicable as well to the points of execution and loss as of contents." *Coddington v. Jenner*, 57 N. J. Eq. 528, 41 Atl. 874.

69. *Bradshaw v. Butler*, 30 Ky. L. Rep. 1249, 100 S. W. 837; *Scott v. Maddox*, 113 Ga. 795, 39 S. E. 500; *In re Estate of Lasance*, 7 Ohio Dec. 246, 5 Ohio N. P. 20; *Grant v. Grant*, 1 Sandf. Ch. (N. Y.) 235.

70. *In re Lambie's Estate*, 97 Mich. 49, 56 N. W. 223; *Anderson v. Irwin*, 101 Ill. 411.

It is not legitimate except in cases of spoliation to infer the due execution of a lost will from proof of facts which, if the will were before the court, would in no way tend to establish it. *Tynan v. Paschall*, 27 Tex. 286, 84 Am. Dec. 619.

71. *Butler v. Butler*, 5 Har. (Del.) 178. And see article "LOST INSTRUMENTS," Vol. VIII.

72. *Bauskett v. Keitt*, 22 S. C. 187.

The execution of a lost will is sufficiently proved in the absence of any contradictory testimony when one of

**4. Existence at Death of Testator.**—The existence of the will at the time of the death of the testator is a fact which can be proved by any relevant evidence.<sup>73</sup>

**5. Loss or Destruction.**—A. IN GENERAL.—Any relevant evidence is admissible to show the loss or destruction of the will.<sup>74</sup>

the attesting witnesses testifies that he saw the testator and the other attesting witness, who had since died, sign an instrument which the former declared to be his will. *In re Harris' Estate*, 10 Wash. 555, 39 Pac. 148.

"The testimony of a subscribing witness to a will alleged to have been destroyed without the consent of the testator is insufficient to establish the execution of the will where the witness is unable to fix the year or the season of the year in which the will was made, and it appears that he did not read the will, nor hear it read, did not know who was appointed executor, and his testimony showed that a legacy was mentioned in the paper which he witnessed which was not in the paper offered for probate." *Michell v. Low*, 213 Pa. St. 526, 63 Atl. 246.

Where a witness to a lost will proves its attestation by three witnesses but cannot remember the name of one of them, this was held to be a sufficient *prima facie* case of due execution. *Dan v. Brown*, 4 Cow. (N. Y.) 483; *Jackson v. Betts*, 6 Cow. (N. Y.) 377.

"The only person present at the making of a will swore that it was not duly executed. The will was afterwards destroyed. Although there was reason to suspect that the will was duly executed notwithstanding the evidence, the court declined to pronounce on that mere suspicion for a will not in existence." *Eckersley v. Platt*, 36 L. J., P. 7, L. R. 1 P. 281, 15 L. T. 327.

Where the subscribing witnesses to a lost will are dead, the testimony of one witness to the handwriting of one of the subscribing witnesses is not sufficient to authorize the probate of a will; nor can the insufficiency of such testimony be supplied by proof of declarations made by the supposed testator to the effect that he had a will in existence of import similar to that offered. *Tynan v. Paschall*, 27 Tex. 286, 84 Am. Dec. 619.

**73.** "Evidence of decedent's unchanged intention, or rather lack of evidence of a changed intention, and of his physical disability, is circumstantial and has some probative force, but very little where the issue is 'existence of the paper subsequent to the death' irrespective of intention." *Gibson v. Gibson*, 6 Ohio C. C. (N. S.) 269.

On the issue of whether a lost will was in existence at the time of the testatrix's death, the fact that a will was found in the surrogate's office which corresponded to the will as described by the attesting witnesses is sufficient proof that it was the will of the testatrix and was in existence at her death. *In re Granacher's Will*, 74 App. Div. 567, 77 N. Y. Supp. 748, affirmed, 174 N. Y. 504, 66 N. E. 1109.

Upon the issue of whether a lost will was in existence at the time of the testator's death, the fact that it was drawn up many years before and had never been seen since, and that meanwhile the testator had drawn and destroyed another will is strong evidence to show that it was not in existence. *Keery v. Dimon*, 37 N. Y. Supp. 92, 72 N. Y. St. 125.

**In New York.**—Declarations of a testator are inadmissible to prove the existence of a lost will at the time of his death, although there is no dispute as to the execution or contents of the will. *In re Kennedy's Will*, 167 N. Y. 163, 60 N. E. 442 (but see *In re Cosgrove's Will*, 31 Misc. 422, 65 N. Y. Supp. 570; *Matter of Marsh*, 45 Hun 107).

**Declarations of Heir.**—On the trial of an application for the probate of a copy of an alleged lost will, the declaration of an heir of the decedent to the effect that an original will had existed and that she had destroyed the same is not admissible in favor of the proponent unless the declarant be a party to the proceeding. *Scott v. Maddox*, 113 Ga. 795, 39 S. E. 500.

**74.** The destruction or the loss of

B. SEARCH FOR WILL. — Diligent search must be shown to have been made for the will before secondary evidence of its contents is admissible,<sup>75</sup> and the sufficiency of the proof of such search and of the loss of the instrument is addressed to the court.<sup>76</sup>

6. Contents. — A. IN GENERAL. — Secondary evidence is admissible to prove the contents of a lost will<sup>77</sup> and it is commonly held

a will may be shown by any evidence which would be sufficient to satisfy the conscience of the jury. *Scott v. Maddox*, 113 Ga. 795, 39 S. E. 500 (construing Georgia Civ. Code, § 3289). And see *Kitchens v. Kitchens*, 39 Ga. 168, 99 Am. Dec. 453; *Mosely v. Carr*, 70 Ga. 333.

**Spoliation.** — Evidence of the mental and physical condition of the chief devisee under an earlier will is admissible to throw light upon his opportunity for spoliating a subsequent will. *Estate of Lambie*, 97 Mich. 49, 56 N. W. 223.

**Hearsay Inadmissible.** — Where it is sought to establish a lost will, evidence that the witness had heard a third person state that she had destroyed the will is not admissible to account for its non-production. *In re Hedgepeth's Will* (N. C.), 63 S. E. 1025.

75. *Jackson v. Betts*, 6 Cow. (N. Y.) 377. See article "BEST AND SECONDARY EVIDENCE," Vol. II. *Dan v. Brown*, 4 Cow. (N. Y.) 483; *Eure v. Pittman*, 10 N. C. (3 Hawks) 364.

"The testimony of a Probate Judge, in whose office a will should have been deposited, that he had seen the will in his office, but had searched for it in vain, cannot authorize the introduction of parol evidence of its contents, and of its having been proved and ordered to be executed, where the minutes of the Probate Court are not produced, nor alleged to have been mislaid, lost or destroyed." *Dash v. Dosson*, 6 Rob. (La.) 11.

**Will Alleged To Have Been Fraudulently Destroyed.** — Where the theory of a case is that a will was fraudulently destroyed, proof of a search and failure to find the will is not required. *Jones v. Casler*, 139 Ind. 382, 38 N. E. 812, 47 Am. St. Rep. 274.

76. *Eure v. Pittman*, 10 N. C. (3 Hawks) 364; *McConnell v. Wildes*, 153 Mass. 487, 26 N. E. 1114.

**Degree of Proof.** — Proof of the loss of a will being addressed exclusively to the court and for the satisfaction of the judge, need not be as direct and technical as is required by the general rules of evidence. *Featherly v. Waggoner*, 11 Wend. (N. Y.) 599.

77. *England.* — *Sugden v. Lord St. Leonards*, 45 L. J., P. 49, 1 P. D. 154, 34 L. T. 372; *Brown v. Brown*, 8 El. & Bl. 875, 92 E. C. L. 876.

*Delaware.* — *Dawson v. Smith*, 3 Houst. 335.

*Hawaii.* — *Estate of Puhakala*, 5 Hawaii 10.

*Kentucky.* — *Muller v. Muller*, 108 Ky. 511, 56 S. W. 802.

*Massachusetts.* — *Clark v. Wright*, 3 Pick. 66; *Thayer v. Kitchen*, 200 Mass. 382, 86 N. E. 952.

*Mississippi.* — *Pratt v. Hargreaves*, 77 Miss. 892, 28 So. 722.

*New Hampshire.* — *Lane v. Hill*, 68 N. H. 275, 44 Atl. 393, 73 Am. St. Rep. 591.

*New York.* — *Everitt v. Everitt*, 41 Barb. 385; *Featherly v. Waggoner*, 11 Wend. 599.

*Ohio.* — *In re Estate of Lasance*, 5 Ohio N. P. 20, 7 Ohio Dec. 246.

*Pennsylvania.* — *Foster's Appeal*, 87 Pa. St. 67, 30 Am. Rep. 340.

*South Carolina.* — *Reeves v. Reeves*, 2 Mill 334; *Legare v. Ashe*, 1 Bay 464.

*Texas.* — *Tynam v. Paschal*, 27 Tex. 286, 84 Am. Dec. 619.

*Virginia.* — *Smith v. Carter*, 3 Rand. 167.

Great latitude is allowed in proving the contents of a lost will; thus it is competent to show that a paper purporting to be the will of the testator was publicly read at his funeral in the presence of the heirs at law who afterwards asserted that their ancestor died intestate. *Nelson v. Whitfield*, 82 N. C. 46.

that there are no degrees of secondary evidence<sup>78</sup> and hence any and all competent evidence may be received.

**B. PERSONS WHO READ THE WILL.** — One of the most satisfactory methods of proving the contents of a lost will is by the testimony of a person who has read it<sup>79</sup> or heard it read,<sup>80</sup> or who himself prepared the will.<sup>81</sup>

**C. COPIES.** — Another satisfactory method of proof is by a copy<sup>82</sup>

**On Appeal, Record of Probate Prima Facie Evidence of Contents.**

Where a lost will has been admitted to probate, the record of probate is *prima facie* evidence in a future proceeding to contest the validity of such will, not only of the due attestation and execution of such will, but also of its contents; and the burden of proof that it is not in substance the will of the testator is upon the contestant. *Behrens v. Behrens*, 47 Ohio St. 323, 25 N. E. 209, 21 Am. St. Rep. 820, *citing* *Haynes v. Haynes*, 33 Ohio St. 598, 31 Am. Rep. 1579; *Mears v. Mears*, 15 Ohio St. 90; *Banning v. Banning*, 12 Ohio St. 437.

**78.** *Burls v. Burls*, 36 L. J., P. 125, L. R. 1 P. 472, 16 L. T. 677.

**But See the Following Cases.**

Where neither the alleged will nor any copy is produced, parol evidence is admissible to show its contents. *Davenport v. Davenport*, 67 N. J. Eq. 320, 58 Atl. 535.

Where a will and its record were burned and it appears that a copy of the will before its destruction had been sent by mail to the party desiring to use it in evidence, parol proof as to the contents of the will was held inadmissible in the absence of any evidence accounting for the non-production of the copy. *Illinois Land & L. Co. v. Bonner*, 75 Ill. 315.

**79.** *Graham v. O'Fallon*, 3 Mo. 507.

Parol evidence as to the contents of a lost will not derived from an inspection of the written will by the witness or from its actual operation as allowed by those who are interested against it and may be presumed to have had actual knowledge of its contents, is insufficient. *Chisholm v. Ben*, 7 B. Mon. (Ky.) 408.

**80.** The contents of a lost will may be established by the testimony of witnesses who have heard it read but who have not read it. the wit-

nesses themselves being illiterate. *Morris v. Swaney*, 7 Heisk. (Tenn.) 591.

Where a person has been in possession for a long length of time and it is attempted to prove that he has no right to the possession by establishing the contents of a lost will, testimony given by a witness, then eighty-five years old, testifying that sixty-eight years before she had heard the will read and stating the testamentary disposition made of the property, is insufficient though admissible to establish the contents of the will. *Apperson v. Dowdy*, 82 Va. 776, 1 S. E. 105.

**Knowledge Derived From Declarations of Testator.** — The contents of a lost will cannot be proved by witnesses who derived their knowledge from the verbal declarations of the testator. *Fuentes v. Gaines*, 25 La. Ann. 85.

**Will Read to Witness by Testator.** Where, to prove the contents of a lost will it is shown that the testator read over the will to the witness, the testimony of the witness is merely in effect equivalent to the testimony as to the testator's declarations, and while admissible in corroboration is not of itself sufficient proof of the contents of the instrument. *Clark v. Turner*, 50 Neb. 290, 69 N. W. 843, 38 L. R. A. 433.

**81.** *Mitchell v. Low*, 213 Pa. St. 526, 63 Atl. 246.

**Identity of Instrument Must Be Shown.** — Where a will is lost, a scrivener who drew it may testify to its contents where it reasonably appears that the one which he drew was the one lost, and this fact need not be established by positive proof. *Ford v. Feagle*, 62 Ind. 61.

**82.** *Happy's Will*, 4 Bibb (Ky.) 553; *Graham v. O'Fallon*, 3 Mo. 507; *In re Lane's Will*, 2 Dana (Ky.) 106; *Spencer v. Spencer*, 1 Gall. 622, 22 Fed. Cas. No. 13,233.

or draft<sup>83</sup> of the last will, properly proved and authenticated.<sup>84</sup>

**D. DECLARATIONS.**—The declarations of the testator made either before or after the execution of his will,<sup>85</sup> or while executing it,<sup>86</sup> are admissible in evidence,<sup>87</sup> though probably only in corrob-

A copy of the will made shortly after the death of the testator by his attorney is admissible as proof of the contents of the lost will. *In re Estate of Lasance*, 7 Ohio Dec. 246, 5 Ohio N. P. 20.

**83.** *Coddington v. Jenner*, 57 N. J. Eq. 528, 41 Atl. 874, *affirmed*, 60 N. J. Eq. 447, 45 Atl. 1090; *Kerns v. Kerns*, 4 Har. (Del.) 83.

The rough and original copy of a will preserved by the person who prepared the will, who saw the deceased execute and sign it as one of the witnesses, and proved by him to contain the same provisions as the lost will will be sufficient evidence of the contents of such lost will. *Dawson v. Smith*, 3 Houst. (Del.) 335. See also *Ewing v. McIntyre*, 141 Mich. 506, 104 N. W. 787.

**84.** In proceedings to prove and establish a destroyed will, proof that the testator caused it to be recorded in the recorder's office and that the record therefrom is a correct copy of the original, with evidence given by the attesting witnesses that the original was duly executed, is sufficient to show that the copy as recorded is a true copy, and it is then admissible in evidence. *Fording v. Weber*, 99 Ind. 598.

**85.** *England.*—*Sugden v. Lord St. Leonards*, 45 L. J., P. 49, 1 P. D. 49, 34 L. T. 372, *overruling* *Quick v. Quick*, 3 Sw. & Tr. 442, 33 L. J., P. 146, 10 Jur. (N. S.) 682, 10 L. T. 619 (questioned in *Woodward v. Goulstone*, 56 L. J., P. 1, 11 App. Cas. 469); *In Goods of Ball*, 25 L. R. Ir. 556.

*Canada.*—*Stewart v. Walker*, 6 Ont. L. 495.

*United States.*—*Southworth v. Adams*, 11 Biss. 256, 22 Fed. Cas. No. 13,194.

*Georgia.*—*Patterson v. Hickey*, 32 Ga. 156.

*Illinois.*—*Matter of Page*, 118 Ill. 576, 8 N. E. 852, 59 Am. Rep. 395.

*Indiana.*—*McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336.

*Kansas.*—*Schnee v. Schnee*, 61 Kan. 643, 60 Pac. 738.

*Kentucky.*—*Muller v. Muller*, 108 Ky. 511, 56 S. W. 802.

*Michigan.*—*Estate of Lambie*, 97 Mich. 49, 56 N. W. 223.

*Missouri.*—*Mann v. Balfour*, 187 Mo. 290, 86 S. W. 103.

*New Jersey.*—*Davenport v. Davenport*, 67 N. J. Eq. 320, 58 Atl. 535; *Rusling v. Rusling*, 36 N. J. Eq. 603.

*Wisconsin.*—*In re Valentine's Will*, 93 Wis. 45, 67 N. W. 12. *Contra, In re Harris' Estate*, 10 Wash. 555, 39 Pac. 148; *Matter of Ruser*, 6 Dem. (N. Y.) 31.

**86.** *Johnson v. Lyford*, L. R. 1 P. D. 546.

**87. New Exception to Hearsay Rule.**—"The question is whether the declarations of the testator can be received as secondary evidence of the contents of the lost will. No doubt, generally speaking, where secondary evidence is admissible, if oral, it must be given on oath; if documentary, it must be verified on oath. Nevertheless, the declarations of deceased persons are in several instances admitted as exceptions to the general rule; where such persons have had peculiar means of knowledge and may be supposed to have been without motive to speak otherwise than according to the truth. It is obvious that a man who has made his will stands preeminently in that position. He must be taken to know the contents of the instrument he has executed. If he speaks of its provisions, he can have no motive for misrepresenting them, except in the rare instances in which a testator may have the intention of misleading by his statements respecting the will. Generally speaking, statements of this kind are honestly made, and this class of evidence may be put on the same footing with the declarations of members of a family

oration of other evidence tending to show the contents of the will.<sup>88</sup>

E. PROOF OF PART OF CONTENTS. — Where it is impossible to prove the entire contents of a lost will, that portion which is proved may be admitted to probate<sup>89</sup> where there is nothing to indicate that the part which cannot be proved would in any way limit or qualify that part which is proved.<sup>90</sup>

F. WEIGHT AND SUFFICIENCY. — a. *In General.* — The precise language or terms used in a will need not be shown,<sup>91</sup> but clear, satisfactory and conclusive evidence of the substance of its contents is required,<sup>92</sup> though proof beyond a reasonable doubt is not

in matters of pedigree, evidence not always to be relied on, yet sufficiently so to make it worth admitting, leaving its effect to be judged of by those who have to decide the case." *Sugden v. Lord St. Leonards*, 45 L. J., P. 49, 1 P. D. 154, 34 L. T. 372. See also *Lane v. Hill*, 68 N. H. 275, 44 Atl. 393, 73 Am. St. Rep. 591.

**Lost Will Relied Upon To Establish Interest of Contents.** — "If the declarations of the testator are legitimate evidence to prove the contents in a proceeding to have a lost will admitted to probate, which the authorities, we think, seem to fully authorize and support, in reason they must be equally so under the issues in the case at bar, to show the contents of the lost will in question, in order that the interest of the appellees in the estate might appear, and the presumption of revocation rebutted." *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336.

88. *Mercer v. Mackin*, 14 Bush. (Ky.) 434; *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151, 110 Am. St. Rep. 431, 62 L. R. A. 383; *Clark v. Turner*, 50 Neb. 290, 69 N. W. 843.

In a suit for the establishment and probate of a lost will, evidence of the declarations of the testator subsequent to the execution of the will, with respect to its contents, is applicable only by way of corroboration of other clear proof by two witnesses of the provisions of the will as matters of fact within their knowledge. *Inlow v. Hughes*, 38 Ind. App. 375, 76 N. E. 763 (containing a full and exhaustive discussion of the authorities).

89. *Sugden v. Lord St. Leonards*, 45 L. J., P. 49, 1 P. D. 154, 34 L. T. 372; *Skeggs v. Horton*, 82 Ala. 352, 2 So. 110; *Burge v. Hamilton*, 72 Ga. 568; *Steele v. Price*, 5 B. Mon. (Ky.) 58; *Jackson v. Jackson*, 4 Mo. 210; *Dickie v. Malechi*, 6 Mo. 177, 34 Am. Dec. 130; *Dower v. Seeds*, 28 W. Va. 113, 57 Am. Rep. 646.

A revocation clause in a will which had been destroyed after the testator's death by his heirs was established upon clear evidence as to that clause, although the evidence as to the contents of the rest of the will was contradictory and therefore not sufficient to establish it. *Vining v. Hall*, 40 Miss. 83.

90. *Butler v. Butler*, 5 Har. (Del.) 178; *Tarbell v. Forbes*, 177 Mass. 238, 58 N. E. 873.

Where a devise in a lost will was of specific articles as well as of a certain number, it cannot be established except where the evidence clearly establishes the specific articles, as any other holding would give an interest substantially different from that intended by the testator. *Steele v. Price*, 5 B. Mon. (Ky.) 58.

91. *Jones v. Casler*, 139 Ind. 382, 38 N. E. 812, 47 Am. St. Rep. 274; *Anderson v. Irwin*, 101 Ill. 411; *Allison v. Allison*, 7 Dana (Ky.) 90; *Tarbell v. Forbes*, 177 Mass. 238, 58 N. E. 873.

92. *England.* — *Silver v. Silver*, 27 L. T. N. S. 766.

*Arkansas.* — *Nunn v. Lynch*, 73 Ark. 20, 83 S. W. 316.

*California.* — *Estate of Kidder*, 66 Cal. 487, 6 Pac. 326.

*Connecticut.* — *Matter of Johnson*, 40 Conn. 489.

expected or required to be made in such a case.<sup>93</sup>

**Contents of a Spoliated Will** may be proved by slight evidence.<sup>94</sup>

b. *Number of Witnesses.* — One witness only is required to establish the contents of a lost will.<sup>95</sup>

*Iowa.* — *McCarn v. Rundall*, 111 Iowa 406, 82 N. W. 924.

*Maryland.* — *Rhodes v. Vinson*, 9 Gill. 169, 52 Am. Dec. 685.

*Massachusetts.* — *Davis v. Sigourney*, 8 Met. 487.

*Mississippi.* — *Vining v. Hall*, 40 Miss. 83.

*New Jersey.* — *In re Willitt's Estate*, 46 Atl. 549; *Wyckoff v. Wyckoff*, 16 N. J. Eq. 401.

*Tennessee.* — *McNeely v. Pearson* (Tenn. Ch. App.), 42 S. W. 165.

**Proof of Revocatory Words.** — The contents of a lost will to such an extent as is necessary to establish a revocation by implication must be clearly shown. The evidence should be clear, unequivocal and convincing, since a construction of the two, if both were actually before the court might harmonize in whole or in part what from the relation of those who speak from recollection of matters more or less distant in point of time would appear inconsistent. *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151, 110 Am. St. Rep. 431, 62 L. R. A. 383.

**Stipulation of Counsel Insufficient.** *Matter of Ruser*, 6 Dem. (N. Y.) 31.

**Argument From Probabilities.** After speaking of the rule that courts are bound to consider the evidence of the contents of a lost will with great caution, the court said: "If courts cannot act on probabilities when the petitioner is putting his case it would seem to follow that they cannot act on probabilities so far as respondents are concerned. It seems to us that it is no answer to direct evidence that a clause was in the original will to show a fact from which an argument might be addressed to a jury, that a testator might probably have done otherwise than the direct evidence showed." *Tarbell*

*v. Forbes*, 177 Mass. 238, 58 N. E. 873.

<sup>93</sup>. *Skeggs v. Horton*, 82 Ala. 352, 2 So. 110.

In **England** proof beyond a reasonable doubt seems to be required. *Woodward v. Goulstone*, 56 L. J., P. 1, 11 App. Cas. 469, 15 L. T. 790; *Harris v. Knight*, 15 P. D. 170, 16 L. T. 507.

<sup>94</sup>. *Mayhood v. Mayhood*, Ir. 8 Eq. 359; *Anderson v. Irwin*, 101 Ill. 411.

**Degree of Proof of Fraudulent Destruction.** — In cases where the fraudulent suppression of a will allows proof of its contents to be made by slight evidence, the proof of the fraudulent suppression must itself be made out clearly and by satisfactory proof. *Marston v. Marston*, 17 N. H. 503, 43 Am. Dec. 611.

<sup>95</sup>. *England.* — *Sugden v. Lord St. Leonards*, 45 L. J., P. 491, P. D. 154, 34 L. T. 372.

*Alabama.* — *Skeggs v. Horton*, 82 Ala. 352, 2 So. 110; *Jaques v. Horton*, 76 Ala. 238.

*Connecticut.* — *Matter of Johnson's Will*, 40 Conn. 587.

*Georgia.* — *Kitchens v. Kitchens*, 39 Ga. 168, 99 Am. Dec. 453; *Scott v. Maddox*, 113 Ga. 795, 39 S. E. 500.

*Illinois.* — *Matter of Page*, 118 Ill. 576, 8 N. E. 852, 59 Am. Rep. 395.

*Kentucky.* — *Baker v. Dobyns*, 5 Dana 220; *Steele v. Price*, 5 B. Mon. 58.

*Missouri.* — *Dickey v. Malechi*, 6 Mo. 177, 34 Am. Dec. 130; *Graham v. O'Fallow*, 3 Mo. 507; *Varnon v. Varnon*, 67 Mo. App. 534.

*New Jersey.* — *Wyckoff v. Wyckoff*, 16 N. J. Eq. 401.

*New York.* — *Dan v. Brown*, 4 Cow. 483.

*North Carolina.* — *In re Hedgepeth's Will*, 63 S. E. 1025.

*Pennsylvania.* — *Lewis v. Lewis*, 6 Serg. & R. 480.

**Interested Person as Witness.**

**Statutory Provisions** in some states require such proof to be made by two witnesses,<sup>98</sup> or one witness and a correct copy of the will.<sup>97</sup> Such statutes are usually limited to proceedings in particular courts<sup>98</sup> and require such proof to be made only of the provisions of the will which confer property rights.<sup>99</sup> Each witness must, however, testify to the substance<sup>1</sup> of a provision before it can be established and their testimony must coincide.<sup>2</sup>

**7. Order of Proof.**—Ordinarily the execution<sup>3</sup> and loss<sup>4</sup> of the

Where the evidence to prove the contents of a lost will is given by the person who drew up the will and who is the principal beneficiary under it, this fact while requiring that the court shall be most careful in accepting the evidence does not require that other evidence be given where it is consistent with all the circumstances. *Stewart v. Walker*, 6 Ont. L. (Can.) 495. And see *Fallow's Estate*, 214 Pa. St. 584, 63 Atl. 889 (testimony of interested witness held insufficient).

**96.** *Estate of Kidder*, 66 Cal. 487, 6 Pac. 326 (Code Civ. Proc. § 1339); *In re Harris' Estate*, 10 Wash. 555, 39 Pac. 148 (Code of Proc. § 879); *Estate of Camp*, 134 Cal. 233, 66 Pac. 227.

**97.** *Indiana*.—*Inlow v. Hughes*, 38 Ind. App. 375, 76 N. E. 763; *Fording v. Weber*, 99 Ind. 598; *Jones v. Casler*, 139 Ind. 382, 38 N. E. 812, 47 Am. St. Rep. 274.

*New York*.—*Kahn v. Hoes*, 14 Misc. 63, 35 N. Y. Supp. 273 (Code of Civ. Proc. § 1865); *In re De Groot's Will*, 9 N. Y. Supp. 471; *Hatch v. Sigman*, 1 Dem. 519; *M'Nally v. Brown*, 5 Redf. 372; *In re Purdy's Will*, 25 Misc. 458, 55 N. Y. Supp. 644, affirmed, 46 App. Div. 33, 61 N. Y. Supp. 430; *In re Barnes' Will*, 70 App. Div. 523, 75 N. Y. Supp. 373; *Everitt v. Everitt*, 41 Barb. 385; *In re Kennedy's Will*, 167 N. Y. 163, 60 N. E. 442.

Where the attesting witness to a lost will testifies to its contents and a copy is produced which is shown to have been made from the will itself, which had been deposited in the surrogate's office, its contents are sufficiently proved. *In re Granacher's Will*, 74 App. Div. 567, 77 N. Y. Supp. 748, affirmed, 174 N. Y. 504, 66 N. E. 1109.

**98.** *In Harris v. Harris*, 26 N. Y. 433, it was held that the provisions of 2 Rev. Stat., p. 68, § 67, requiring two witnesses to establish a lost will in the court of chancery related only to that special proceeding and did not abolish the common law form of evidence which allowed proof of a lost will by a single credible witness wherever that fact became necessary to be established in any other action. See also *In re Kennedy's Will*, 167 N. Y. 163, 60 N. E. 442 (construing Code §§ 1865, 2621).

**99.** *Jones v. Casler*, 139 Ind. 382, 38 N. E. 812, 47 Am. St. Rep. 274.

**1.** *Estate of Camp*, 134 Cal. 233, 66 Pac. 227.

**2.** *Todd v. Rennick*, 13 Colo. 546, 29 Pac. 898; *Buechle's Estate*, 5 Pa. Dist. 127, 17 Pa. Co. Ct. 449; *s. c.*, 13 Pa. Dist. 16; *Matter of Ruser*, 6 Dem. (N. Y.) 31.

**Where Draft Is Proved.**—Under a statute providing that the contents of a lost will can be established only by clear proof by two witnesses, or by a correct copy and the testimony of one witness, where a copy is shown to be a true copy by the testimony of one witness and where it is shown to have been copied by the person with whom it was deposited by the testator and by his direction, we do not believe it necessary to prove the exact contents by any other witness, but it is sufficient if some other witness states in general terms the provisions of the instrument. *Fording v. Weber*, 99 Ind. 598.

**3.** *Michell v. Low*, 213 Pa. St. 526, 63 Atl. 246; *McKenna v. McMichael*, 189 Pa. St. 440, 42 Atl. 14.

**4.** *Conoly v. Gayle*, 61 Ala. 116; *Marshall v. Marshall*, 42 S. C. 436, 20 S. E. 298; *Newell v. Homer*, 120 Mass. 277.



will should be established before secondary evidence of its contents is admissible, but this rule is not inflexible.

## XV. MISCELLANEOUS MATTERS.

**1. Order of Proof.** — While the order of proof is largely within the discretion of the court,<sup>5</sup> an exception to the general rule is made in most jurisdictions, in will cases, in that the proponent is required to establish only a *prima facie* case in the first instance and is allowed to introduce further evidence in chief after the contestant has replied.<sup>6</sup> In a few jurisdictions this is not allowed.<sup>7</sup> The contestant is always required to introduce his entire case in chief.<sup>8</sup>

**5. Illinois.** — *Floto v. Floto*, 233 Ill. 605, 84 N. E. 712; *Slingloff v. Bruner*, 174 Ill. 561, 51 N. E. 772.

**Maryland.** — *Stirling v. Stirling*, 64 Md. 138, 149, 21 Atl. 273.

**Massachusetts.** — *Nash v. Hunt*, 116 Mass. 237, 252.

**Michigan.** — *Fraser v. Jennison*, 42 Mich. 206, 223, 3 N. W. 882.

**Missouri.** — *Rankin v. Rankin*, 61 Mo. 295.

**Rhode Island.** — *Hamilton v. Hamilton*, 10 R. I. 538.

**West Virginia.** — *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

The order in which contestants testify is immaterial, although when the action started there was but one contestant and the others were subsequently added. *Murphy's Exrs. v. Murphy*, 23 Ky. L. Rep. 1460, 65 S. W. 165.

A surrogate may, in his discretion, while the hearing in a probate proceeding is pending, allow either party at any time to offer further evidence even though such party had rested his case. *In re Beck's Will*, 39 N. Y. Supp. 810.

**Contested Probate.** — *In re McDermott's Estate*, 148 Cal. 43, 82 Pac. 842.

**6. Kentucky.** — *King v. King*, 19 Ky. L. Rep. 868, 42 S. W. 347; *Folks v. Folks*, 107 Ky. 561, 54 S. W. 837.

**Michigan.** — *Taff v. Hosmer*, 14 Mich. 309; *Kempsey v. McGinnis*, 21 Mich. 123 (full discussion).

**Minnesota.** — *In re Layman's Will*, 40 Minn. 371, 42 N. W. 286.

**Mississippi.** — *Sheehan v. Kearney*, 21 So. 41.

**Nebraska.** — *Seebrook v. Fedawa*, 30 Neb. 424, 46 N. W. 650.

**Ohio.** — *Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459.

**West Virginia.** — *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

**7. Craig v. Southard**, 148 Ill. 37, 35 N. E. 361; *Brown v. Ward*, 53 Md. 376, 388, 36 Am. Rep. 422; *King v. Gilson*, 206 Mo. 264, 104 S. W. 52.

"In some courts it is held that neither party is called upon to produce all his testimony in support of any allegation in issue until it has been developed on the trial that an issue in the evidence is made upon that question; the view of such courts being that where the burden of proof of a given allegation rests upon a party, it is sufficient for that party, in the first instance, to produce proof enough to make a *prima facie* case, and that he is not required to accumulate other testimony until evidence has been introduced tending to contradict his *prima facie* case. That rule has not prevailed in the courts of this state; but the more usual rule is, that the party upon whom the burden of proof rests must, in the first instance, produce all the proof he proposes to offer in support of his allegation; and after his adversary has closed his proof, he may only be heard in adducing proof directly rebutting the proofs given by his adversary, this question of practice must, to a greater or less degree be left to the discretion of the court trying the case." *Mueller v. Rehhan*, 94 Ill. 142.

**8. Rankin v. Rankin**, 61 Mo. 295.

**2. Competency of Witnesses.** — A. IN GENERAL. — The disqualifications of interest which existed at common law have been largely removed by statute, and the rules governing the subject will be found discussed elsewhere in this work.<sup>9</sup>

**B. TRANSACTIONS WITH DECEASED PERSONS.** — The sole important remnant of disqualifying interest is to be found in the modern statutes dealing with transactions with deceased persons. The entire article dealing with this subject should be carefully examined.<sup>10</sup>

**3. Admissions.** — The admissions of one of several legatees or devisees are not competent evidence against the others, since the validity of the whole will is in issue and only such evidence can be introduced to impeach it as is competent against all the parties seeking to establish it.<sup>11</sup>

Admissions of a Sole Devisee are of course competent evidence.<sup>12</sup>

9. See articles "COMPETENCY," Vol. III, p. 211; "HUSBAND AND WIFE," Vol. VI; "PARTIES AND PERSONS INTERESTED AS WITNESSES," Vol. IX, p. 506.

10. See article "TRANSACTIONS WITH DECEASED PERSONS," Vol. XII, p. 676.

**Mental Capacity.** — The effect of these statutes as bearing upon the proof of the mental capacity of a testator will be found treated at page 901 of the above article.

**Execution and Contents of Will.** See page 917 of same article.

11. *Alabama.* — Roberts v. Tra-  
wick, 13 Ala. 61; Taylor v. Kelly,  
31 Ala. 59, 68 Am. Dec. 150; Wit-  
tick v. Traun, 31 Ala. 203; Blakey's  
Heirs v. Blakey's Exr., 33 Ala. 611.

*Connecticut.* — Livingston's Ap-  
peal, 63 Conn. 68, 26 Atl. 470; Car-  
penter's Appeal, 74 Conn. 431, 51  
Atl. 126.

*Indiana.* — Roller v. Kling, 150  
Ind. 159, 49 N. E. 948; Hays v.  
Burkham, 67 Ind. 359.

*Iowa.* — In re Ames, 51 Iowa 596,  
2 N. W. 408; Dye v. Young, 55  
Iowa 433, 7 N. W. 687; Parsons v.  
Parsons, 66 Iowa 754, 21 N. W.  
570, 24 N. W. 564.

*Massachusetts.* — Shailer v. Bum-  
stead, 99 Mass. 112.

*Missouri.* — Seibert v. Hatcher,  
205 Mo. 83, 102 S. W. 962.

*New York.* — Matter of Baird,  
47 Hun 77.

*Ohio.* — Thompson v. Thompson,

13 Ohio St. 356; Seal v. Goebel, 11  
Ohio C. C. (N. S.) 433.

*Pennsylvania.* — Clark v. Morris-  
son, 25 Pa. St. 453; Nussear v. Ar-  
nold, 13 Serg. & R. 323; Transue  
v. Brown, 31 Pa. St. 92; Dotts v.  
Fetzer, 9 Pa. St. 88.

*South Carolina.* — Dillard v. Dil-  
lard, 2 Strobb. L. 89.

*Texas.* — Dennis v. Neal (Tex.  
Civ. App.), 71 S. W. 387.

*Virginia.* — Whitelaw v. White-  
law, 96 Va. 712, 32 S. E. 458.

*West Virginia.* — Forney v. Fer-  
rell, 4 W. Va. 729.

**Admissible by Consent.** — The de-  
clarations and acts of a proponent  
who is not the sole legatee are not  
admissible in evidence to defeat the  
probate of a will. If all the other  
legatees were contesting the will  
or consenting to the admission of  
the testimony the rule would doubt-  
less be different. Blakey's Heirs v.  
Blakey's Exrx., 33 Ala. 611.

**Where Interest of All Would Be  
Subserved.** — On the trial of an issue  
of *devisavit vel non* between the  
executor, who was also the principal  
legatee, and another legatee, the  
declarations or admissions of the  
executor cannot be received to in-  
validate the will which makes pro-  
vision for himself and several oth-  
ers, even when offered in connec-  
tion with proof that it will be to  
the interest of all the legatees ex-  
cept the executor to set it aside.  
Bunyard v. McElroy, 21 Ala. 311.

12. The admissions of a sole de-

**4. Privilege of Attorney.** — The attorney who drew a will may testify to its execution<sup>13</sup> or contents<sup>14</sup> and such testimony is not regarded as privileged. This result is reached either upon the ground of policy<sup>15</sup> or upon an implied waiver of the privilege.<sup>16</sup>

## XVI. ON APPEAL.

**1. Nature of Appeal.** — Various statutory methods are provided as a means of appealing from a decree of a surrogate admitting or refusing to admit a will to probate. Nearly all of them,<sup>17</sup> however, treat the appeal as a trial *de novo*, and allow the introduction of all

vises that the will through which he claims has been revoked by a later will are admissible against his representatives who seek to probate the earlier will and are alone sufficient, if believed, to establish the fact of revocation if the jury find that the revoking will has been fraudulently suppressed or destroyed. *Matter of Lambie*, 97 Mich. 49, 56 N. W. 223.

Declarations of the two proponents who seek to establish a lost will, that they did not believe that the deceased had left a will, are competent evidence in behalf of the defendants. *Durant v. Ashmore*, 2 Rich. L. (S. C.) 184.

**Admissions of Heir.** — It is admissible to prove, as against an heir denying the existence of a will, that a writing alleged to be such was taken by one of the devisees in the presence of the heir from a tin box containing other valuables and read over in the presence of the heir. *Nelson v. Whitfield*, 82 N. C. 46.

**Self-Serving Declarations Inadmissible.** — *Jameson v. Hall*, 37 Md. 221.

**13.** *Coates v. Semper*, 82 Minn. 460, 85 N. W. 217; *In re Layman's Will*, 40 Minn. 371, 373, 42 N. W. 286; *In re Downing's Will*, 118 Wis. 581, 95 N. W. 876.

**In New York** an attorney who prepares and superintends the execution of a will is not a competent witness to testify to its due execution, unless he is also an attesting witness. *In re Sears' Estate*, 33 Misc. 141, 68 N. Y. Supp. 363. (applying § 836 of New York Code as modified by ch. 295, laws of

1893); *Mason v. Williams*, 53 Hun 398, 6 N. Y. Supp. 479. And see article "PRIVILEGED COMMUNICATIONS," Vol. X, p. 291.

**14.** *England.* — *Russell v. Jackson*, 9 Hare 387, 68 Eng. Reprint 558. *Canada.* — *Stewart v. Walker*, 5 Ont. L. 495.

*Illinois.* — *Scott v. Harris*, 113 Ill. 447.

*Indiana.* — *Towles v. McCurdy*, 163 Ind. 12, 71 N. E. 129; *Inlow v. Hughes*, 38 Ind. App. 375, 76 N. E. 763.

*Iowa.* — *Denning v. Butcher*, 91 Iowa 425, 59 N. W. 69; *Winters v. Winters*, 102 Iowa 53, 71 N. W. 184.

*Missouri.* — *Graham v. O'Fallon*, 4 Mo. 338.

**Attorney Acting as Mere Scrivener.** — In *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. 874, it was said: "A lawyer, in receiving the directions or instructions of one intending to make a will, is confided in by reason of his professional character as a counselor, and he acts in that capacity, although asking no questions, and without advising he does nothing more than to reduce those directions to writing. The relation, therefore, between the testatrix and the witness was that of client and attorney." And see article "PRIVILEGED COMMUNICATIONS," Vol. X, p. 247, n. 31.

**15.** *Doherty v. O'Callaghan*, 157 Mass. 90, 31 N. E. 726, 34 Am. St. Rep. 258, 17 L. R. A. 188.

**16.** See article "PRIVILEGED COMMUNICATIONS," Vol. X, p. 318, nn. 70, 75.

**17.** In Delaware the superior court trying an appeal from the register of wills is strictly an appellate court and does not try the case

relevant evidence as on an original hearing.<sup>18</sup> The same is true

*de novo* or upon new evidence. *Cummins v. Cummins*, 1 *Marv.* (Del.) 423, 31 *Atl.* 876.

**18. Colorado.**—Under Colorado, Gen. Stats. § § 3499 and 3510, providing that, on an appeal to the district court from an order of the county court refusing or admitting a will to probate, the proponent may support the will by any evidence that would be competent in the contest of a will instituted in the district court, the contestant is not confined on such appeal to the testimony of the subscribing witnesses, but may offer any competent testimony. *In re D'Avignon's Will*, 12 *Colo. App.* 489, 55 *Pac.* 936 (differentiating the Illinois procedure under a similar statute).

**Connecticut.**—The superior court on an appeal from the probate of a will sits in the place of a court of probate and can receive any evidence on matters covered by the reasons of appeal which are or would have been relevant and competent on the original hearing. *In re Vivian's Appeal*, 74 *Conn.* 257, 50 *Atl.* 797.

**Illinois.**—In Illinois on an appeal from an order denying probate, any relevant evidence is admissible. *Webster v. Yorty*, 194 *Ill.* 408, 62 *N. E.* 907; *Thompson v. Owen*, 174 *Ill.* 229, 51 *N. E.* 1046, 45 *L. R. A.* 682; *In re Will of Barry*, 219 *Ill.* 391, 76 *N. E.* 577; *Hill v. Kehr*, 228 *Ill.* 204, 81 *N. E.* 848; *Mead v. Presbyterian Church*, 229 *Ill.* 526, 82 *N. E.* 371; *In re Tobin*, 196 *Ill.* 484, 63 *N. E.* 1021; *In re Estate of Kohley*, 200 *Ill.* 189, 65 *N. E.* 699. But where the order admitted the will to probate the only evidence which can be considered is that of the subscribing witnesses to the will. *Greene v. Hitchcock*, 222 *Ill.* 216, 78 *N. E.* 614; *Andrews v. Black*, 43 *Ill.* 256; *Hobart v. Hobart*, 154 *Ill.* 610, 39 *N. E.* 581; *Crowley v. Crowley*, 80 *Ill.* 469.

**New Jersey.**—On appeal from the orphans' court the ordinary may decide the question on the evidence before the jury, or on additional proof taken in accordance with the practice in the prerogative court. *Rusling v. Rusling*, 36 *N. J. Eq.* 603. And see *s. c.*, 35 *N. J. Eq.* 120;

*White v. Starr*, 47 *N. J. Eq.* 244, 20 *Atl.* 875; *Smith v. Smith*, 48 *N. J. Eq.* 566, 25 *Atl.* 11.

**New York.**—In New York where an appeal is taken from an order or decree of the surrogate on the facts, the supreme court has the same power to decide the question of fact that the surrogate had. *In re Tuttle's Will*, 123 *App. Div.* 167, 108 *N. Y. Supp.* 133 (applying Code of Civ. Proc., par. 2586).

Where a decree of the surrogate admitting a will to probate is appealed from, the question is to be determined by a consideration of the whole evidence as a *de novo* proposition; and if the mind of the court is in doubt it is its duty to set aside the probate and direct a trial of the issues. *In re Brunor*, 21 *App. Div.* 259, 47 *N. Y. Supp.* 681; *In re Tompkin's Will*, 69 *App. Div.* 474, 74 *N. Y. Supp.* 1002; *In re Van Houten's Will*, 11 *App. Div.* 208, 42 *N. Y. Supp.* 919.

The power given by § 2586 New York Code of Civ. Proc. to an appellate court to receive further testimony upon an appeal taken from the decree of a surrogate should be sparingly exercised as it practically opens the case and gives a new hearing on new evidence before an appellate tribunal. *Matter of Hannah*, 45 *Hun. (N. Y.)* 561. And see *Scribner v. Williams*, 1 *Paige Ch. (N. Y.)* 550; *Case v. Towle*, 8 *Paige Ch. (N. Y.)* 479.

**Ohio.**—Proceedings to contest the validity of a will under the statute are in the nature of an appeal for the order of probate thereof, and all material facts in issue are to be heard and determined *de novo* as though such order of probate had not been made, except that such order of probate is *prima facie* evidence of the due attestation, execution and validity of the will, and the burden of proof is on the contestants to invalidate it. *Haynes v. Haynes*, 33 *Ohio St.* 598, 31 *Am. Rep.* 579.

**Texas.**—Trials on appeal from a county court are trials *de novo*, and any competent evidence may be admitted although it was not produced

where the method employed is to issue a bill out of chancery.<sup>19</sup>

**2. Presumptions and Burden of Proof.**—While there is a presumption in favor of the regularity of the proceedings in the probate court,<sup>20</sup> the general burden of proof rests upon the proponent of the will, on appeal,<sup>21</sup> though in many jurisdictions, by statute, the certificate of the oaths of the subscribing witnesses<sup>22</sup> or the order admitting the will to probate<sup>23</sup> are admissible in evidence, establish a *prima facie* case, and shift the burden of proceeding with the evidence to the contestant.<sup>24</sup>

**3. Certificate of Attesting Witnesses.**—In many states the certificates of the attesting witnesses made under oath on the probate of a will, are admitted in evidence on an appeal or contest, usually as a result of statute, and establish a *prima facie* case.<sup>25</sup> In others,

on the hearing of the will when it was offered for probate. *Kelly v. Settegast*, 68 Tex. 13, 2 S. W. 870.

**19.** *Rigg v. Wilton*, 13 Ill. 15, 54 Am. Dec. 419; *Tate v. Tate*, 89 Ill. 42.

**20.** *Franklin v. Boone*, 39 Tex. Civ. App. 597, 88 S. W. 262.

It will be presumed that the orphans' court acted correctly unless the contrary appears, and that it had sufficient evidence to authorize the allowance of the will. *McGrews v. McGrews*, 1 Stew. & P. (Ala.) 30.

**21.** See *supra*, VII, 1, B

On an appeal from the decree of a probate court approving a will the will is to be proved in the supreme court as if the question had originated there, and the proponent having the affirmative has the right to open and close. *Buckminster v. Perry*, 4 Mass. 593.

**22.** See *infra*, XVI, 3.

**23.** See *infra*, XVI, 4.

**24.** *Wait v. Westfall*, 161 Ind. 648, 665, 68 N. E. 271; *Roller v. Kling*, 150 Ind. 159, 163, 49 N. E. 948; *Teegarden v. Lewis*, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9; *Steinkuehler v. Wempner*, 169 Ind. 154, 81 N. E. 482, 15 L. R. A. (N. S.) 673; *West v. Knoppenberger*, 4 Ohio C. C. (N. S.) 305.

The probate of a will under § 2675, Burns' Ann., impresses it with *prima facie* validity and it will stand as a valid instrument in the absence of affirmative extrinsic proof brought against it; and in an action to contest after probate the plaintiff very logically and rightly has the burden

of proof. *Morell v. Morell*, 157 Ind. 179, 60 N. E. 1092.

**25.** *Alabama.*—*Johnston v. Glascock*, 2 Ala. 218.

*Illinois.*—*Johnson v. Farrell*, 215 Ill. 542, 74 N. E. 760; *Entwistle v. Meikle*, 180 Ill. 9, 54 N. E. 217; *Slingloff v. Bruner*, 174 Ill. 561, 51 N. E. 772; *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *Baker v. Baker*, 202 Ill. 595, 67 N. E. 410 (admissible though witnesses have already testified to same effect); *Thompson v. Bennett*, 194 Ill. 57, 62 N. E. 321; *Keithley v. Stafford*, 126 Ill. 507, 18 N. E. 740; *Rigg v. Wilton*, 13 Ill. 15, 54 Am. Dec. 419; *Johnson v. Johnson*, 187 Ill. 86, 58 N. E. 237; *Hesterberg v. Clark*, 166 Ill. 241, 46 N. E. 734, 57 Am. St. Rep. 135; *Waters v. Waters*, 222 Ill. 26, 78 N. E. 1; *Graybeal v. Gardner*, 146 Ill. 337, 34 N. E. 528; *Holloway v. Galloway*, 51 Ill. 159; *Carpenter v. Calvert*, 83 Ill. 62.

*New Jersey.*—*In re Beggans' Will*, 68 N. J. Eq. 572, 59 Atl. 874; *Farley v. Farley*, 50 N. J. Eq. 434, 26 Atl. 178.

Where the trial is *de novo*, the written statements of the subscribing witnesses given on the probate of the will are admissible in evidence though they might not be if the case were a contest. *McConnell v. Keir*, 76 Kan. 527, 92 Pac. 540.

Texas Rev. Stat., art. 1855, provides that a certified copy of the record of testimony taken on the probate of a will may be read in evidence on the trial of the same matter in any other court when taken there by appeal or otherwise. It

however, they are not admitted,<sup>26</sup> at least unless the absence of the witnesses is satisfactorily accounted for.<sup>27</sup>

**4. Order Admitting to Probate.**—The order admitting a will to probate is admissible and establishes a *prima facie* case by virtue of statutory provisions in several states.<sup>28</sup> In the absence of such a

was held that where a contest had been removed from the county court to the district court the evidence taken in the county court was admissible, and although the witnesses themselves were in court the court properly refused permission to cross-examine the witnesses. *Prather v. McClelland*, 76 Tex. 574, 13 S. W. 543.

**Original Affidavits Admissible.** *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *Potter v. Potter*, 41 Ill. 80. And see *Beeks v. Odom*, 70 Tex. 183, 7 S. W. 702.

**Oath Taken After Admission of Will Certificate Inadmissible.** "Upon the face of the record the will could not have been admitted upon such testimony, because it appeared by the certificate that the oath was taken after the will was admitted, and it therefore did not appear that it was a 'certificate of the oath of the witnesses at the time of the first probate.' Proponents introduced the testimony of the county clerk for the purpose of explaining this discrepancy. It could not be so explained. The certificate could not be aided by oral evidence, and the court properly excluded it." *Godfrey v. Phillips*, 209 Ill. 584, 71 N. E. 19.

**Lack of Cross-Examination Immaterial.**—*Beeks v. Odom*, 70 Tex. 183, 7 S. W. 702.

**Admissible To Contradict Witness.**

On the trial in the circuit court the affidavits subscribed by the attesting witnesses in the county court are admissible in evidence to contradict the testimony of these witnesses. *In re Will of Barry*, 219 Ill. 391, 76 N. E. 577.

**26.** *In re Hedgepeth's Will* (N. C.), 63 S. E. 1025.

**27.** *Kettmann v. Metzger*, 3 Ohio C. C. (N. S.) 224.

**28. Kansas.**—*Kansas Gen. Stats.* 1901, § 7958; *Scott v. Thrall* (Kan.), 95 Pac. 563.

**Mississippi.**—Under the Missis-

sippi Code of 1888, § 1969, a probate of a will in common form is expressly made *prima facie* evidence of its validity in all future contests; and on such contests the proof taken on the preliminary probate is admissible in evidence. *Tucker v. Whitehead*, 59 Miss. 594 (commenting on the earlier practice). For the former practice see *Edwards v. Gaulding*, 38 Miss. 118.

**New York.**—*Scott v. Barker*, 129 App. Div. 241, 113 N. Y. Supp. 695; *Roche v. Nason*, 105 App. Div. 256, 93 N. Y. Supp. 565; *Cook v. White*, 43 App. Div. 388, 60 N. Y. Supp. 153; *Dobie v. Armstrong*, 27 App. Div. 520, 50 N. Y. Supp. 801; *Shayne v. Shayne*, 54 Misc. 474, 106 N. Y. Supp. 34; *Mock v. Kaufman*, 82 N. Y. Supp. 310; *Iverson v. Iverson*, 80 App. Div. 599, 80 N. Y. Supp. 1011; *Heath v. Koch*, 173 N. Y. 629, 66 N. E. 1110, *affirming* 74 App. Div. 338, 77 N. Y. Supp. 513; *Hagan v. Sone*, 68 App. Div. 60, 74 N. Y. Supp. 109.

In an action to establish the validity of a will, § 2653a Code Civ. Proc. New York, expressly provides that all the plaintiff need do is to introduce the will and the decree of the surrogate admitting it to probate in evidence, and thereupon it becomes incumbent upon the defendants to show the invalidity of the will. *Carolan v. O'Donnell*, 105 App. Div. 577, 94 N. Y. Supp. 171; *Roche v. Nason*, 105 App. Div. 256, 63 N. Y. Supp. 565.

**Rights To Open and Close Remains With Proponents.**—*Hagan v. Sone*, 68 App. Div. 60, 74 N. Y. Supp. 109 (express terms of statute).

**Ohio.**—*Behrens v. Behrens*, 47 Ohio St. 323, 25 N. E. 209, 21 Am. St. Rep. 820 (§ 5948 Ohio Rev. Stat.); *Haynes v. Haynes*, 33 Ohio St. 598, 31 Am. Rep. 579; *Ousley v. Witheron*, 13 Ohio C. C. 298; *Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459.

In Ohio under § 5948 Rev. Stat.

statute it is inadmissible as evidence of any facts recited in it.<sup>29</sup>

## XVII. LEGATEES AND DEVISEES.

**1. Presumptions.** — A. AGAINST DISHERISON. — There is a presumption that the testator does not intend to disinherit his heirs.<sup>30</sup>

B. AGAINST PARTIAL INTESACY. — A testator who leaves a will is presumed to have intended to dispose of his entire estate thereby,<sup>31</sup> but this presumption can only be applied in cases in which the language used is ambiguous.<sup>32</sup>

C. TIME OF VESTING. — A presumption also exists to the effect that a legacy was intended to vest at the earliest possible moment.<sup>33</sup>

the probate record is admissible in evidence in an action directly contesting the validity of a will and *prima facie* establishes its validity. The effect of this presumption is to fix the burden of proof permanently and conclusively upon the contestant. *Hutson v. Hartley*, 72 Ohio St. 262, 74 N. E. 197.

**Statute Applies to Probate of Lost Wills.** — *Banning v. Banning*, 12 Ohio St. 437. And see *Converse v. Starr*, 23 Ohio St. 491.

**Washington.** — Although the order of the court admitting a will to probate is not conclusive of the facts necessary to support it, yet it makes a *prima facie* case upholding the validity of the will; and in an action to test the validity of the will the burden of proof is upon the contestants. *Higgins v. Nethery*, 30 Wash. 239, 70 Pac. 489.

**29.** *Graybeal v. Gardner*, 146 Ill. 337, 34 N. E. 528; *Purdy v. Hall*, 134 Ill. 298, 25 N. E. 645; *Craig v. Southard*, 148 Ill. 37, 35 N. E. 361; *Weston v. Teufel*, 213 Ill. 291, 72 N. E. 908; *Henline v. Brady*, 110 Ill. App. 75; *Rogers v. Thomas*, 1 B. Mon. (Ky.) 390; *Johnston v. Glasscock*, 2 Ala. 218.

**30.** *Close v. Farmers' L. & T. Co.*, 195 N. Y. 92, 87 N. E. 1005.

**31.** *Arkansas.* — *Gregory v. Welch*, 118 S. W. 404.

*Connecticut.* — *Wolfe v. Hatheway*, 70 Atl. 645.

*Illinois.* — *Hoffner v. Custer*, 237 Ill. 64, 86 N. E. 737; *Vestal v. Garrett*, 197 Ill. 398, 64 N. E. 345; *English v. Cooper*, 183 Ill. 203, 55 N. E. 687; *Felkel v. O'Brien*, 231 Ill. 329, 83 N. E. 170; *Bond v. Moore*, 236 Ill. 576, 86 N. E. 386.

*Iowa.* — *Whitehouse v. Whitehouse*, 136 Iowa 165, 113 N. W. 759.

*Missouri.* — *McMahan v. Hubbard*, 217 Mo. 624, 118 S. W. 48; *Lehnhoff v. Theine*, 184 Mo. 346, 83 S. W. 469.

*New York.* — *Close v. Farmers' L. & T. Co.*, 195 N. Y. 92, 87 N. E. 1105.

*North Carolina.* — *Harper v. Harper*, 148 N. C. 453, 62 S. E. 553.

"This presumption seems to amount to this: Where there is a general intention appearing in the will to thereby make a complete disposition of all of the testator's property, such general intent is allowed weight in determining what was intended by a particular devise that may admit of enlargement or limitation." *McMahan v. Hubbard*, 217 Mo. 624, 118 S. W. 481.

**32.** *Gilpin v. Williams*, 17 Ohio St. 396; *Robbins v. Smith*, 5 Ohio C. C. (N. S.) 545.

"The rules in respect of presumptions against partial intestacy can have no controlling effect in a case like the present, where the language used by the testator is plain and unambiguous. The rule is only applied when the words used, by any 'fair interpretation or allowable implication,' will embrace the property otherwise undevised." *Oldham v. York*, 99 Tenn. 68, 41 S. W. 333.

**33.** *Duffield v. McMaster* (1906) 1 Ir. 333.

"It is conceded that the law favors the vesting of remainders absolutely rather than contingently, and at the earliest possible period, and presumes that words of postponement relate to the beginning of the enjoyment, and not to the vesting of

D. PAYMENT. — a. *In General*. — A presumption of payment of a legacy arises after the lapse of twenty years.<sup>34</sup>

b. *Weight*. — Clear proof is required to overcome this presumption, especially where the rights of *bona fide* purchasers have intervened.<sup>35</sup>

E. PROVISION IN LIEU OF DOWER. — A provision in a will for the widow is presumed to be a matter of bounty and not intended in lieu of dower,<sup>36</sup> and extrinsic evidence of intention is inadmissible to determine the question.<sup>37</sup>

F. ELECTION. — There is a presumption that where the provisions made for a person in a will were more beneficial than those made by the law, the person elected to take under the will rather than to claim the portion which would come to him under the law.<sup>38</sup>

By Statute in Indiana the presumption is that there is an intention to take under the will.<sup>39</sup>

the estate." *In re Carney's Estate* (Ind.), 86 N. E. 400.

The law favors the early vesting of an estate, and courts will place that construction upon the language of the will which will give this result. *Gregory v. Welch* (Ark.), 118 S. W. 404.

34. *Hayes v. Whitall*, 13 N. J. Eq. 241; *Congregational Church v. Benedict*, 59 N. J. Eq. 136, 44 Atl. 878.

"I take it that the equitable rule is that a suit to recover a legacy will be barred by the same delay as is sufficient to prevent a recovery upon mortgage. It is true that there is no special statute of limitations applying to the recovery of legacies, and that the general statute does not reach suits, because such statutes are not recognized in cases of express trusts, and executors or administrators are regarded as trustees of an express trust. *Hedges v. Norris*, 32 N. J. Eq. 192. Yet, as in the case of mortgages, a court of equity will, in analogy to the statute of limitation, raise a presumption, after the lapse of 20 years, that a legacy has been paid." *Magee v. Bradley*, 54 N. J. Eq. 326, 35 Atl. 103.

Where a will was admitted to probate forty years before, the burden is upon the legatee to overcome the presumption of payment of a legacy charged upon land. *In re Parker's Estate*, 12 Pa. Co. Ct. 436.

**Ignorance of Legacy.** — *Congrega-*

tional Church of White River Village v. Benedict, 59 N. J. Eq. 136, 44 Atl. 878.

35. *Congregational Church v. Benedict*, 59 N. J. Eq. 136, 44 Atl. 878.

Positive testimony of the legatees to the effect that legacies were never paid, together with the probabilities of the case, was held sufficient to rebut the evidence of payment of a legacy arising from the lapse of twenty years. *Magee v. Bradley*, 54 N. J. Eq. 326, 35 Atl. 103.

Where it appears that some legacies were paid but it is claimed that others were not paid, it is a justifiable inference, where the same condition of affairs exist, that the latter were also paid where twenty years have elapsed since they became due. *Magee v. Bradley*, 54 N. J. Eq. 326, 35 Atl. 103.

36. *Thompson v. Betts*, 74 Conn. 576, 51 Atl. 564, 92 Am. St. Rep. 235.

37. *Cowdrey v. Cowdrey* (N. J.), 67 Atl. 111; *Hall v. Hall*, 8 Rich. L. (S. C.) 407.

38. *Doty v. Hendrix*, 16 N. Y. Supp. 284.

Where the provision in a will is more beneficial than the widow's dower right, the presumption of law is that she elected to take under the provision in preference to her dower. *Merrill v. Emery*, 10 Pick. (Mass.) 507; *Johnson v. Connecticut Bank*, 21 Conn. 148.

39. Under the Indiana statute as it existed until 1885, when a will



**2. Facts Evidencing Election.** — A. IN GENERAL. — The question of election is a question of fact<sup>40</sup> and may be evidenced by any unambiguous acts of a person which clearly show such an intention.<sup>41</sup>

**Statutory Provisions** in some states require an election to be evidenced by entry upon a court record.<sup>42</sup>

B. IN EQUITY. — Unequivocal acts must be shown to establish an election to take land instead of the proceeds of its sale.<sup>43</sup>

was probated a widow who was called upon to elect between a testamentary provision and her statutory rights in her deceased husband's estate was required to signify her choice by some open avowal or affirmative act under the will only when her aim was to accept the provisions of the will; and the presumption was, in the absence of any act, that she intended to take her right under the law. *O'Brien v. Knotts*, 165 Ind. 308, 75 N. E. 594; *Piercy v. Piercy*, 19 Ind. 467; *Wilson v. Moore*, 86 Ind. 244; *Hopkins v. Quinn*, 93 Ind. 227. But by the act of 1885, p. 239, par. 2666, Burn's Ann. St. 1901, the rule is changed, and in the absence of any acts evidencing intention the presumption is that the widow intends to take under the will. *O'Brien v. Knotts*, 165 Ind. 308, 75 N. E. 594; *Whitesell v. Strickler*, 167 Ind. 602, 78 N. E. 845.

40. *Zimmerman v. Lebo*, 151 Pa. St. 345, 24 Atl. 1082, 17 L. R. A. 536; *Mayo v. Tudor's Heirs*, 74 Tex. 471, 12 S. W. 117. And see article "Dower," Vol. IV.

41. *Showalter v. Showalter*, 107 Va. 713, 60 S. E. 48.

"In *Craig v. Conover*, 80 Iowa 358, 45 N. W. 892, it is said that the rule is that 'no particular form of words is necessary to denote an intention to take under the will, but, if the record discloses an act or declaration of the widow plainly indicating a purpose to take under the will, she will be held to have so elected.' In that case statements contained in the report of the executors of the will and a receipt signed by the widow for all the personal property bequeathed to her by the will and consenting to the closing of the estate were given the effect of a consent under the statute." *In re Franke's Estate*, 97 Iowa 704,

66 N. W. 918. And see *Wold v. Berkholtz*, 105 Iowa 370, 75 N. W. 329; *Church's Exr. v. Church's Estate*, 80 Vt. 228, 67 Atl. 549.

"An election may be by matter in pais, as well as by matter of record; but it can be only by plain and unequivocal acts, with full knowledge of all the circumstances, and of the party's rights, and such acts must be done with the intention of electing." *In re Peck's Estate*, 80 Vt. 469, 68 Atl. 433.

In order to show an election from the acts of any person it must appear that such person had full knowledge of all the requisite circumstances as to the amount of the different properties and his own rights in connection with them. *Showalter v. Showalter*, 107 Va. 713, 60 S. E. 48.

**Declarations.** — On the issue of an election, declarations of the demandant not made at the time she accepted under the will and having no connection with that act except that they refer to the subject, were held inadmissible. *Light v. Light*, 21 Pa. St. 407.

42. *Jones v. Jones*, 137 Iowa 382, 114 N. W. 1066; *Byerly v. Sherman*, 126 Iowa 447, 102 N. W. 157; *Baldozier v. Haynes*, 57 Iowa 683, 11 N. W. 651.

"An election must be made known to the court of common pleas of the proper county, and the record, unless lost or destroyed, is the only evidence by which it can be established; because it is the best proof of which the nature of the case admits." *Stillely v. Folger*, 14 Ohio 610.

43. *Beatty v. Byers*, 18 Pa. St. 105.

"But though the subject thus directed to be converted is thus stamped with the character of the property into which it is to be converted, the party entitled to the ben-

**3. Nature of Devise.** — To determine whether a devise is specific or general<sup>44</sup> or whether a legacy is residuary,<sup>45</sup> evidence of the nature, extent and condition of the testator's estate, and of the circumstances under which he made his will, is admissible.

**4. Acceptance of Legacy or Devise.** — A. PRESUMPTIONS. — A legatee or devisee is presumed to have accepted any provision in a will which is beneficial to him.<sup>46</sup>

B. DECLARATIONS. — Declarations of a devisee in possession are admissible to show whether he has accepted the devise.<sup>47</sup>

C. RENUNCIATION BY DEED. — It has been held that a renunciation of a devise could only be made and proved by the execution of a deed by the devisee.<sup>48</sup> This view, however, does not express the law as it exists today.<sup>49</sup>

efficient interest may elect to prevent the actual conversion, and to hold it in the form in which he found it; and this election he may make by application to the court of equity or by unequivocal acts or declarations plainly manifesting his determination." *Harcum's Admr. v. Hudnall*, 14 Gratt. (Va.) 369.

44. *Matter of Hastings*, 6 Dem. (N. Y.) 307.

Where the question was whether a devise was specific or general, the fact of whether or not the testator when he made his will had sufficient personal property to satisfy the general pecuniary legacies without resort to the land described in the will is a circumstance bearing upon his intent. If he had no such property there would be less reason for holding the devises specific, since it will not be presumed that he intended to make general legacies which could not be paid except out of the realty and then devise the realty so that it could not be applied to the payment of those legacies. His belief regarding the amount of his property was material, and his declarations either written or oral are properly admitted as evidence of his belief. *In re Painter's Estate*, 150 Cal. 498, 89 Pac. 98.

45. *Morgan v. Dodge*, 41 N. H. 255.

46. *Perry v. Hale*, 44 N. H. 363; *Brown v. Wood*, 17 Mass. 68; *Yawger v. Yawger*, 37 N. J. Eq. 216.

"The rule is that *prima facie*, every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is

given. And the estate so given being for his benefit, he is presumed to assent to it until the contrary appears. *Townson v. Tickell*, 3 Barn. & Ald. 31; *Blanchard v. Sheldon*, 43 Vt. 512; *Pope v. Savings Bank*, 56 Vt. 284. This presumption obtains on the ground of implied benefit, even though the beneficiary be ignorant of the transaction." *Church's Exr. v. Church's Estate*, 80 Vt. 228, 67 Atl. 549. And see *Ex parte Fuller*, 2 Story 327, 9 Fed. Cas. No. 5,147.

"The most that appears at present is an intention to renounce; and even this is not very clear; it is possible that the intention was merely to impede the creditors in the collection of their debts. Until the legatees shall actually renounce their legacies, their assent to the provisions of the will, which are apparently beneficial to them, will be presumed." *Stebbins v. Lathrop*, 4 Pick. (Mass.) 33.

*Assent of Executors* to a specific legacy is presumed where the legatees are in possession under it. *Schley v. Collis*, 47 Fed. 250, 13 L. R. A. 567; *Parker v. Chambers*, 24 Ga. 527.

47. *Duffey v. Presbyterian Cong.*, 48 Pa. St. 46.

48. *Bryan v. Hyre*, 1 Rob. (Va.) 94, 39 Am. Dec. 246; *Webster v. Gilman*, 1 Story 499, 29 Fed. Cas. No. 17,335.

49. In commenting upon the rule laid down by some courts that a renunciation of a devise can only be made by the execution of a deed by such devisee, the court in *Defrees*

**D. ENTRY AND POSSESSION.** — The most satisfactory evidence of an acceptance of a devise is entry upon the land and possession of it.<sup>50</sup>

**E. CIRCUMSTANTIAL EVIDENCE.** — All the surrounding circumstances are to be considered in determining whether a devise or legacy has been accepted,<sup>51</sup> and where there is a burden attached to the gift the devisee or legatee is entitled to a reasonable time in which to make an investigation, and his conduct during this period is not conclusive evidence upon the question of his acceptance.<sup>52</sup>

**5. Charge Upon Real Estate.** — **A. PAROL EVIDENCE.** — Parol evidence to aid in determining whether a legacy was charged upon land is admissible<sup>53</sup> only to aid in interpreting the language used by the testator,<sup>54</sup> where the will is ambiguous,<sup>55</sup> and it never is allowed to add anything to the will itself.<sup>56</sup>

*v. Lake*, 109 Mich. 415, 67 N. W. 505, 32 L. R. A. 744, said: "It is in our opinion illogical to say that a deed is necessary because of the presumption that the title is vested, when the title does not vest by devise unless there is an acceptance. It would seem that the deed would be necessary only where the title had actually vested, which appears to depend upon acceptance."

**50.** *Perry v. Hale*, 44 N. H. 363; *Van Orden v. Van Orden*, 10 Johns. (N. Y.) 30; *Glen v. Fisher*, 6 Johns. Ch. (N. Y.) 33; *Wheeler v. Lester*, 1 Bradf. (N. Y.) 293; *Defreese v. Lake*, 109 Mich. 415, 67 N. W. 505, 32 L. R. A. 744.

Evidence that a third person was in possession, to whom the devisee gave directions as to his remaining and quitting the possession, is sufficient evidence of entry and possession to show an acceptance of a devise. *Perry v. Hale*, 44 N. H. 363; *Tole v. Hardy*, 6 Cow. (N. Y.) 333, 340.

The acceptance of a devise by a life tenant will be presumed if he goes into possession, although he claims the fee under sales for taxes while the property was in the possession of the prior tenant; but such presumption is not conclusive and may be overthrown by proof of acts inconsistent with acceptance. *Defreese v. Lake*, 109 Mich. 415, 67 N. W. 505, 32 L. R. A. 744.

**51.** *Haebler v. Eichler Brew. Co.*, 42 App. Div. 95, 58 N. Y. Supp. 894.

**Acts as Owner.** — *Messenger v.*

*Andrews*, 4 Russ. 478, 38 Eng. Reprint 885.

**Testifying at Probate a Renunciation.** — *Morse v. Tilden*, 35 Misc. 560, 72 N. Y. Supp. 30.

**Amount of Debts To Be Considered.** — *Messenger v. Andrews*, 4 Russ. 478, 38 Eng Reprint 885.

**52.** *Van Orden v. Van Orden*, 10 Johns. (N. Y.) 30.

**53.** *Leigh v. Savidge*, 14 N. J. Eq. 124; *Adamson v. Ayres*, 5 N. J. Eq. 349, 353; *Van Winkle v. Van Houten*, 3 N. J. Eq. 172, 186; *Snyder v. Warbasse*, 11 N. J. Eq. 463. *Contra*, *Stephenson v. Heathcote*, 4 Eden (Eng.) 37; *Parker v. Fearnley*, 2 Sim. & S. 592, 57 Eng. Reprint 472.

**54.** "In *McCorn v. McCorn* (100 N. Y. 511, 513) it is said: 'Whether a legacy is charged upon the real estate of the decedent is always a question of the testator's intention. The language of the will is the basis of the inquiry, but extrinsic circumstances which aid in the interpretation of that language, and help to disclose the actual intention, may also be considered.'" *Fries v. Osborn*, 190 N. Y. 35, 82 N. E. 716.

**Declarations** of a testator are inadmissible to show an intention to charge legacies upon the land. *Massaker v. Massaker*, 13 N. J. Eq. 264.

**55.** *Dearlove v. Otis*, 99 Ill. App. 99; *Fries v. Osborn*, 190 N. Y. 35, 82 N. E. 716; *Goldner v. Chandler*, 87 Me. 63, 32 Atl. 784; *Wentworth v. Read*, 166 Ill. 139, 46 N. E. 777.

**56.** Where a will disposes only

**B. FACTS SHOWING INTENTION TO CHARGE.** — *a. Blending Real and Personal Property.* — Where real and personal property is commingled in a general fund, this is regarded as evidence of an intention to charge real estate with the payment of legacies.<sup>57</sup>

*b. Amount of Personal Property.* — Insufficiency of the personal property to pay legacies<sup>58</sup> or debts<sup>59</sup> is not of itself sufficient evidence to charge the real estate.

*c. Other Matters.* — That a will contains no residuary clause<sup>60</sup> that legacies are entirely charitable<sup>61</sup> or given in lieu in dower,<sup>62</sup> or that certain property is not to be disturbed during the lifetime of a life tenant<sup>63</sup> have been held not to show an intention to charge legacies upon the land.

**C. EXTENT OF CHARGE.** — The extent to which land is charged with the payment of a legacy may be shown by evidence of the circumstances surrounding the making of the will and the extent of the property devised.<sup>64</sup>

**6. Cumulative Legacies.** — Where the same amount is left to a person by different clauses of the same will or by different wills, and substantially the same words are used, there is a presumption that the legacies were substitutional and not cumulative,<sup>65</sup> but evi-

of personal property, extrinsic evidence is inadmissible to show that the testator intended to charge his real estate with the legacies, since such evidence can be used only for the purpose of interpreting something which is actually written in the will, and there must be some provision in the will which will serve as a subject for interpretation; for under the guise of interpretation extrinsic evidence cannot be utilized, for the purpose of adding to the will, provisions which otherwise are not found there at all. *Fries v. Osborn*, 190 N. Y. 35, 82 N. E. 716.

Circumstances occurring subsequent to the execution of the will cannot be resorted to for the purpose of finding an intention to create a charge upon real estate. *Morris v. Sickly*, 133 N. Y. 456, 31 N. E. 332.

<sup>57.</sup> *Snyder v. Warbasse*, 11 N. J. Eq. 463; *Dearlove v. Otis*, 99 Ill. App. 99.

<sup>58.</sup> *Taylor v. Tolen*, 38 N. J. Eq. 91; *Johnson v. Poulson*, 32 N. J. Eq. 390; *Hathaway v. Sherman*, 61 Me. 466. And see *Golder v. Chandler*, 87 Me. 63, 32 Atl. 784.

**No Personal Property When Will Was Executed.** — *Canfield v. Bostwick*, 21 Conn. 550.

Where the will of the testator was made only a few days before his death and he bequeathed certain sums of money to different persons, but made no disposition of his residuary estate, nor did he make any provision for the payment of the legacies, it was held that parol evidence was inadmissible to show that he had no personal property, for the purpose of creating an inference that he must have known that the legacies could only be paid out of his real estate and that he must therefore have intended to charge the payment of them on the real estate. *McGough v. Hughes*, 18 R. I. 768, 30 Atl. 851.

<sup>59.</sup> *Snyder v. Warbasse*, 11 N. J. Eq. 463.

<sup>60.</sup> *Taylor v. Tolen*, 38 N. J. Eq. 91.

<sup>61.</sup> *Taylor v. Tolen*, 38 N. J. Eq. 91.

<sup>62.</sup> *Snyder v. Warbasse*, 11 N. J. Eq. 463.

<sup>63.</sup> *Taylor v. Tolen*, 38 N. J. Eq. 91.

<sup>64.</sup> *Watt v. Pitman*, 125 Ind. 168, 25 N. E. 191; *Borst v. Crommie*, 19 Hun (N. Y.) 209.

<sup>65.</sup> *Thompson v. Betts*, 74 Conn. 576, 51 Atl. 564, 92 Am. St. Rep.

dence of the circumstances under which the will was made is to be carefully considered.<sup>66</sup>

**7. Ademption and Satisfaction. — Presumptions. — A. GIFT TO CHILD. — a. In General.** — Where a testator, after having provided for a child in his will, makes him a gift or advancement, there is a presumption that such payment was intended as an ademption or satisfaction of the legacy,<sup>67</sup> in whole or in part, since the law does not favor double portions.<sup>68</sup>

235; *Hurst v. Beach*, 5 Madd. 351, 22 R. R. 304, 56 Eng. Reprint 929.

**Similarity of Language.** — *Gould v. Chamberlain*, 184 Mass. 115, 68 N. E. 39.

**Repetitions in Codicils.** — *Hubbard v. Alexander*, 45 L. J., Ch. 740, 3 Ch. Div. 738, 35 L. T. 52.

**Extrinsic Evidence Admissible To Rebut the Presumption Which Arises.** — *Hurst v. Beach*, 5 Madd. 351, 22 R. R. 304, 56 Eng. Reprint 929.

**Declarations Admissible.** — *Lyon v. Fisk*, 1 La. Ann. 444.

66. Where the question was whether legacies were cumulative or substitutional, evidence of the surrounding circumstances is admissible; and it may be shown that the testator knew that he was living on a steadily diminishing income and expressed his doubt as to whether his property would be sufficient to satisfy the legacies made by him. *Gould v. Chamberlain*, 184 Mass. 115, 68 N. E. 39.

"Where there is something on the face of the instrument raising doubt or ambiguity as to whether it was intended by the testator to be in substitution for or addition to a previous will, the court is justified in having recourse to external evidence to ascertain the testator's intentions." *Jenner v. Finch*, 49 L. J., P. 25, 5 P. D. 106, 42 L. T. 327.

67. *England.* — *Ex parte Pye*, 18 Ves. 141, 34 Eng. Reprint 271.

*Georgia.* — *Rogers v. French*, 19 Ga. 316.

*Iowa.* — *In re Youngerman's Estate*, 136 Iowa 488, 114 N. W. 7; *Davis v. Close*, 104 Iowa 261, 73 N. W. 600.

*Maryland.* — *Wallace v. DuBois*, 65 Md. 153, 4 Atl. 402.

*Michigan.* — *Carmichael v. Lathrop*, 108 Mich. 473, 66 N. W. 350.

*New Jersey.* — *Sims v. Sims*, 10 N. J. Eq. 158; *Van Houten v. Post*, 32 N. J. Eq. 709.

*New York.* — *Degraaf v. Teerpenning*, 52 How. Prac. 313; *Arthur v. Arthur*, 10 Barb. 9; *Hine v. Hine*, 39 Barb. 507; *In re Weiss*, 39 Misc. 71, 78 N. Y. Supp. 877.

**Burden of Proof.** — *Piper v. Barse*, 2 Redf. (N. Y.) 19.

**Gift Need Not Be of Same Nature.**

"It seems, therefore, that the rule of *ejusdem generis* is not conclusive that the testator did not intend to adeem a legacy by giving another thing in his lifetime; but is one (and in England, a strong) circumstance to prevent the presumption of ademption or satisfaction, yet capable of being overruled by other circumstances." *Jones v. Mason*, 5 Rand. (Va.) 577.

68. **Basis of Presumption.** — See *Jones v. Mason*, 5 Rand. (Va.) 577.

**Two Presumptions.** — "In order to establish a case for the application of this rule as to double portions, there must be two matters, I think, made out, and it will be seen upon reflection, that there are two presumptions really which are to be considered, and not one. In the first place, both of the suggested gifts or donations must be gifts in the nature of a portion. The first presumption here comes under discussion: it is said that, whatever gifts are made by the father, which it may be supposed will have to be distributed among the children, or which are given by the father to one child with a view to establishing him in life, are presumed to be portions within the meaning of the rule. . . . But, supposing both gifts are gifts in the nature of portions, then comes a further question for the solution of which a further presumption is invoked.

b. *Declarations*. — Declarations of a testator are inadmissible as direct evidence of an intent to adeem or satisfy a legacy,<sup>69</sup> but when made at the time of the advancement relied upon they are admissible to characterize the act<sup>70</sup> and they are also admitted to rebut the presumption of satisfaction<sup>71</sup> and to contradict such rebutting evidence.<sup>72</sup>

c. *Residuary Legacy*. — The early rule was that no presumption of ademption arose where the legacy was residuary in its nature,<sup>73</sup> but this is no longer the law.<sup>74</sup>

d. *Rebuttal*. — All of the circumstances surrounding the case are to be considered,<sup>75</sup> and parol evidence is admissible to aid in ar-

That question is, whether it was intended that the former gift or portion should take the place of an advancement of the gift which is given by the will, and there the second presumption which is invoked has to be dealt with — a presumption to the effect that the former gift, the gift *inter vivos*, was intended as an advancement *pro tanto* of the gift under the bequest." *In re Lacon*, L. R. (1891) 2 Ch. Div. 432.

69. *Richards v. Humphreys*, 15 Pick. (Mass.) 133; *Kirk v. Edowes*, 3 Hare 509, 67 Eng. Reprint 482; *Phillips v. McCombs*, 53 N. Y. 494; *De Groff v. Teerpenning*, 14 Hun (N. Y.) 301. But see *Tillotson v. Race*, 22 N. Y. 122; *In re Ritter's Estate*, 10 Pa. Super. 352; *Zeiter v. Zeiter*, 4 Watts (Pa.) 212, 28 Am. Dec. 698; *Lloyd v. Harvey*, 2 Russ. & M. (Eng.) 310.

**Actual Payment Not Proved by Declarations.** — *Van Houten v. Post*, 33 N. J. Eq. 344.

70. *Richards v. Humphreys*, 15 Pick. (Mass.) 133.

71. *Jones v. Mason*, 5 Rand. (Va.) 577; *Van Houten v. Post*, 33 N. J. Eq. 344; *Wedley v. Langstaff*, 3 Desaus. (S. C.) 504.

72. "Evidence of declarations may, perhaps, be admitted to rebut the presumption that a payment is an ademption of a legacy. And when admitted to rebut, then, probably, similar evidence to the contrary must be allowed to come in. (3 Greenl. Evid., § 366; *Hine v. Hine*, 39 Barb. 512). But, in the present case, the evidence of declarations was admitted to show that the testator intended to adeem the leg-

acy. We think this was incorrect." *De Groff v. Teerpenning*, 14 Hun (N. Y.) 301.

73. *Clendening v. Clymer*, 17 Ind. 155.

74. "Among other limitations was the rule that the presumption could not be applied to a residuary bequest because the court would not presume that a legacy of a residue, or other indefinite amount, had been satisfied by an advancement, as the testator might be ignorant whether the benefit that he was conferring equalled that which he had already willed. *Freemantle v. Banks*, 5 Ves. 85; *Clendening v. Clymer*, 17 Ind. 155; 2 Story Eq. Jur. § 1115. This exception fell with the discarding of the rule that satisfaction must be in full." *Carmichael v. Lathrop*, 108 Mich. 473, 66 N. W. 350.

**75. Bequest in Residuary Clause.** "It is urged, on behalf of the appellant, that the fact that the bequest is contained in the residuary clause of the will, prevents the application of the rule in regard to ademption. But the position is not well taken. This is a legacy of a fixed amount, and, if it were not, the circumstance that it is in the residuary clause will make no difference." *Van Houten v. Post*, 32 N. J. Eq. 709.

**Codicil Republishing Will.** *Paine v. Parsons*, 14 Pick. (Mass.) 318.

**Difference in Specie Immaterial.** In *Carmichael v. Lathrop*, 108 Mich. 473, 66 N. W. 350, the court after reviewing the authorities and stating the early rule to be that "when the gift by will and the portion are not *ejusdem generis*, the presumption will be repelled" comes to the

ring at the testator's intention in making the gift or advancement.<sup>76</sup>  
 e. *Weight*. — This presumption readily yields to evidence of a contrary intent.<sup>77</sup>

B. GIFT TO STRANGERS. — Where the gift is made to a person as to whom the testator does not stand *in loco parentis* the presumption of ademption does not arise,<sup>78</sup> although extrinsic evidence is always admissible to show the actual intention of the testator.<sup>79</sup>

C. LEGACIES LEFT TO CREDITORS. — There is an equitable<sup>80</sup> presumption in a case in which a legacy is bequeathed to a creditor of the testator that the legacy was intended as a satisfaction of the debt,<sup>81</sup> provided that it is equal to or exceeds the amount of the

conclusion that such is not the modern rule, but that this fact is merely to be considered as bearing upon the testator's intention. *Contra*, *Fisher v. Keithley*, 142 Mo. 244, 43 S. W. 650, 64 Am. St. Rep. 560.

76. *Miner v. Atherton's Exr.*, 35 Pa. St. 528; *Rogers v. French*, 19 Ga. 316; *Wallace v. DuBois*, 65 Md. 153, 4 Atl. 402.

"The presumption upon the will was that the advancement was intended in satisfaction of the portion, and the onus was upon the plaintiffs to overcome that presumption by showing a different intent. Parol proof was competent, not to vary the terms of the will, but to establish the acts and intents of the testator, either in behalf of the plaintiffs in rebutting the presumption of satisfaction, or of the defendants in reply to such evidence in support of the alleged satisfaction." *Hine v. Hine*, 39 Barb. (N. Y.) 507.

A testator having made a gift of money to one of his daughters, signified his intention of executing a codicil to his will in order to equalize the shares of his children. He finally, however, determined to make a new will but he was taken suddenly ill and died without executing it. Parol evidence of his acts was admitted to show that the gift to the daughter was intended to operate as an ademption *pro tanto* of the legacy given her. *Tuckett-Lawry v. Lamoureux*, 1 Ont. L. 364, *affirmed*, 3 Ont. L. 577.

77. *Van Houten v. Post*, 33 N. J. Eq. 344.

78. *Carmichael v. Lathrop*, 108 Mich. 473, 66 N. W. 350. And see

*Ex parte Pye*, 18 Ves. 141, 34 Eng. Reprint 271.

"In case of a legacy to a stranger—that is, to one to whom, even though a relative, the testator does not stand *in loco parentis*—there is no presumption that the subsequent benefit by way of payment or contract is a satisfaction of the legacy. The subsequent benefit may be presumed, however, to be a satisfaction of the legacy, if it is clearly made to appear by extrinsic evidence that satisfaction was intended, and this intention is sufficiently indicated if the benefit subsequently conferred is the same, or is in terms made a substitute therefor, or is so far identical in character that it is *ejusdem generis*." *In re Youngerman's Estate*, 136 Iowa 488, 114 N. W. 7.

Legacy Given for Particular Purpose. — "If a testator gives a legacy to a stranger for any particular purpose and subsequently makes a payment, advancement or gift for the same purpose, such payment, etc., is presumed to be and will operate as a satisfaction of the legacy. Parol evidence is admissible for the purpose of repelling or strengthening the presumption even when not admissible in other cases or for other purposes." *In re Ritter's Estate*, 10 Pa. Super. 352.

79. *Wilson v. Smith*, 117 Fed. 707.

80. *Cloud v. Clinkinbeard's Exrs.*, 8 B. Mon. (Ky.) 397.

81. *Gilliam v. Chancellor*, 43 Miss. 437, 5 Am. Rep. 498; *In re McNamara's Estate*, 148 Mich. 346, 111 N. W. 1066.

"A testator bequeathed his wife a legacy of £625. He then owed her that exact amount. The debt

debt and is of the same nature.<sup>82</sup> The courts readily seize upon circumstances to rebut this presumption,<sup>83</sup> however, and extrinsic evidence is admitted to support the intention as expressed upon the face of the will.<sup>84</sup>

**D. LEGACIES LEFT TO DEBTORS.**—Similarly, where a testator leaves a legacy to his debtor, there is a presumption that it is a release and discharge of the debt;<sup>85</sup> extrinsic evidence is admissible here to rebut or support the presumption.<sup>86</sup>

was paid off in his lifetime:—*Held*, that the sum was not payable as a legacy." *Gillings v. Fletcher*, L. R. (1888), 38 Ch. Div. 373.

82. *Cloud v. Clinkinbeard's Exrs.*, 8 B. Mon. (Ky.) 397; *Dey v. Williams*, 22 N. C. (2 Dev. & B. Eq.) 66; *Gilliam v. Chancellor*, 43 Miss. 437, 50 Am. Rep. 498.

83. *Williams v. Crary*, 4 Wend. (N. Y.) 443.

84. "The law raises, in certain cases, presumptions against the apparent intention of the testator, and one of these presumptions is, that a legacy from a debtor to a creditor of a sum as great or greater than the debt was intended as a satisfaction. (*Chanct's Case*, 1 P. Wms. 408.) So, also, when two legacies substantially alike are given by the same will, a presumption arises that only one legacy was intended. (*Hooley v. Hatton*, 1 Bro. C. C. 390.) The courts in these cases have permitted parol evidence to be given in support of the apparent intention of the testator, and to rebut the presumption which the law raises, 'for the effect of such testimony is not to show that the testator did not mean what he has said, but, on the contrary, to prove what he has expressed.'" *Reynolds v. Robinson*, 82 N. Y. 103.

**Legacy Less Than Debt.**—*Owens v. Simpson*, 5 Rich. Eq. (S. C.) 405.

Where a legacy is left to a creditor of the testator extrinsic evidence will not be admitted to prove or disprove the intention of the testator that the creditor elect between his debt and the legacy; but there is no objection in such a case to the admission of evidence to show the state and circumstances of the property. *Waters v. Howard*, 1 Md. Ch. 112. And see *Owens v.*

*Simpson*, 5 Rich. Eq. (S. C.) 405.

**Parol Evidence to Strengthen Presumption.**—*Reynolds v. Robinson*, 82 N. Y. 103.

85. *Gilliam v. Brown*, 43 Miss. 641. But see *Stagg v. Beekman*, 2 Edw. Ch. (N. Y.) 89.

"While there may be some doubt whether or not a legacy given by a creditor to his debtor will, of itself, afford the basis of a presumption that the debt is thereby satisfied, so as to justify the admission of extrinsic evidence, yet, where language contained in the will can only be made consistent with the facts to which it refers, upon the theory that the testator intended the legacy as an additional or cumulative gratuity, the authorities all agree that parol evidence may be heard, showing the manner in which the testator treated and talked of the debt, so as to apply the language of the will to the facts in question, to the end that the real meaning of the language may be ascertained." *Daugherty v. Rogers*, 119 Ind. 254, 20 N. E. 779, 3 L. R. A. 847.

86. *Sharp v. Wightman*, 205 Pa. St. 285, 54 Atl. 888.

"The presumption that release was intended when a debt stands against a legacy, may, like any other presumption, be rebutted by proof arising either on the face of the will, or dehors. It is not adduced to control the will, but to rebut a presumption from matter extrinsic to it." *Zeigler v. Eckert*, 6 Pa. St. 13, 47 Am. Dec. 428.

**Declarations of the testator** made either before, at, or after the time of making the will, that he did not intend that the debt should ever be collected, are admissible to show that a legacy was intended as a discharge of the debt. *Zeigler v.*



## XVIII. ADMISSIBILITY IN EVIDENCE.

**1. In General.** — A will, properly authenticated,<sup>87</sup> is admissible in evidence in proof of title<sup>88</sup> or any other fact as to which it is relevant.<sup>89</sup>

**2. Past Probate.** — A. BURDEN OF PROOF. — The burden of proving that a will which it is sought to introduce in evidence has been probated is upon the party offering the will.<sup>90</sup>

B. PRESUMPTION. — a. *Records Lost.* — Where the records of the probate court have been lost or destroyed there is a presumption that a will shown to have been offered for probate was properly probated and registered.<sup>91</sup>

b. *Records Incomplete.* — While no presumption that a will has been duly probated will arise from the mere lapse of time,<sup>92</sup> probate will sometimes be presumed if the will comes from the custody of the ordinary,<sup>93</sup> or if the records though somewhat incomplete show that some action was taken, and appear fair and regular on their face.<sup>94</sup> No presumption of probate arises from the mere fact that the will has been recorded with the clerk.<sup>95</sup>

c. *Acts and Conduct of Parties.* — Probate may be inferred from

Eckert, 6 Pa. St. 13, 47 Am. Dec. 428.

87. Farrell v. Patterson, 43 Ill. 52.

88. Trittipio v. Morgan, 99 Ind. 269; Corley v. McElmeel, 149 N. Y. 228, 43 N. E. 628; Drake v. Cunningham, 127 App. Div. 79, 111 N. Y. Supp. 199.

89. Lawrence v. Oglesby, 178 Ill. 122, 52 N. E. 945.

A Nuncupative Will cannot pass title to land, but it is admissible in connection with other evidence to show that the decedent had previously made a parol sale or gift of the land. Wooldridge v. Hancock, 70 Tex. 18, 6 S. W. 818.

90. Fotherree v. Lawrence, 30 Miss. 416.

91. Panaud v. Jones, 1 Cal. 488; Hymer v. Holyfield (Tex. Civ. App.), 87 S. W. 722.

Production of the will with indorsements of filing, with affidavit of subscribing witness attached, and proof of the handwriting of the clerk, sufficiently proves the probating of the will — the records having been destroyed by fire. Hymer v. Holyfield (Tex. Civ. App.), 87 S. W. 722.

92. Fotherree v. Lawrence, 30 Miss. 416. And see Jemison v. Smith, 37 Ala. 185.

The presumption that an ancient will was probated does not arise unless it is shown that the records of the court were lost or destroyed. Lagow v. Glover, 77 Tex. 448, 14 S. W. 141.

Possession under a will for a length of time raises a presumption that it was duly probated. Smyth v. New Orleans Canal & Bkg. Co., 93 Fed. 899, 35 C. A. 646.

93. Stephens v. French, 48 N. C. (3 Jones' L.) 359. *Contra*, Rogers v. Rogers, 78 Ga. 688, 3 S. E. 451.

94. Marshall v. Fisher, 46 N. C. (1 Jones' L.) 111; Barr v. Closterman, 1 Ohio Ct. Dec. 546; Marcy v. Marcy, 6 Metc. (Mass.) 360.

But where it affirmatively appears that the notice of probate given was less than that required by law there is no presumption that there was ever a hearing upon the matter. Chase v. Ross, 36 Wis. 267.

95. *Recording of Foreign Will.* Where a foreign will is admitted to record by the register, it will not be presumed that it was formally proved and probated before him. Fenderson v. Missouri Tie & T. Co., 104 Mo. App. 290, 78 S. W. 819. *Contra*, Opp v. Chess, 204 Pa. St. 401, 54 Atl. 354.

acts performed which would not have been allowed had probate not been regularly made.<sup>96</sup>

C. NECESSITY. — a. *In General*. — Since under the modern statutes, the probate courts are given exclusive jurisdiction over the probate of wills, it is held that no will can be introduced in evidence and relied upon as a testamentary instrument<sup>97</sup> unless it has first been admitted to probate in the proper court.<sup>98</sup>

b. *Foreign Wills*. — (1.) *In General*. — A foreign will must be shown to have been probated in the foreign court<sup>99</sup> unless original proof is offered in favor of the will.<sup>1</sup> In the absence of a statute probate in the state in which it is offered in evidence need not be shown,<sup>2</sup> though in many jurisdictions statutes require that the for-

96. *Opp v. Chess*, 204 Pa. St. 401, 54 Atl. 354; *Holliday v. Ward*, 19 Pa. St. 485, 57 Am. Dec. 671; *Guthrie v. Kerr*, 85 Pa. St. 303; *In re Coleman's Petition*, 163 Pa. St. 334, 30 Atl. 161; *Marcy v. Marcy*, 6 Metc. (Mass.) 360 (executor giving bond).

Where it appears that executors were allowed to act and make returns to the court, it will be presumed that the will had been probated. *Counts v. Wilson*, 45 S. C. 571, 23 S. E. 942.

97. While an unprobated will is inadmissible for any testamentary purpose, it may still be used to show an acknowledgment of liability. *Thomas v. Arthur*, 7 Bush (Ky.) 245.

98. *United States*. — *Moore v. Green*, 2 Curt. 202, 17 Fed. Cas. No. 9,763 (applying law of Rhode Island); *Bell v. Greenfield*, 5 Cranch 669, 3 Fed. Cas. No. 1,251; *Wilkinson v. Leland*, 2 Pet. 627.

*Arkansas*. — *Crow v. Powers*, 19 Ark. 424; *Phebe v. Quillin*, 21 Ark. 490 (but see *Campbell v. Garven*, 5 Ark. 485).

*California*. — *Castro v. Richardson*, 18 Cal. 480; *Carpenter v. Gardiner*, 29 Cal. 160.

*Georgia*. — *New v. Nichols*, 73 Ga. 143; *Johnson v. Sirmans*, 69 Ga. 617; *Bryan v. Walton*, 14 Ga. 185.

*Indiana*. — *Rogers v. Stevens*, 8 Ind. 464; *Pitts v. Melsner*, 72 Ind. 469.

*Kentucky*. — *Thomas v. Arthur*, 7 Bush 245.

*Louisiana*. — *Stewart's Exr. v. Row*, 10 La. 530.

*Maine*. — *Cousens v. Advent Church*, 93 Me. 292, 45 Atl. 43.

*Massachusetts*. — *Shumway v. Holbrook*, 1 Pick. 114, 11 Am. Dec. 153.

*Mississippi*. — *Fotherree v. Lawrence*, 30 Miss. 416.

*Missouri*. — *Barnard v. Bateman*, 76 Mo. 414; *Snuffer v. Howerton*, 124 Mo. 637, 28 S. W. 166.

*New York*. — *Smith v. Ryan*, 116 App. Div. 397, 101 N. Y. Supp. 1011.

*Ohio*. — *Lessee of Swazey v. Blackman*, 8 Ohio 5.

*Oregon*. — *Willamette Falls Co. v. Gordon*, 6 Or. 175; *Jones v. Dove*, 6 Or. 188.

*Texas*. — *Ochoa v. Miller*, 59 Tex. 460; *Lagow v. Glover*, 77 Tex. 448, 14 S. W. 141; *Moursund v. Priess*, 84 Tex. 554, 19 S. W. 775; *Caffey's Exrs. v. Caffey*, 12 Tex. Civ. App. 616, 35 S. W. 738; *Hymmer v. Holyfield* (Tex. Civ. App.), 87 S. W. 722; *Jones v. Dove*, 6 Or. 188. *Contra*, *Smith v. Bonsall*, 5 Rawle (Pa.) 80. And see *Hays v. Harden*, 6 Pa. St. 409.

"Unlike most instruments, a will in this state must be established in court by proof as prescribed by statute before it goes into effect." *In re Downing's Will*, 118 Wis. 581, 95 N. W. 876.

In *California* a will executed before 1848 is admissible in evidence without proof of its probate. *Adams v. Norris*, 23 How. (U. S.) 353.

99. *Jennison v. Smith*, 37 Ala. 185.

1. See *infra*, XVIII, 2 D., b, (1), notes.

2. *United States*. — *Long v. Patton*, 154 U. S. 573 (applying law of Illinois).

oreign will must also be probated in the courts of the particular state.<sup>3</sup>

(2.) **Showing Necessary.**—The general rule is that when the foreign will disposes of real property owned by a non-resident, the proof must show that the will was executed with all the formalities required by the local law.<sup>4</sup> Several states, however, do not re-

*Georgia.*—*Doe v. Roe*, 31 Ga. 593.

*Illinois.*—*Shepard v. Carriel*, 19 Ill. 313; *Newman v. Willetts*, 52 Ill. 98. But see *Jones v. Jones*, 107 Ill. App. 464.

*Louisiana.*—*Johnson v. Rannels*, 6 Mart. (N. S.) 621.

*Mississippi.*—*Melvin v. Lyons*, 10 Smed. & M. 78.

*Missouri.*—*Gaines v. Fender*, 82 Mo. 497; *Drake v. Curtis*, 88 Mo. 644; *Keith v. Keith*, 80 Mo. 125; *Lewis v. St. Louis*, 69 Mo. 599; *Stevens v. Oliver*, 200 Mo. 492, 98 S. W. 492; *Keith v. Keith*, 97 Mo. 223, 10 S. W. 597.

*Tennessee.*—*Kiernan v. Casey*, 116 Tenn. 245, 93 S. W. 576; *Smith v. Neilson*, 13 Lea 461.

*Vermont.*—*Walton v. Hall's Estate*, 66 Vt. 455, 29 Atl. 803 (*contra*, *Ives v. Allyn*, 12 Vt. 89).

**Title Only Collaterally in Issue.** Where title to land situated in a foreign state and devised by a will executed and probated in that state, comes incidentally in question in another state, the will need not have been probated in the state where the suit is brought before it is admissible in evidence. *Slack v. Walcott*, 3 Mason 508, 22 Fed. Cas. No. 12, 932.

3. *Alabama.*—*Inge v. Johnson*, 110 Ala. 650, 20 So. 757; *Describes v. Wilmer*, 69 Ala. 28; *Jordan v. Jordan*, 65 Ala. 305.

*Indiana.*—*Thieband v. Sebastian*, 10 Ind. 454.

*Kentucky.*—*Carmichael v. Elmen-dorf*, 4 Bibb 484; *Overton v. Overton*, 123 Ky. 311, 96 S. W. 469; *Sneed v. Ewing*, 5 J. J. Marsh. 460, 22 Am. Dec. 41.

*Maryland.*—*Beatty v. Mason*, 30 Md. 409.

*Nebraska.*—*F. E. & M. V. R. Co. v. Setright*, 34 Neb. 253, 51 N. W. 833.

*New Hampshire.*—*Barstow v. Sprague*, 40 N. H. 27.

*New Jersey.*—*Graham v. White-*

*ly*, 26 N. J. L. 254. And see *Wallace v. Wallace*, 3 N. J. Eq. 616.

*North Carolina.*—*Ward v. Hearne*, 44 N. C. (Busb. L.) 184; *Kelly v. Ross*, 44 N. C. (Busb. L.) 277. But see *Lancaster v. McBryde*, 27 N. C. (5 Ired. L.) 421; *Helme v. Sanders*, 10 N. C. (3 Hawks) 563.

*Rhode Island.*—*Olney v. Angell*, 5 R. I. 198, 73 Am. Dec. 62.

*Texas.*—*Paschal v. Acklin*, 27 Tex. 173.

**In Kentucky**, while the general rule is as stated in the text, an exception is made in favor of wills probated in Virginia before the separation of Kentucky. *Morgan's Devises v. Gaines*, 3 A. K. Marsh. (Ky.) 613; *Gray v. Patton*, 2 B. Mon. (Ky.) 12.

**Personal Property.**—A will of personal property admitted to probate at the place of the testator's domicile is admissible in evidence in another state, although not probated there. *Hurst v. Mellinger*, 73 Tex. 189, 11 S. W. 184.

4. *Fenderson v. Missouri Tie & T. Co.*, 104 Mo. App. 290, 78 S. W. 819.

Only effect of statute allowing proof of foreign will by certified copy is to do away with necessity of formal proof. It may be contested, and is to be treated as an original will, and the law of the state will be applied. *Heard v. Drennen* (Miss.), 46 So. 243.

Speaking of the full faith and credit clause of the constitution, the court said: "The courts of a state being without jurisdiction as to the title to lands in another state, this provision of the constitution does not make conclusive the probate proceedings in another state in respect to a will devising lands in another state." *Pritchard v. Henderson*, 2 Penne. (Del.) 553, 47 Atl. 376.

**Procedure in Probating Will, Immaterial.**—Where statute allows recording of a foreign will on proof that it was executed in accordance

quire this if the law of the former state has been complied with.<sup>5</sup>

**D. MODE OF PROOF.** — a. *Domestic Wills.* — The fact of probate of a domestic will may be proved by a certified copy of the will and the probate proceedings.<sup>6</sup>

**Direct Proof** may be resorted to if the parties do not desire to avail themselves of the method provided by statute.<sup>7</sup>

**Lost or Destroyed Records** may be supplied by secondary evidence.<sup>8</sup>

with the laws of the state, it is not necessary to prove that it was also probated in accordance with its laws. *In re Coope's Will*, 53 Misc. 509, 103 N. Y. Supp. 431.

**Personal Property.** — Probate of will — as to personal property — at place of residence of decedent is good as to stock of corporation in another state though will would not have been valid there. *Delta Trust & B. Co. v. Pearce* (Miss.), 45 So. 981.

5. *O'Brien v. Woody*, 4 McLean 75, 18 Fed. Cas. No. 10,398 (applying law of Indiana); *Appeal of Murdoch* (Conn.), 72 Atl. 290; *Lyon v. Ogden*, 85 Me. 374, 27 Atl. 258; *Babcock v. Collins*, 60 Minn. 73, 61 N. W. 1020; *State v. District Court*, 34 Mont. 96, 85 Pac. 866; *Ives v. Salisbury's Heirs*, 56 Vt. 567; *Hayes v. Lienlokken*, 48 Wis. 509, 4 N. W. 584.

Where exemplified copy of foreign will is offered for probate, the fact that some of the matters essential to a valid original probate in the home state are lacking will not authorize a refusal of probate. *In re Gertsen's Will*, 127 Wis. 602, 106 N. W. 1096 (applying § 3790, Stats. 1898).

6. *Hickman v. Gillum*, 66 Tex. 314, 1 S. W. 339; *Robertson v. Hill*, 127 Ga. 175, 56 S. E. 289; *Thursby v. Myers*, 57 Ga. 155; *Kentucky Land & I. Co. v. Crabtree*, 113 Ky. 922, 70 S. W. 31 (actual probate must be shown); *Churchill v. Corker*, 25 Ga. 479. And see article "RECORDS." Vol. X, p. 909.

"A Certified Copy of a will, with a transcript of the record of the county court admitting the will to probate, may be admitted in evidence without further identification." *Fremont, E. & M. V. R. Co. v. Setright*, 34 Neb. 253, 51 N. W. 833.

**Original Will Not Evidence.**

*Smith v. Stone*, 127 Ga. 483, 56 S. E. 640.

**Common Law Rule.** — In the absence of a statute where a will is relied upon as a muniment of title, the original will must be produced and proved. *Grier v. Canada*, 119 Tenn. 17, 107 S. W. 970; *Weatherhead v. Sewell*, 9 Humph. (Tenn.) 272; *State v. Lancaster*, 119 Tenn. 638, 105 S. W. 858.

**Recording Will** not necessary to authorize the admission of a certified copy, although a statute authorizes the record. *Rodney v. McLaughlin*, 97 Mo. 426, 9 S. W. 726; *Lewis v. St. Louis*, 4 Mo. App. 563.

**Under the Tennessee Statute** a certified copy of the probated will may be read in evidence and establishes a *prima facie* case, though it may be attacked for fraud or irregularity of execution. *Grier v. Canada*, 119 Tenn. 17, 107 S. W. 970; *State v. Lancaster*, 119 Tenn. 638, 105 S. W. 858.

7. See article "RECORDS," Vol. X, pp. 903, 904.

Probate "may be shown by a record of the act made upon the minutes of the court, or by an entry written upon some part of the instrument showing that it was duly proved before the court and approved or ordered to be recorded as the will of the testator; or it may be shown by proof that letters testamentary were granted upon it by the probate court." *Fotherree v. Lawrence*, 30 Miss. 416.

In the absence of the certificate of the judge to the probate records, he may appear himself and identify the entries. *Koltermann v. Chilvers* (Neb.), 117 N. W. 405.

8. *Corbett v. Nutt*, 18 Gratt. (Va.) 624.

**Degree of Proof.** — Where a probated will has been lost, the proof of its provisions need not be made

b. *Foreign Wills.* — (1.) *In General.* — By virtue of statutory provisions in the various states foreign wills may be proved by the production of exemplified copies of the will and the proceedings taken in the court which admitted the will to probate.<sup>9</sup>

The Act of Congress regulating the proof of the judicial records of a sister state, also applies to wills<sup>10</sup> and renders ineffectual any provision in a state statute in excess of its own requirements.<sup>11</sup>

(2.) *Form of Certification.* — The general rules regulating the form in which certified copies must be drawn up will be found thoroughly discussed elsewhere in this work.<sup>12</sup>

*Proceedings of Probate Court.* — It should be especially noticed, however, that in every instance the exemplification of the will must be accompanied by a transcript of the proceedings in the probate court.<sup>13</sup>

by that clear proof which is required when it is sought to establish the contents of a lost will in the first instance. *Rumph v. Hiott*, 35 S. C. 444, 15 S. E. 235.

9. *United States.* — *Secrist v. Green*, 3 Wall. 744; *O'Brien v. Woody*, 4 McLean 75, 18 Fed. Cas. No. 10,398.

*Connecticut.* — Appeal of *Murdock*, 72 Atl. 290 (Gen. Stat. 1902, §§ 293, 305).

*Illinois.* — *Stull v. Veatch*, 236 Ill. 207, 86 N. E. 227 (Hurd's Rev. Stat. 1905, ch. 148); *Newman v. Willetts*, 52 Ill. 98; *Gardner v. Ladue*, 47 Ill. 211, 95 Am. Dec. 487.

*Mississippi.* — *Heard v. Drennen*, 46 So. 243 (Code 1906, § 2004); *Montgomery v. Milliken*, 5 Smed. & M. 151, 43 Am. Dec. 507.

*South Carolina.* — *Sally v. Gunter*, 13 Rich. L. 72.

And see article, "RECORDS," Vol. X, p. 910.

*Original Proof.* — A foreign will may always be proved as an original will if the parties so desire. *Bateman v. Bartlett*, 3 A. K. Marsh (Ky.) 86.

"A copy of a will executed in a foreign country, sworn to be a true copy, by one of the attesting witnesses to the original, and that the testator was of sound disposing mind, and that the will was acknowledged by him in the presence of the other subscribing witnesses, is admissible in evidence." *Elmondorff v. Carmichael*, 3 Litt. (Ky.) 473.

10. See article "RECORDS," Vol. X, p. 1019.

11. *Dusenberry v. Abbott* (Neb.), 95 N. W. 466.

12. See article "RECORDS," Vol. X, pp. 905-917, also pp. 1021-1033. And see *Dusenberry v. Abbott* (Neb.), 95 N. W. 466; *Maxwell v. Stewart*, 22 Wall. (U. S.) 77.

*Certification by Same Person as Clerk and Judge, Proper.* — *Stevens v. Oliver*, 200 Mo. 492, 98 S. W. 492; *Sully v. Gunter*, 13 Rich. L. (S. C.) 72.

13. *Fenderson v. Missouri Tie & T. Co.*, 104 Mo. App. 290, 78 S. W. 819; *Morris v. Keyes*, 1 Hill (N. Y.) 540; *F. E. & M. V. R. Co. v. Setright*, 34 Neb. 253, 51 N. W. 833; *Pope v. Cutler*, 34 Mich. 150; *Mower v. Verplanke*, 101 Mich. 209, 59 N. W. 393.

The certificate of the register of wills, accompanying a will purporting to have been probated in another jurisdiction which states that the said will was proven and admitted to probate and record, is insufficient, as being the mere conclusion of the clerk. What is required is a certified copy of the judgment of probate. *Youmans v. Ferguson*, 122 Ga. 331, 50 S. E. 141.

*Will Prohibited in Foreign Country.* — In the absence of proof that the proceedings in a foreign court were conducted in a manner different from those of the state in which a foreign will is offered for probate, the transcript of the proceedings which merely recites a short

E. OPERATION AND EFFECT. — a. *Collateral Attack*. — (1.) In General. — A decree of a probate court is not subject to collateral attack,<sup>14</sup> as such a court is a court of general jurisdiction and this rule applies even though the probate was only in common form,<sup>15</sup> or was a decree admitting a foreign will to probate and record,<sup>16</sup> or was the decree of a foreign court itself.<sup>17</sup> The same rule applies

order admitting the will to probate, is insufficient; the preliminary proceedings should also be incorporated. *Wickersham v. Johnston*, 104 Cal. 407, 38 Pac. 89.

14. *United States*. — *Gaines v. New Orleans*, 6 Wall. 642.

*Arkansas*. — *Carraway v. Moore*, 75 Ark. 146, 86 S. W. 993; *St. Joseph's Convent v. Garner*, 66 Ark. 623, 53 S. W. 298.

*California*. — *In re Davis' Estate*, 86 Pac. 183.

*Connecticut*. — *Appeal of Mix*, 35 Conn. 121, 95 Am. Dec. 222; *Gates v. Treat*, 17 Conn. 388.

*Florida*. — *Thomas v. Williamson*, 51 Fla. 332, 40 So. 831.

*Georgia*. — *Hightower v. Williams*, 104 Ga. 608, 30 S. E. 862.

*Kansas*. — *Keith v. Guthrie*, 59 Kan. 200, 52 Pac. 435.

*Kentucky*. — *Well's Will*, 5 Litt. 273; *Kentucky Land & I. Co. v. Crabtree*, 113 Ky. 922, 70 S. W. 31; *Miller v. Swan*, 91 Ky. 36, 14 S. W. 964; *Davis v. Leete*, 111 Ky. 659, 64 S. W. 441; *Leslie v. Maxey*, 23 Ky. L. Rep. 2435, 67 S. W. 839.

*Maryland*. — *Pleasants v. McKenney*, 71 Atl. 955; *Emmert v. Stouffer*, 64 Md. 543, 3 Atl. 293, 6 Atl. 177.

*Michigan*. — *Byrne v. Hume*, 84 Mich. 185, 47 N. W. 679.

*Missouri*. — *Stevens v. Larwill*, 110 Mo. App. 140, 84 S. W. 113; *Stowe v. Stowe*, 140 Mo. 594, 41 S. W. 951; *Cohen v. Herbert*, 205 Mo. 537, 104 S. W. 84; *Stevens v. Oliver*, 200 Mo. 492, 98 S. W. 492.

*Nebraska*. — *Beer v. Plant*, 96 N. W. 348; *Byron Reed Co. v. Klambunde*, 76 Neb. 801, 108 N. W. 133; *Loosemore v. Smith*, 12 Neb. 343, 11 N. W. 493; *Williams v. Miles*, 63 Neb. 859, 89 N. W. 451.

*New Jersey*. — *Ryno's Exr. v. Ryno's Admr.*, 27 N. J. Eq. 522.

*Pennsylvania*. — *Stout v. Young*, 217 Pa. St. 427, 66 Atl. 659.

*Texas*. — *Glover v. Coit*, 36 Tex. Civ. App. 104, 81 S. W. 136; *Box v. Lawrence*, 14 Tex. 545; *Lewis v. Ames*, 44 Tex. 319; *Locust v. Randle* (Tex. Civ. App.), 102 S. W. 946. And see article "JUDGMENTS," Vol. VII, p. 838.

Probate by Clerk of Court is a judicial act and cannot be attacked collaterally. *McClure v. Spivey*, 123 N. C. 678, 31 S. E. 857; *Mayo v. Jones*, 78 N. C. 402.

15. *London v. Wilmington & W. R. Co.*, 88 N. C. 584; *Petty v. Ducker*, 51 Ark. 281, 11 S. W. 2; *Reeves v. Hager*, 101 Tenn. 712, 50 S. W. 760.

*Ex parte* decrees are *prima facie* valid. *Thomas v. Blair*, 111 La. 678, 35 So. 811; *Succession of Justus*, 45 La. Ann. 190, 12 So. 130.

16. *State v. District Court*, 34 Mont. 96, 85 Pac. 866; *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Tracy v. Muir*, 151 Cal. 363, 90 Pac. 832; *Morrison v. Fletcher*, 119 Ky. 488, 84 S. W. 548; *Whalen v. Nisbet*, 95 Ky. 464, 26 S. W. 188; *Stevens v. Oliver*, 200 Mo. 492, 98 S. W. 492; *Appelgate v. Smith*, 31 Mo. 166.

"The certified copy of the will and the transcript of the order of probate in the foreign state raises a presumption that all necessary legal formalities at such probate were complied with and such evidence is conclusive of the validity of the foreign probate and is not subject to collateral attack, unless such transcript shows on its face that the will was not properly admitted to probate." *Stull v. Veatch*, 236 Ill. 207, 86 N. E. 227.

17. *Garvey v. U. S. Fidelity Co.*, 77 App. Div. 391, 79 N. Y. Supp. 337; *Mooney v. Hinds*, 160 Mass. 469, 36 N. E. 484; *Simmons v. Saul*, 138 U. S. 439.

to a decree refusing probate of the will as sought by the proponent.<sup>18</sup>

**At Common Law** the ecclesiastical courts had no jurisdiction over real property and therefore the establishment of a will as to personal property did not operate to establish it even *prima facie*, in the case of real property.<sup>19</sup> But at the present time the same courts have charge of wills of both realty and personalty, and in most jurisdictions no distinction is made between the two,<sup>20</sup> though the old rule still obtains in a few states.<sup>21</sup>

(2.) **Matters Concluded.** — (A.) **IN GENERAL.** — The only matters as to which the decree is conclusive evidence are those involved in the very point which was in issue, namely, the validity or invalidity of the will.<sup>22</sup>

(B.) **DOMICIL.** — Where a domestic will is propounded the finding

18. *Castro v. Richardson*, 18 Cal. 478; *Smith v. James*, 74 Iowa 462, 38 N. W. 160; *Dale v. Hays*, 53 Ky. 315; *Ballow v. Hudson*, 13 Gratt. (Va.) 672; *In re Goldsticker's Will*, 192 N. Y. 35, 84 N. E. 581, 18 L. R. A. (N. S.) 99; *Schultz v. Schultz*, 10 Gratt. (Va.) 358, 60 Am. Dec. 335.

19. See *Davies v. Leete*, 111 Ky. 659, 64 S. W. 441; *Corley v. McElmeel*, 149 N. Y. 228, 43 N. E. 628.

20. *Rumph v. Hiott*, 35 S. C. 444, 15 S. E. 235.

21. *Dixon v. Cozine*, 114 N. Y. Supp. 615; *Corley v. McElmeel*, 149 N. Y. 228, 43 N. E. 628; *Harris v. Harris*, 26 N. Y. 433; *In re Merriam*, 136 N. Y. 58, 32 N. E. 621; *Naylor v. Brown*, 32 Misc. 298, 66 N. Y. Supp. 729; *Barbour v. Moore*, 4 App. Cas. (D. C.) 535 (*prima facie* evidence of validity by statute).

"Probate of a will is only presumptive evidence of its due execution, so far as it relates to real property, and it can be proved in an action affecting the title to the property." *Smith v. Ryan*, 116 App. Div. 397, 101 N. Y. Supp. 1011.

In Florida certified copies of recorded wills are admissible and the validity of the will as to personal property is conclusively presumed, and it is *prima facie* evidence of validity as to real estate in any action in relation to such property. *Thomas v. Williamson*, 51 Fla. 332, 40 So. 831.

Proceedings in the orphans' court where the will was presented for

probate as a testament of personal property, the court having no jurisdiction over wills of real estate, are inadmissible upon the subsequent issue as to the validity of the will in regard to real estate in a court having competent jurisdiction. *Harrison v. Rowan*, 3 Wash. C. C. 580, 11 Fed. Cas. No. 6,141.

22. *Palmer v. Bradley*, 142 Fed. 193; *Corrigan v. Jones*, 14 Colo. 311, 23 Pac. 913; *White Memorial Home v. Price*, 195 Ill. 279, 62 N. E. 872; *Stanley v. Safe Deposit Co.*, 87 Md. 450, 40 Atl. 53; *Post v. Mason*, 91 N. Y. 539, 43 Am. Rep. 689; *In re Hasselbrook's Estate*, 128 App. Div. 874, 113 N. Y. Supp. 97; *Stout v. Young*, 217 Pa. St. 427, 66 Atl. 659 (testamentary age).

Probate of the will "is evidence that the will was duly executed by the testator, that he had legal capacity to execute it, and that it had not been revoked." *Clapp v. Vatcher* (Cal. App.), 99 Pac. 549.

Fact that will was conditional and that condition never occurred cannot be shown in a collateral attack. *Laufer v. Powell*, 30 Tex. Civ. App. 604, 71 S. W. 549.

Copies of foreign wills duly exemplified under Laws of United States are entitled to full faith and credit, and the paper found to be a will in the foreign state is to be accepted as his will, and the person found to be designated as executor is to be recognized, though the court need not issue letters to such person. *Appeal of Murdoch* (Conn.), 72 Atl. 290.

**Construction of Will Not In-**

of the probate court as to the domicile of the decedent is conclusive,<sup>23</sup> but where the will propounded is a foreign will it is held that the court before which it is offered may investigate this question,<sup>24</sup> its finding is, however, conclusive.<sup>25</sup>

(3.) **Presumptions.** — (A.) **IN GENERAL.** — Even in those cases involving jurisdictional matters in which a collateral attack is allowed, there is a strong presumption in favor of the regularity and validity of the action of the probate court.<sup>26</sup>

**involved.** — *Neimand v. Seemann*, 136 Iowa 713, 114 N. W. 48. And see *Clements v. Maury* (Tex. Civ. App.) 110 S. W. 185; *Stull v. Veatch*, 236 Ill. 207, 86 N. E. 227.

23. *Estate of Dole*, 147 Cal. 188, 81 Pac. 534; *Irwin v. Scriber*, 18 Cal. 500; *In re Estate of LaTour*, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441; *McFeeley v. Scott*, 128 Mass. 16; *Stanley v. Safe Dep. Co.*, 87 Md. 450, 40 Atl. 53.

In a proceeding to set aside a will, the probate court having general jurisdiction, it will be presumed that it had jurisdiction in this particular case, *i. e.*, that it found that the testator was last an inhabitant of the county or that he had estate in the county. *Knight v. Hollings*, 73 N. H. 495, 63 Atl. 38.

24. See *Plant v. Harrison*, 36 Misc. 649, 74 N. Y. Supp. 411; *Compare Corrigan v. Jones*, 14 Colo. 311, 23 Pac. 913.

Where a foreign will is offered for probate two questions arise: First, the sufficiency of the proofs of foreign probate, and second, the question of the residence of the deceased. *In re Clark*, 148 Cal. 108, 82 Pac. 760, 1 L. R. A. (N. S.) 996.

The orphans' court was held to have power to determine the domicile of a decedent — as a prerequisite to levying a collateral inheritance tax, although a court in another state had admitted his will to probate and issued letters testamentary. *In re Dalrymple's Estate*, 215 Pa. St. 367, 64 Atl. 554.

Statutes providing for the allowance and recording of wills admitted to probate in other jurisdictions, have no application where it appears that the decedent was a resident of the state and domiciled there at his death. *In re Clark*, 148 Cal. 108, 82 Pac. 760, 1 L. R. A. (N. S.) 996;

*Bate v. Incisca*, 59 Miss. 513; *Stark v. Parker*, 56 N. H. 481; *Tarbell v. Walton*, 71 Vt. 406, 45 Atl. 748; *Scripps v. Wayne* Probate Judge, 131 Mich. 265, 90 N. W. 1061.

25. *St. Joseph's Convent v. Garner*, 66 Ark. 623, 53 S. W. 298; *Janes v. Williams*, 31 Ark. 175.

26. *Sisco v. Martin*, 61 App. Div. 502, 70 N. Y. Supp. 597; *Koltermann v. Chilvers* (Neb.), 117 N. W. 405; *Roberts v. Flanagan*, 21 Neb. 503, 32 N. W. 563; *Jemison v. Smith*, 37 Ala. 185 (presumptions drawn in favor of a foreign will); *Creasy v. Alverson*, 43 Mo. 13; *Moore v. Willamette T. & L. Co.*, 7 Or. 359 (presumption of filing of petition for probate); *Salmon v. Huff*, 9 Tex. Civ. App. 164, 28 S. W. 1044 (probate by clerk in vacation presumed to have been confirmed).

Where it appears that a will devising real estate was not attested by two witnesses, it will be presumed that it was wholly in the testator's handwriting — the court having admitted it to probate. *Stevenson v. Huddleson*, 13 B. Mon. (Ky.) 299.

On a collateral attack there is a presumption that an order continuing the hearing of the petition for probate was regularly made, nothing contrary appearing on the face of the record. *In re Davis' Estate*, (Cal.), 86 Pac. 183.

The record of the county court contained a copy of the will and the evidence taken by the clerk when it was exhibited for proof and showed that it had been recorded. It was held that after the lapse of fifty years it would be presumed that the probate by the clerk had been confirmed by the court. *Rothwell v. Jamison*, 147 Mo. 601, 49 S. W. 503. And see *Salmon v. Huff*, 9 Tex. Civ. App. 164, 28 S. W. 1044.

Where it appears that a foreign



(B.) **NOTICE.** — Thus it will be presumed that the required notice was properly given.<sup>27</sup>

(C.) **SUFFICIENCY OF EVIDENCE.** — The court is presumed to have been furnished with sufficient evidence to authorize it to probate the will.<sup>28</sup>

b. **Direct Attack.** — (1.) **In General.** — The statutory proceedings providing for a direct attack upon the decree are exclusive of all others and form the sole method by which a direct attack may be made.<sup>29</sup>

(2.) **Failure To Attack.** — Failure to attack a decree of the probate court<sup>30</sup> within the time limited by the various statutes,<sup>31</sup> or in the

will was propounded before a court or officer having jurisdiction, there is a presumption that the will was duly proved according to the laws of that state. *Martin v. Martin*, 70 Neb. 207, 97 N. W. 289; *Wilt v. Cutter*, 38 Mich. 189; *Otto v. Doty*, 61 Iowa 23, 15 N. W. 578.

**Residence of Persons Named as Executors** within the county not presumed where it would follow that proof would be necessary that they had been cited. *McCrea v. Haraszthy*, 51 Cal. 146.

**Decedent Domiciled in Another State.** — Presumption arises that the court found that he left assets within the county. *Fletcher's Admr. v. Sanders*, 7 Dana (Ky.) 345, 32 Am. Dec. 96.

**Judicial Notice** taken that the proceedings of courts of ordinary are loose and irregular. *Jemison v. Smith*, 37 Ala. 185 (foreign will admitted to probate although record was irregular).

27. *Acklen v. Goodman*, 77 Ala. 521 (affirmative showing of notice not required).

**Recital of Notice in Decree** warrants presumption that an order had been regularly issued directing a citation of the heirs. *Moore v. Earl*, 91 Cal. 632, 27 Pac. 1087.

**Lapse of Time.** — Notice presumed to have been properly given. *Brown v. Wood*, 17 Mass. 68 (20 years); *Giddings v. Smith*, 15 Vt. 344 (7 years); *Portz v. Schantz*, 70 Wis. 497, 36 N. W. 249 (15 years).

28. *Newman v. Virginia T. & C. Steel & I. Co.*, 80 Fed. 228, 25 C. C. A. 382; *Harven v. Springs*, 32 N. C. (10 Ired. L.) 180; *Holman v. Riddle*, 8 Ohio St. 384.

Where a will is admitted to probate upon the testimony of one of the subscribing witnesses it will be presumed that this witness testified to all the facts necessary to authorize the probate. *Lindsay's Heirs v. McCormack*, 2 A. K. Marsh. (Ky.) 229, 12 Am. Dec. 387; *Jenkins v. Jenkins*, 96 N. C. 254, 2 S. E. 522. And see *Moody v. Johnson*, 112 N. C. 798, 17 S. E. 578.

Under a statute authorizing probate upon the testimony of one only of the subscribing witnesses, if the judge is satisfied that there is to be no contest, where a will is admitted on such testimony it is presumed that the necessary evidence was furnished the judge. *Barney v. Chittenden*, 2 Greene (Iowa) 165.

29. *Del Campo v. Camarillo* (Cal.), 98 Pac. 1049.

30. *Neimand v. Seemann*, 136 Iowa 713, 114 N. W. 48; *Smith v. James*, 74 Iowa 462, 38 N. W. 160; *P'Simer v. Steele*, 32 Ky. L. Rep. 647, 106 S. W. 851; *Kemmerer v. Kemmerer*, 233 Ill. 327, 84 N. E. 256.

31. *Georgia.* — *Robertson v. Hill*, 127 Ga. 175, 56 S. E. 289 (Civil Code § 3283 specifying seven years); *Gay v. Sanders*, 101 Ga. 601, 28 S. E. 1019; *Hooks v. Brown*, 125 Ga. 122, 53 S. E. 583; *Sutton v. Hancock*, 118 Ga. 436, 45 S. E. 504.

*Montana.* — *Spencer v. Spencer*, 31 Mont. 631, 79 Pac. 320 (one year allowed).

*New Hampshire.* — *Knight v. Hollings*, 73 N. H. 495, 63 Atl. 38 (one year allowed).

*Pennsylvania.* — *Stout v. Young*, 217 Pa. St. 427, 66 Atl. 659 (five years allowed).

absence of statutes, within a reasonable time,<sup>32</sup> will operate to bar any subsequent contest.

## XIX. CONSTRUCTION.

**1. Presumptions.** — A. OWNERSHIP OF PROPERTY. — A testator will be presumed to have devised only property over which he had the power of testamentary disposition.<sup>33</sup>

B. MATTERS OF LAW. — There is a presumption that the testator knew the law applicable to the disposition of his property,<sup>34</sup> that he intended to make a legal rather than an illegal disposition of it<sup>35</sup> and that he used language in the sense in which it would be interpreted in the place of his domicil, at least when disposing of personal property.<sup>36</sup>

C. FACTS ASSUMED. — There is also a presumption that the facts are as they are assumed and alleged to be by the testator.<sup>37</sup>

**2. Extrinsic Evidence.** — A. IN GENERAL. — The same rule applies to wills as to other written instruments,<sup>38</sup> and parol evi-

**32.** Probate court will not *set aside* decree in common form after laches of twelve years. *Knight v. Hollings*, 73 N. H. 495, 63 Atl. 38.

**33.** *In re Gilmore*, 81 Cal. 240, 22 Pac. 655; *Miller v. Springer*, 70 Pa. St. 269; *Isler v. Isler*, 88 N. C. 581.

**Title Uncertain.** — If the testator's title is uncertain it will be presumed that he intended to devise only the title he himself had. *Tomkins v. Merriam*, 155 Pa. St. 440, 26 Atl. 659.

**34.** *In re Gilmore*, 81 Cal. 240, 22 Pac. 655.

**35.** *Klock v. Stevens*, 20 Misc. 383, 45 N. Y. Supp. 603.

**36.** In construing a will of personal property it will be presumed that the testator used the language according to the sense in which it would be applied according to the law of the country in which he is domiciled, unless something appears to rebut this presumption. *Harrison v. Nixon*, 9 Pet. (U. S.) 483.

**37.** *White v. White*, 30 Vt. 338.

"If it be charged that the provision involves a false description, and that there is nothing for the provision, giving to the language its ordinary meaning, to operate upon, the burden of establishing that fact is upon the party alleging it."

*Charch v. Charch*, 57 Ohio St. 561, 49 N. E. 408.

A provision in a will that the testator desired certain advancements made to his children and represented by notes of hand and book accounts to be considered as so much of their portion individually, will be presumed to properly describe the deeds and property intended to be affected; and the person who claims that a debt evidenced by a bond and mortgage was also within the contemplation of the testator must establish this fact. *Hopkins v. Holt*, 9 Wis. 228.

**38.** See article "PAROL EVIDENCE," Vol. IX, p. 370; also *Noble v. Fickes*, 230 Ill. 594, 82 N. E. 950, 13 L. R. A. (N. S.) 1203.

**Distinction Between Wills and Contracts.** — "The principles of the rules of law regulating the admissibility of extrinsic evidence to aid the construction of wills and of contracts required to be in writing, seem to be the same. But, in applying them it seems to be necessary to bear in mind that there is a distinction between the two classes of instruments. The will is the language of the testator soliloquizing, if one may use the phrase, and the court in construing his language may properly take into account all that he knew at the time in order

dence is inadmissible to add to, vary, or contradict the language used.<sup>39</sup>

The Statute of Wills furnishes a reason in addition to the general parol evidence rule, why this principle should be applied in the case of wills.<sup>40</sup>

B. EXPRESSED INTENT CONTROLS.—And so the courts are always careful in discussing the admissibility of extrinsic evidence to recognize the rule that it is the intent of the testator as expressed in the language used which controls,<sup>41</sup> and all evidence admitted is admitted for the purpose of arriving at this particular intent.<sup>42</sup>

to see in what sense the words were used." *Per* Blackburn, J., in *Grant v. Grant*, L. R. 5 C. P. (Eng.) 727.

39. *United States*.—*Stevens v. Vancleve*, 4 Wash. C. C. 262, 23 Fed. Cas. No. 13,412.

*Georgia*.—*Doyal v. Smith*, 28 Ga. 262.

*Illinois*.—*Bradley v. Rees*, 113 Ill. 327, 55 Am. Rep. 422.

*Indiana*.—*McAlister v. Butterfield*, 31 Ind. 25; *Whiteman v. Whiteman*, 152 Ind. 263, 53 N. E. 225.

*Iowa*.—*Gilmore v. Jenkins*, 129 Iowa 686, 106 N. W. 193.

*Kentucky*.—*Jackson v. Payne's Exrs.*, 2 Met. 567; *Stephen v. Walker*, 8 B. Mon. 600.

*Massachusetts*.—*Best v. Berry*, 189 Mass. 510, 75 N. E. 743.

*New Hampshire*.—*Loring v. Woodward*, 41 N. H. 391.

*New Jersey*.—*Cleveland v. Havens*, 13 N. J. Eq. 101, 78 Am. Dec. 90; *Hand v. Hoffman*, 8 N. J. L. 71; *Halsted v. Meeker's Exrs.*, 18 N. J. Eq. 136.

*New York*.—*Mann v. Mann*, 14 Johns. 1.

*North Carolina*.—*Kinsey v. Rehm*, 24 N. C. (2 Ired. L.) 192.

*Ohio*.—*Lessee of Worman v. Teagarden*, 2 Ohio St. 380; *Reinhard v. Reinhard*, 15 Ohio Dec. 741.

*Pennsylvania*.—*Gilmor's Estate*, 154 Pa. St. 523, 26 Atl. 614, 35 Am. St. Rep. 855; *Phelp's Estate*, 4 Pa. Dist. 258; *Torbert v. Twining*, 1 Yeates 432.

*Tennessee*.—*Clark v. Clark*, 2 Lea 723.

*Texas*.—*Hunt v. White*, 24 Tex. 643.

40. *Leigh v. Savidge*, 14 N. J.

Eq. 124; *Daugherty v. Rogers*, 119 Ind. 254, 20 N. E. 779, 3 L. R. A. 847.

"Inasmuch as our statute requires all last wills and testaments to be in writing and properly witnessed, intrinsic evidence is never admissible to alter, detract from or add to the terms of a will. If the words of the testator as to the donee and subject to the gift are unambiguous, those words cannot be varied by evidence of extraneous facts, however clearly a different intention may appear." *Vestal v. Garrett*, 197 Ill. 398, 64 N. E. 345.

**Distinction Between Wills and Deeds.**—*Torbert v. Twining*, 1 Yeates (Pa.) 432.

41. *California*.—*In re Young's Estate*, 123 Cal. 337, 55 Pac. 1011.

*Illinois*.—*Hawhe v. Chicago & W. I. R. Co.*, 165 Ill. 561, 46 N. E. 240; *Bond v. Moore*, 236 Ill. 576, 86 N. E. 386.

*Kentucky*.—*Mitchell v. Walker*, 17 B. Mon. 61; *Long v. Duvall*, 6 B. Mon. 219.

*New York*.—*Klock v. Stevens*, 20 Misc. 383, 45 N. Y. Supp. 603; *Tole v. Hardy*, 6 Cow. 333.

*North Carolina*.—*Reeves v. Reeves*, 16 N. C. (1 Dev. Eq.) 386.

*Ohio*.—*Charch v. Charch*, 57 Ohio St. 561, 49 N. E. 408.

*South Carolina*.—*Rosborough v. Hemphill*, 5 Rich. Eq. 95.

*Tennessee*.—*Dixon v. Cooper*, 88 Tenn. 177, 12 S. W. 445.

*Wisconsin*.—*Hanley v. Kraftczyk*, 119 Wis. 352, 96 N. W. 820.

**Exceptions Are Only Apparent.** *In re Young's Estate*, 123 Cal. 337, 55 Pac. 1011.

42. *Collins v. Hope*, 20 Ohio 492.

Thus Conditions cannot be shown where the devise appears absolute on its face;<sup>43</sup> nor can intended limitations upon the general words used to describe the beneficiaries<sup>44</sup> or the property devised<sup>45</sup> be established.

C. UNAMBIGUOUS LANGUAGE. — Where the language of the will is unambiguous all evidence to aid in its construction is inadmissible.<sup>46</sup>

D. APPLICATION OF DESCRIPTION. — As in the case of all other written instruments parol evidence is always and necessarily admissible to ascertain what the descriptive terms used in a will prop-

"Even in cases where extrinsic evidence is admitted to explain latent ambiguities, and to perfect imperfect descriptions of beneficiaries, or the subject-matter of devises or bequests, no evidence is admissible to change or vary the testator's expressed intent. This must always be deduced from the will itself, assisted by such extrinsic evidence. The proofs afforded by such evidence are to be employed merely as an aid to the court in determining what in fact was the expressed intent of the testator; and, if that intent may not be so found, the devise or bequest must lapse, since it is not within the power of a court to make a new will." *In re Dominici's Estate*, 15 Cal. 181, 90 Pac. 448.

43. *United States*. — *Lyman v. Lyman*, 2 Paine 11, 15 Fed. Cas. No. 8,628.

*Louisiana*. — *Succession of Quinlan*, 118 La. 602, 43 So. 249.

*Maryland*. — *Sewell v. Slingloff*, 57 Md. 537, 549.

*Massachusetts*. — *Crocker v. Crocker*, 11 Pick. 252.

*New York*. — *Shanley v. Shanley*, 34 App. Div. 172, 54 N. Y. Supp. 652.

*Pennsylvania*. — *Comfort v. Math-er*, 2 Watts & S. 450, 37 Am. Dec. 523; *Sword v. Adams*, 3 Yeates 34; *Ritter v. Fox*, 6 Whart. 99.

*South Carolina*. — *Whilden v. Whilden*, Riley 205.

Where a will is shown to be conditional, parol evidence is inadmissible to show that the testator intended to abide by the will after the event which constituted the condition has passed. See *Robnett v.*

*Ashlock*, 49 Mo. 171 (containing a review of English and American cases).

It was held that proof that by a devise to a parent the testator meant a devise to the children of such parent, since the testator knew that the parent was dead, was inadmissible as it would be in contradiction of the intention manifested by the will when construed in accordance with legal principles. *Judy v. Williams*, 2 Ind. 449.

44. "Where a testator directed payment of \$1,000 to each of the children of P., who had married testator's niece, but whose wife was dead when the will was made, the children of P. born of a marriage contracted after the execution of the will are entitled to the benefit of its provisions, as the will speaks as of the time of testator's death; and evidence is not admissible to show the circumstances surrounding testator at the date of the will for the purpose of showing that he intended to limit his bounty to the children of P. by his niece. *Gray's Admr. v. Pash*, 24 Ky. L. Rep. 963, 66 S. W. 1026.

45. *Chase v. Stockett*, 72 Md. 235, 19 Atl. 761; *Miller v. Miller*, 22 Misc. 582, 49 N. Y. Supp. 407; *Lawrence v. Ketchum*, 4 Ont. App. 92; *Taylor v. Horst*, 23 Wash. 446, 63 Pac. 231.

*Duration of Interest*. — *Avery v. Chappell*, 6 Conn. 270, 16 Am. Dec. 53.

46. *Connecticut*. — *Canfield v. Bostwick*, 21 Conn. 550; *Jackson v. Alsop*, 67 Conn. 249, 34 Atl. 1106; *Thompson v. Betts*, 74 Conn. 576, 51 Atl. 564, 92 Am. St. Rep. 235.

*Georgia*. — *Steers & Co. v. Morgan*, 66 Ga. 550; *Hill v. Alford*, 46 Ga.

erly comprehend and to show that the person or property in question is that mentioned in the will.<sup>47</sup> This is a question entirely separate and apart from any question of construction.

**Declarations of the testator** are admissible for this purpose.<sup>48</sup>

**Descriptive Terms.**—This rule is especially applicable to cases in

247; *Cochran v. Hudson*, 110 Ga. 762, 36 S. E. 71.

*Iowa*.—*Wright v. Wright*, 122 Iowa 549, 98 N. W. 472.

*Maryland*.—*Shipley v. Mercantile Tr. & Dep. Co.*, 102 Md. 649, 62 Atl. 814.

*New Jersey*.—*Hand v. Hoffman*, 8 N. J. L. 71.

*New Mexico*.—*Perea v. Barela*, 5 N. M. 458, 23 Pac. 766.

*New York*.—*Bunner v. Storm*, 1 Sandf. Ch. 357; *Bradhurst v. Field*, 63 Hun 633, 18 N. Y. Supp. 535.

*Ohio*.—*Charch v. Charch*, 57 Ohio St. 561, 49 N. E. 408.

**Difficulty of Construction Immaterial.**—“The first question in this, as in every other case where the construction of a written document is concerned, is whether the will or other document, upon the face of it, is or is not ambiguous, or, on the contrary, capable of a definite judicial construction. It must be borne in mind that a will is not ambiguous by reason only that it is difficult of construction. If it is finally held to bear a particular construction, that must govern its legal meaning, notwithstanding any difficulty that the courts may have felt in arriving judicially at the construction. It is only ambiguous when, after full consideration, it is determined judicially that no interpretation can be given to it.” *In re Grainger*, L. R. (1900), 2 Ch. Div. (Eng.) 756.

47. *Iowa*.—*Whitehouse v. Whitehouse*, 136 Iowa 165, 113 N. W. 759.

*Maryland*.—*Young v. Twigg*, 27 Md. 620.

*Minnesota*.—*Case v. Young*, 3 Minn. 209.

*New York*.—*Pritchard v. Hicks*, 1 Paige Ch. 270; *Hyatt v. Pugsley*, 23 Barb. 285.

*Ohio*.—*Ashworth v. Carleton*, 12 Ohio St. 381; *Black v. Hill*, 32 Ohio St. 313.

*Pennsylvania*.—*Myers v. Myers*, 16 Pa. Super. 511.

*South Carolina*.—*Ellsworth v. Buckmyer*, 1 Nott & McC. 431.

*Virginia*.—*Roy's Exrs. v. Rowzie*, 25 Gratt. 599.

*Wisconsin*.—*Flood v. Kerwin*, 113 Wis. 673, 89 N. W. 845.

“Parol proof is always admissible to apply the language of a will to its subject-matter, but when this is done, such proof is never admissible to show that the testator intended to do something different from what the language of his will plainly expresses.” *Chase v. Stockett*, 72 Md. 235, 19 Atl. 761.

“To look outside of the will to ascertain what the testator at the time of using the words may have proposed as to their effect—and to refer ‘aliunde’ to learn upon what subject-matter the language as used would operate, are very different inquiries, and so recognized by the authorities. In the first case evidence or explanations ‘*dehors*’ the instrument, is not admitted to speak for the testator; in the latter such means of ascertaining the subject of the devise are clearly admissible.” *Young v. Twigg*, 27 Md. 620.

48. *Bradley v. Rees*, 113 Ill. 327, 55 Am. Rep. 422; *Ryerss v. Wheeler*, 22 Wend. (N. Y.) 148. But see *Trustees v. Keaslee*, 15 N. H. 317.

“The Declarations of the testator are admissible as evidence of facts upon which the will is to operate, as would be any other competent testimony to the same effect, and to fit the words of the will to their appropriate and intended objects. But no evidence of the kind will be heard to show an intent modified and different from that expressed in the instrument itself.” *Thomas v. Lines*, 83 N. C. 191.

which lands are devised by some broad, general descriptive term.<sup>49</sup>

E. SURROUNDING CIRCUMSTANCES. — a. *In General*. — The rule is often stated to be that, in order to enable the court to place itself in the position of the testator,<sup>50</sup> evidence of all the circumstances surrounding him at the time he wrote his will<sup>51</sup> is admissible to aid in its construction.<sup>52</sup>

49. *Connecticut*. — *Spencer v. Higgins*, 22 Conn. 521 ("the property which she brought").

*Florida*. — *Stewart v. Mathews*, 19 Fla. 752 ("all my lands on Orange Lake in Marion county, known as the McCormick plantation").

*Indiana*. — *Hartwig v. Shiefer*, 42 N. E. 471 ("my life insurance policy amounting to \$1,000").

*New Jersey*. — *Ackerman v. Crouter*, 68 N. J. Eq. 49, 59 Atl. 574 ("the farm which I own at Wortendyke and known as the David A. Wortendyke farm").

*North Carolina*. — *Kincaid v. Lowe*, 62 N. C. (Phill. Eq.) 41 ("the Linebarger plantation").

*Pennsylvania*. — *In re Snyder's Estate*, 217 Pa. St. 71, 66 Atl. 157, 11 L. R. A. (N. S.) 49 (shares of stock in the "Second National Bank of Mercer").

*South Carolina*. — *Perry v. Morgan*, 1 Strobb. 8 ("the old tract of land I bought from Abney"); *Jones v. Quattlebaum*, 31 S. C. 606, 9 S. E. 982 ("all that tract of land, part of which is known as the Henry Raiford place").

*Tennessee*. — *McCorry v. King*, 3 Humph. 267 ("the tract I bought of Charles and James McCartney, lying in Green county").

"This point is well illustrated in *Sanford v. Raikes*, 1 Mer. 646, where Sir William Grant in discussing the admissibility of extrinsic evidence in such cases observed: 'I had always understood that, where the subject of a devise was described by reference to some extrinsic fact, it was not merely competent but necessary to admit extrinsic evidence to ascertain the fact and through that medium to ascertain the subject of the devise.'" *Thomson v. Thomson*, 115 Mo. 56, 21 S. W. 1085, 1128.

"If the intention of the devise be to convey all of the property of the

testator, such general description will suffice, and extrinsic evidence is admissible to show such property as was in the testator and such as was necessarily included in the general terms employed by him in devising it. At last, the question of description is one of degree only, and if the conveyance be of an entire estate, parol evidence is admissible to ascertain the geographical extent and limit of the property covered thereby." *Flannery v. Hightower*, 97 Ga. 592, 25 S. E. 371.

"A testator devised by one clause of his will 'all my land which lies on the south side of the county road leading, &c., called Parsons' Outlet, or by whatsoever name or names the same may be known or called, except so much of said land as lies on the south side of Beaver Dam Branch'; and by another clause he devised 'all the lands I own on the south side of Beaver Dam Branch.' . . . Extrinsic evidence was held admissible to show the location of the land and of the branch, but not to show what was the intention of the testator in the use of the words, 'Beaver Dam Branch.'" *Walston's Lessee v. White*, 5 Md. 297.

50. *Phillips v. Ferguson*, 85 Va. 509, 8 S. E. 241, 17 Am. St. Rep. 78, 1 L. R. A. 837; *Hiscocks v. Hiscocks*, 5 Mees. & W. (Eng.) 363; *Flynn v. Holman*, 119 Iowa 731, 94 N. W. 447.

51. *Subsequent Circumstances Inadmissible*. — *Morris v. Sickly*, 133 N. Y. 456, 31 N. E. 332; *Trustees v. Sturgeon*, 9 Pa. St. 321.

"When extrinsic circumstances are to be resorted to, in order to aid in giving construction, they are to have reference to such circumstances as existed at the date of making the will, and not to those posterior, or to such as may exist at the time of construing it." *Myers v. Eddy*, 47 Barb (N. Y.) 263.

52. *England*. — *Webber v. Stan-*

ley, 10 L. T. 417; *Martin v. Drinkwater*, 2 Beav. 215; *Charter v. Charter*, L. R. 7 H. L. 364.

*Canada*.—*Davidson v. Boomer*, 15 Grant Ch. 218.

*United States*.—*Smith v. Bell*, 6 Pet. 68.

*Alabama*.—*Travis v. Morrison*, 28 Ala. 494.

*Connecticut*.—*Thompson v. Betts*, 74 Conn. 576, 51 Atl. 564, 92 Am. St. Rep. 235; *Wolfe v. Hatheway*, 70 Atl. 645.

*District of Columbia*.—*Kaiser v. Brandenburg*, 16 App. Cas. 310.

*Florida*.—*Lines v. Darden*, 5 Fla. 51.

*Georgia*.—*White v. Holland*, 92 Ga. 216, 18 S. E. 17, 44 Am. St. Rep. 87.

*Illinois*.—*Smith v. Dennison*, 112 Ill. 367; *Bishop v. Morgan*, 82 Ill. 351, 25 Am. Dec. 327; *Hawhe v. Chicago & W. I. R. Co.*, 165 Ill. 561, 46 N. E. 240; *Armstrong v. Barber*, 88 N. E. 246; *Felkel v. O'Brien*, 231 Ill. 329, 83 N. E. 170; *Hollenbeck v. Smith*, 231 Ill. 484, 83 N. E. 206; *Dearlove v. Otis*, 99 Ill. App. 99.

*Indiana*.—*Whiteman v. Whiteman*, 152 Ind. 263, 53 N. E. 225; *Stevenson v. Druley*, 4 Ind. 519; *Jackson v. Hoover*, 26 Ind. 511.

*Kansas*.—*Donohue v. Donohue*, 54 Kan. 136, 37 Pac. 998; *Ernst v. Foster*, 58 Kan. 438, 49 Pac. 527.

*Kentucky*.—*Henry v. Henry*, 81 Ky. 342.

*Louisiana*.—*Succession of Thorame*, 12 La. Ann. 384.

*Maryland*.—*Walston v. White*, 5 Md. 297.

*Massachusetts*.—*Crocker v. Crocker*, 11 Pick. 252.

*Mississippi*.—*Gilliam v. Chancellor*, 43 Miss. 437, 5 Am. Rep. 498.

*Missouri*.—*Riggs v. Myers*, 20 Mo. 239; *McMahan v. Hubbard*, 217 Mo. 624, 118 S. W. 481.

*Nebraska*.—*Little v. Giles*, 25 Neb. 313, 41 N. W. 186.

*New Hampshire*.—*Goodhue v. Clark*, 37 N. H. 525; *Lummis v. Mitchell*, 34 N. H. 39.

*New Jersey*.—*Halsted v. Meeker's Exrs.*, 18 N. J. Eq. 136; *Benham v. Hendrickson*, 32 N. J. Eq. 441; *Leigh v. Savidge*, 14 N. J. Eq. 124.

*New Mexico*.—*Perea v. Barela*, 5 N. M. 458, 23 Pac. 766.

*New York*.—*In re Miner's Will*, 72 Hun 568, 25 N. Y. Supp. 537, affirmed, 146 N. Y. 121, 40 N. E. 788; *Terpening v. Skinner*, 30 Barb. 373, affirmed, 29 N. Y. 505; *Ex parte Hornby*, 2 Bradf. 420; *Mason v. Mason*, 2 Sandf. Ch. 432; *Williams v. Crary*, 4 Wend. 443.

*North Carolina*.—*Woods v. Woods*, 55 N. C. (2 Jones' Eq.) 420; *Lowe v. Carter*, 55 N. C. (2 Jones' Eq.) 377.

*Ohio*.—*Painter v. Painter*, 18 Ohio 247, 265; *Youtsey v. Bowman*, 18 Ohio Dec. 577.

*Oregon*.—*Moreland v. Brady*, 8 Or. 303, 34 Am. Rep. 581.

*Pennsylvania*.—*In re Barr's Estate*, 2 Pa. St. 428, 45 Am. Dec. 608; *Rewalt v. Ulrich*, 23 Pa. St. 388; *In re Hermann's Estate*, 220 Pa. St. 52, 69 Atl. 285; *Crick's Estate*, 35 Pa. Super. 39.

*South Carolina*.—*Hall v. Hall*, 8 Rich. L. 407; *Schoppert v. Gillam*, 6 Rich. Eq. 83.

*Texas*.—*Hunt v. White*, 24 Tex. 643; *Peet v. Commerce & E. St. R. Co.*, 70 Tex. 522, 8 S. W. 203.

*Vermont*.—*Holmes v. Holmes*, 36 Vt. 525.

*Virginia*.—*Wootton v. Redd's Exrs.*, 12 Gratt. 196.

*Wisconsin*.—*In re Ohse's Will*, 119 N. W. 93; *In re Donges' Estate*, 103 Wis. 497, 79 N. W. 786, 74 Am. St. Rep. 885.

*Reason for Rule*.—*Hunt v. White*, 24 Tex. 643.

*Duty of Courts To Consider Such Evidence*.—*Frick v. Frick*, 82 Md. 218, 33 Atl. 462.

*Weight of Such Circumstances*.—*Currie v. Murphy*, 35 Miss. 473.

"A will ambiguous or uncertain on its face should be construed in the light of the circumstances which surrounded the testator when it was made, including the situation and condition of his estate and of his family and beneficiaries and their mutual relations; and, therefore, a demurrer which is addressed solely to the legal effect of the written instrument, and disregards any possible modifying influence of legitimate evidence *aliunde*, ought to be

**Interpretation** of the language used is the office of such evidence,<sup>53</sup> and it is never admissible to import into a will an intention different from that expressed.<sup>54</sup>

b. *Exception*.—In spite of the general nature of the rule as stated above many of the cases engraft upon it this exception—that where the will is plain, simple, and unambiguous upon its face, no evidence of the surrounding circumstances can be admitted.<sup>55</sup>

overruled.” *Fritsche v. Fritsche*, 75 Conn. 285, 53 Atl. 585.

**To Show Execution of Power.** In determining whether a testator executed a power when making his will, it is competent for the court to compare the dispositions of the will with his own individual property to determine his intention in the matter. *White v. Hicks*, 33 N. Y. 383.

53. *In re Grainger*, L. R. (1900) 2 Ch. Div. 756; *Lenz v. Sens*, 27 Tex. Civ. App. 442, 66 S. W. 110; *Allen v. Allen*, 18 How. (U. S.) 385; *Fairfield v. Lawson*, 50 Conn. 501, 47 Am. Rep. 669; *Allan v. Vanmeter's Devisees*, 1 Met. (Ky.) 264; *Griscom v. Evens*, 40 N. J. L. 402, 29 Am. Rep. 251.

“The rule is this: where the language of the testator is plain and unambiguous such language must govern, and therefore extrinsic evidence is inadmissible to show that he meant something different from what his language imports; but any evidence is admissible, which, in its nature and effect, simply explains what the testator has written; ‘in other words, the question in expounding a will is not what the testator meant as distinguished from what his words express; but simply what is the meaning of his words?’” *Walston's Lessee v. White*, 5 Md. 297.

54. *Connecticut*.—*Spencer v. Higgins*, 22 Conn. 521.

*District of Columbia*.—*Atkins v. Best*, 27 App. Cas. 148.

*Illinois*.—*Engelthaler v. Engelthaler*, 196 Ill. 230, 63 N. E. 669; *Hollenbeck v. Smith*, 231 Ill. 484, 83 N. E. 206.

*Indiana*.—*Dennis v. Holsapple*, 148 Ind. 297, 47 N. E. 631, 62 Am. St. Rep. 526, 46 L. R. A. 168.

*Kentucky*.—*Stephen v. Walker*, 8 B. Mon. 600.

*Louisiana*.—*Succession of Quinlan*, 118 La. 602, 43 So. 249.

*Michigan*.—*Kinney v. Kinney*, 34 Mich. 250.

*Missouri*.—*McQueen v. Lilly*, 131 Mo. 9, 31 S. W. 1043.

*New Jersey*.—*Griscom v. Evans*, 40 N. J. L. 402, 29 Am. Rep. 251.

*Pennsylvania*.—*Thompson v. Kaufman*, 9 Pa. Super. 305.

55. *Illinois*.—*Heslop v. Gatton*, 71 Ill. 528; *Brownfield v. Wilson*, 78 Ill. 470.

*Missouri*.—*Webb v. Hayden*, 166 Mo. 39, 65 S. W. 760.

*New Jersey*.—*Brearley v. Brearley*, 9 N. J. Eq. 21.

*New York*.—*Myers v. Eddy*, 47 Barb. 263; *Ladies Union Benev. Soc. v. VanNatta*, 43 Misc. 217, 88 N. Y. Supp. 413; *Matter of Wells*, 113 N. Y. 396, 21 N. E. 137, 10 Am. St. Rep. 457; *Rapalye v. Rapalye*, 27 Barb. 610.

*North Carolina*.—*Williamson v. Williamson*, 57 N. C. (4 Jones' Eq.) 281.

*Rhode Island*.—*Perry v. Hunter*, 2 R. I. 80.

*South Carolina*.—*Reynolds v. Reynolds*, 65 S. C. 390, 43 S. E. 878; *Rogers v. Morrell*, 64 S. E. 143.

“In the construction of the will, the court will put itself as far as possible in the position of the testator, by taking into consideration the circumstances surrounding him at the time of the execution of the will. But this rule does not apply when the clearness of the language made use of is such that there is no room for doubt.” *Dearlove v. Otis*, 99 Ill. App. 99.

“Where the language of a will is clear and unambiguous, a doubt suggested by extrinsic evidence of the testator's circumstances at the time he wrote the will cannot be permitted to affect the construction of



c. *Limitations of Rule.*—It must be carefully noticed that the evidence which is admissible under this rule is confined solely to circumstantial evidence by which the court may be aided in construing the language used. Direct evidence of intention as of the testator's declarations is never admitted.<sup>56</sup>

d. *Facts Which May Be Shown.*—Any fact having a bearing upon the meaning with which the language was used is admissible.<sup>57</sup> So the relationship of the parties,<sup>58</sup> the financial circumstances of the family,<sup>59</sup> the quantity and character of the estate,<sup>60</sup> the manner in which it was acquired,<sup>61</sup> or any motives which might be likely to influence the testator<sup>62</sup> in disposing of his property may be shown.

e. *To Raise an Ambiguity.*—It is only by the admission of evidence of the surrounding circumstances that the existence of a

the will." *In re Allshouse's Estate*, 23 Pa. Super. 146.

56. *Stephen v. Walker*, 8 B. Mon. (Ky.) 600; *Alexander v. Bates*, 127 Ala. 328, 28 So. 415.

"The distinction between evidence which is ancillary only to a right understanding of the words to which it is applied, and which is, therefore, simply *explanatory of the words themselves*, and evidence which is applied to prove *intention itself*, as an independent fact, is broad and palpable.' 'Where the inquiry is, what the words of a will express, as distinguished from what the testator meant by the words, evidence of *declarations of intention*, of *instructions* given by the testator for preparing his will, or any evidence of a similar nature, is obviously inapplicable to the point of inquiry.'" *Rosborough v. Hemphill*, 5 Rich. Eq. (S. C.) 95.

57. *Clarke v. Clarke*, 46 S. C. 230, 24 S. E. 202.

58. *German Pioneer Verein v. Meyer*, 70 N. J. Eq. 192, 63 Atl. 835; *Hurst v. Von de Veld*, 158 Mo. 239, 58 S. W. 1056; *Turner v. Burr*, 141 Mich. 106, 104 N. W. 379; *Barber v. Pittsburgh*, etc. R. Co., 166 U. S. 83.

"It is proper to consider the environments and the natural objects of the testator's bounty at the time of the making of the will, to enable the court to arrive at the intention of the testator in the construction of the will." *McClelland's*

*Exrs. v. McClelland* (Ky.), 116 S. W. 730.

59. *Edens v. Williams' Exrs.*, 7 N. C. (3 Murph. L.) 27; *Watkins v. Flora*, 30 N. C. (8 Ired. L.) 374; *Bond's Appeal*, 31 Conn. 183.

60. *Billingslea v. Moore*, 14 Ga. 370; *Simmons v. Simmons*, 73 Ala. 235; *Marshall's Appeal*, 2 Pa. St. 388; *Schlottman v. Hoffman*, 73 Miss. 188, 18 So. 893, 55 Am. St. Rep. 527.

"Evidence of the condition of a testator's property at the time the will is made, as well as at the time it takes effect, may throw light upon the meaning and effect of the language used in expressing his intention, and is therefore admissible for that purpose, in connection with the written instrument." *Jacobs v. Butten*, 79 Conn. 360, 65 Atl. 150.

61. *Blair v. Scribner*, 65 N. J. Eq. 498, 57 Atl. 318.

62. *Wardner v. Seventh Day Baptist Memorial Board*, 232 Ill. 606, 83 N. E. 1077.

In construing a will, extrinsic circumstances as to the age of the devisee and his relations with the testator are admissible. *Lowe v. Lord Huntingtower*, 4 Russ. 532, 2 L. J. (O. S.) K. R. 164, 26 R. R. 633, 38 Eng. Reprint 910.

**Contract With Devisee.**—*George v. George*, 186 Mass. 75, 71 N. E. 85.

**Affection for Children.**—*Mersman v. Mersman*, 136 Mo. 244, 37 S. W. 909. *Contra*, *Wilson v. Bull*, 97 Md. 128, 54 Atl. 629.

latent ambiguity<sup>63</sup> can be shown, and it follows that they are always admissible for this purpose.<sup>64</sup>

F. DIRECT EVIDENCE OF INTENTION. — a. *In General.* — The cases are in hopeless conflict upon the question of when direct evidence of a testator's intention — as distinguished from evidence of the surrounding circumstances which is always admissible — is admissible. The rule that where an ambiguity is latent it may be explained but where it is patent it cannot be<sup>65</sup> is of little value as it has its exceptions in reference to both its branches.<sup>66</sup> Moreover, many of the cases in holding extrinsic evidence admissible fail to specify the nature of the evidence admitted and hence it is impossible to say upon what theory they are decided.

b. *Rule Stated.* — It may be laid down as a general rule that all direct evidence the object of which is to show that the testator's intention was different from that signified by him in the use of the words in his will is inadmissible.<sup>67</sup>

c. *Declarations.* — Declarations of a testator are inadmissible to

63. *Tudor v. Terrel*, 2 Dana (Ky.) 47; *Mitchell v. Mitchell*, 6 Md. 224; *Halsted v. Meeker's Exrs.*, 18 N. J. Eq. 136; *McMahan v. Hubbard*, 217 Mo. 624, 118 S. W. 48; *Daugherty v. Rogers*, 119 Ind. 254, 20 N. E. 779, 3 L. R. A. 847.

64. *Vernor v. Henry*, 3 Watts 385; *In re Metzger's Estate*, 222 Pa. St. 276, 71 Atl. 96.

"It is suggested that there is a latent ambiguity in the will, and that extrinsic evidence of the testator's intention is admissible. On such a claim as this the initial matter for consideration is whether a latent ambiguity exists at all. If there be none, no extrinsic evidence of intention can be given. But, in order to ascertain whether there is a latent ambiguity, whether, in fact, the words of the will are applicable indifferently to more than one person, evidence of the surrounding circumstances and of the state of knowledge and belief of the testator is admissible." *Henderson v. Henderson*, (1905) 1 Ir. Rep. 353.

65. See *infra*, XIX, 2, G, a.

**So-Called Intermediate Class.**

"The difficulty of distinguishing between patent and latent ambiguities led Judge Story to suggest that there was an intermediate class, partaking of the nature of both patent and latent ambiguities — i. e., 'when the words are all sensible and have

a settled meaning, but at the same time consistently admit of two interpretations, according to the subject-matter in the contemplation of the parties.'" *Schlottman v. Hoffman*, 73 Miss. 188, 18 So. 893, 55 Am. St. Rep. 527.

66. *Schlottman v. Hoffman*, 73 Miss. 188, 18 So. 893, 55 Am. St. Rep. 527.

**Patent Ambiguities Which May Be Explained.** — "It appears, that when the terms of a will are uncertain, parol evidence is inadmissible in proof of a testator's intention, except in all cases of latent ambiguity, and in these cases of patent ambiguity, where it may be used in support of the will by repelling a legal and technical presumption raised against express terms, where it is offered to rebut an equity or trust raised by implication, and where it is offered to make definite the object of the testator's bounty (the person) or the subject of disposition (the property), it being evident that a bequest has been distinctly made by the testator to some person, and of one of two or more particular things." *Billingslea v. Moore*, 14 Ga. 370. And see *Warner v. Brinton*, 29 Fed. Cas. No. 17,179.

67. *Grimes' Exrs. v. Harmon*, 35 Ind. 198, 9 Am. Rep. 690. And see cases cited *supra*, XIX, 2, B.

aid in the construction of his will,<sup>68</sup> except in explanation of latent ambiguities<sup>69</sup> as subsequently noted.

**Instructions Given by the Testator to the scrivener cannot be shown.**<sup>70</sup>

**G. RULES APPLIED.** — a. *Latent and Patent Ambiguities.* — Many

**68.** *United States.* — *Stevens v. Vancleve*, 4 Wash. C. C. 262, 23 Fed. Cas. No. 13,412.

*Alabama.* — *Foscue v. Lyon*, 55 Ala. 440.

*California.* — *Matter of Gilmore*, 81 Cal. 240, 22 Pac. 655.

*Connecticut.* — *Pinney v. Newton*, 66 Conn. 141; 33 Atl. 591.

*Delaware.* — *Walter v. Miller*, 5 Har. 151.

*District of Columbia.* — *Kaiser v. Brandenburg*, 16 App. Cas. 310; *McAleer v. Schneider*, 2 App. Cas. 461.

*Georgia.* — *Welman v. Neufville*, 75 Ga. 124.

*Illinois.* — *Hubbard's Estate v. Hubbard*, 99 Ill. App. 555, *affirmed*, 198 Ill. 621, 64 N. E. 1038; *Hollenbeck v. Smith*, 231 Ill. 484, 83 N. E. 206; *Hoffner v. Custer*, 237 Ill. 64, 86 N. E. 737; *Brownfield v. Wilson*, 78 Ill. 467.

*Indiana.* — *Pocock v. Redinger*, 108 Ind. 573, 9 N. E. 473, 58 Am. Rep. 71.

*Iowa.* — *Scott v. Scott*, 137 Iowa 239, 114 N. W. 881.

*Kentucky.* — *Cochran v. Lee's Admr.*, 27 Ky. L. Rep. 64, 84 S. W. 337; *Chenault's Guardian v. Chenault's Exrs.*, 10 Ky. L. Rep. 840, 9 S. W. 775; *s. c.*, 88 Ky. 83, 11 S. W. 424; *Weston v. Foster*, 7 Met. 297; *Osborne v. Varney*, 7 Met. 301.

*Maryland.* — *Frick v. Frick*, 82 Md. 218, 33 Atl. 462; *Shipley v. Mercantile Tr. & Dep. Co.*, 102 Md. 649, 62 Atl. 814.

*Massachusetts.* — *Denfield, Petitioner*, 156 Mass. 265, 30 N. E. 1018; *Foster v. Smith*, 156 Mass. 379, 31 N. E. 291; *Brown v. Saltonstall*, 3 Met. 423; *Farrar v. Ayres*, 5 Pick. 404; *Crocker v. Crocker*, 11 Pick. 252; *Gould v. Chamberlain*, 184 Mass. 115, 68 N. E. 39.

*Michigan.* — *Turner v. Burr*, 141 Mich. 106, 104 N. W. 379; *Forbes v. Darling*, 94 Mich. 621, 54 N. W. 385.

*Mississippi.* — *Magee v. McNeil*, 41 Miss. 17, 90 Am. Dec. 354.

*New York.* — *Mann v. Mann*, 14 Johns. 1; *Williams v. Freeman*, 83 N. Y. 561.

*Tennessee.* — *Hennegar v. Deadrick* (Tenn. Ch. App.), 54 S. W. 138.

*Texas.* — *St. Paul's Sanitarium v. Freeman* (Tex. Civ. App.), 111 S. W. 443; *Peet v. Commerce & E. St. R. Co.*, 70 Tex. 522, 8 S. W. 203.

*Vermont.* — *Wells v. Wells' Estate*, 37 Vt. 483.

*Virginia.* — *Senger v. Senger*, 81 Va. 687; *App v. App*, 106 Va. 253, 55 S. E. 672; *Wootton v. Redd's Exr.*, 12 Gratt. 196.

#### **Memorandum Attached to Will.**

Where a will contains written at its bottom a statement by the testator as to how he wished certain property to be divided, it was held that since this was not executed it was a mere declaration of the testator and was inadmissible to control the construction of his will. *Hosea v. Skinner*, 32 Misc. 653, 67 N. Y. Supp. 527.

**Written Memorandum** made by the testator before executing his will cannot be received to control, alter or modify in any respect his intentions as clearly expressed in his will. *Wilson v. Bull*, 97 Md. 128, 54 Atl. 629.

**69.** *Paton v. Ormerod*, 61 L. J., P. 120, (1892) P. 247, 66 L. T. 381; *Ladies Union Benev. Soc. v. VanNatta*, 43 Misc. 217, 88 N. Y. Supp. 413; *Lehnhoff v. Theine*, 184 Mo. 346, 83 S. W. 469; *Phelps' Estate*, 4 Pa. Dist. 258; *Cotton v. Smithwick*, 66 Me. 360.

"In the case of a latent ambiguity in a will, explanatory declarations made by the testator at the time of the execution of it are admissible in evidence; so also are previous professions of the testator, indicative of his design to give his property in a particular way." *Vernor v. Henry*, 3 Watts (Pa.) 385.

**70.** *Zabriske v. Huyler*, 62 N. J. Eq. 697, 51 Atl. 197; *M'Allister v. Tate*, 11 Rich. L. (S. C.) 509; *Cdf.*

cases state the fundamental rule as being that latent ambiguities<sup>71</sup> may be explained by parol evidence,<sup>72</sup> but patent ambiguities cannot<sup>73</sup> without examining the principles involved or differentiating between evidence which is admissible and that which is not admissible.<sup>74</sup> It is also commonly said that when an ambiguity is raised by extrinsic evidence, further evidence is admissible to remove it.<sup>75</sup>

*fin v. Elliott*, 9 Rich. Eq. (S. C.) 244; *Long v. Duvall*, 6 B. Mon. (Ky.) 219; *Griscom v. Evens*, 40 N. J. L. 402, 29 Am. Rep. 251; *In re Donohue's Estate*, 46 Misc. 370, 94 N. Y. Supp. 1087; *Hill v. Felton*, 47 Ga. 455, 15 Am. Rep. 643.

Testimony of the one who drew the will, which is unambiguous on its face, is not admissible to prove an intent as to the disposition of the property different from that expressed by the language of the will. *Defreese v. Lake*, 109 Mich. 415, 67 N. W. 505, 32 L. R. A. 744.

**71.** *Trustees v. Sturgeon*, 9 Pa. St. 321; *Hand v. Hoffman*, 8 N. J. L. 71.

**72.** *England*.—*Miller v. Travers*, 8 Bingh. 244, 21 E. C. L. 288.

*Connecticut*.—*Brainerd v. Cowdrey*, 16 Conn. 1.

*Illinois*.—*Giger v. Busch*, 122 Ill. App. 13; *Bradley v. Rees*, 113 Ill. 327, 55 Am. Dec. 422.

*Massachusetts*.—*Sargent v. Towne*, 10 Mass. 301.

*Mississippi*.—*Love v. Buchanan*, 40 Miss. 758.

*Missouri*.—*Willard v. Darrah*, 168 Mo. 660, 68 S. W. 1023, 90 Am. St. Rep. 1023.

*New Hampshire*.—*Trustees v. Peaslee*, 15 N. H. 317.

*New Jersey*.—*Hand v. Hoffman*, 8 N. J. L. 71.

*New York*.—*Mann v. Mann*, 1 Johns. Ch. 231.

*North Carolina*.—*Taylor v. Maris*, 90 N. C. 619; *President, etc. Deaf & D. Inst. v. Norwood*, 45 N. C. (Busb. Eq.) 65.

*Pennsylvania*.—*Wusthoff v. Dracon*, 3 Watts 240.

*Virginia*.—*Hawkins v. Garland*, 76 Va. 149; *Senger v. Senger*, 81 Va. 687.

*West Virginia*.—*Wilson v. Perry*, 29 W. Va. 169, 1 S. E. 302.

**Georgia Code Provision.**—"While the general rule is that only latent

ambiguities are explainable by parol evidence, under our code either a patent or a latent ambiguity may be so explained. Civil Code, § 3325." *Oliver v. Henderson*, 121 Ga. 836, 49 S. E. 743.

**73.** *Alabama*.—*Johnson v. Johnson*, 32 Ala. 637.

*Illinois*.—*Engelthaler v. Engelthaler*, 196 Ill. 230, 63 N. E. 669.

*Kentucky*.—*Smith v. Smith*, 24 Ky. L. Rep. 1964, 72 S. W. 766; *Thomas v. Scott*, 24 Ky. L. Rep. 2031, 72 S. W. 1129.

*Missouri*.—*Davis v. Davis*, 8 Mo. 56.

*New York*.—*Hyatt v. Pugsley*, 23 Barb. 285.

*North Carolina*.—*Field v. Eaton*, 16 N. C. (1 Div. Eq.) 283; *President, etc. Deaf & D. Inst. v. Norwood*, 45 N. C. (Busb. Eq.) 65; *Taylor v. Maris*, 90 N. C. 619.

*Ohio*.—*Clark v. Trustees*, 3 Ohio C. C. 152.

*Rhode Island*.—*Lewis v. Douglass*, 14 R. I. 604.

*South Carolina*.—*Holbrook v. Gaillard*, *Riley Eq.* 167; *Jennings v. Talbert*, 77 S. C. 454, 58 S. E. 420.

**74. Example.**—"But where there is a latent ambiguity in the language of the will, or the will contains inconsistent provisions, extrinsic evidence is admissible to enable the court to ascertain and give effect to the intention of the testator as expressed in the will, when read in the light of all the surrounding circumstances as they existed at the time the will was executed." *Hanley v. Kraftczyk*, 119 Wis. 352, 96 N. W. 820.

**75.** *Pickering v. Pickering*, 50 N. H. 349.

"Whenever, therefore, in applying a will to the objects or subjects therein referred to, extrinsic facts appear which produce or develop a latent ambiguity, not apparent upon the face of the will itself, since the

b. *Meaning of Words Used.* — (1.) *Presumption.* — There is a presumption that a testator used the words in his will in their ordinary, popular meaning and without any peculiar significance,<sup>76</sup> and according to the meaning given them at the place of his domicil.<sup>77</sup>

(2.) *Parol Evidence.* — (A.) *TRADITIONAL RULE.* — (a.) *In General.* The old rule was that the clear meaning of the words as used in a will could not be disturbed by extrinsic evidence of intention, and many cases still support this view.<sup>78</sup> Thus such words as "children,"<sup>79</sup> "heirs,"<sup>80</sup> or "nieces"<sup>81</sup> have a well established meaning

ambiguity is disclosed by the introduction of extrinsic facts, the court may inquire into every other material extrinsic fact or circumstance to which the will certainly refers, as well as to the relation occupied by the testator to those facts, to the end that a correct interpretation of the language actually employed by the testator in his will may be arrived at." *Daugherty v. Rogers*, 119 Ind. 254, 20 N. E. 779, 3 L. R. A. 847.

76. *Daugherty v. Rogers*, 119 Ind. 254, 20 N. E. 779, 3 L. R. A. 847; *Cromer v. Pinckney*, 3 Barb. Ch. (N. Y.) 466; *Wolfe v. Hatheway* (Conn.), 70 Atl. 645; *Kaiser v. Brandenburg*, 16 App. Cas. (D. C.) 310; *Ferguson v. Mason*, 2 Sneed (Tenn.) 618.

**Will Drawn by Ignorant Person.** "The fact that the paper was evidently drawn by an ignorant or unskilled person must also be considered by the courts, and the language employed by such a person given a less rigid and technical interpretation than where the evidence of skill and technical knowledge in the writer is apparent upon the face of the instrument." *Flynn v. Holman*, 119 Iowa 731, 94 N. W. 447. See also *Brownfield v. Wilson*, 78 Ill. 470.

77. *Gurard v. Gurard*, 73 Ga. 506.

78. *Myers v. Eddy*, 47 Barb. (N. Y.) 263; *Blair v. Scribner*, 65 N. J. Eq. 498, 57 Atl. 318.

Where a testator directed that all his just "debts and expenses" were to be satisfied out of certain legacies, parol evidence was held inadmissible to show that by the word "expenses" the testator intended to include the expenses of settling the estate. *Accounts of Exrs. of Haines*, 8 N. J. Eq. 506.

Where a testator used a Latin phrase in his will incorrectly, it was held that an affidavit filed by consent giving the language of the testator, after the execution of the will, as to the meaning of these words, was inadmissible. *Archer v. Morris*, 61 N. J. Eq. 152, 47 Atl. 275.

79. Where property is left to a third person's children, evidence is inadmissible to show that the testator intended the property to go to such person's children by his first wife, who was the testator's sister. *In re Miller's Estate* (No. 1), 26 Pa. Super. 443.

Parol evidence is admissible to show that by the term "my children" in a will the testator meant "my sons." *Weatherhead v. Baskerville*, 11 How. (U. S.) 329. And see *Fouke v. Kemp*, 5 Har. & J. (Md.) 135.

**Illegitimate Children Never Included.** — *Flora v. Anderson*, 67 Fed. 182; *Shearman v. Angel, Bailey* (S. C.) 351. See also *Appel v. Byers*, 98 Pa. St. 479; *Ferguson v. Mason*, 2 Sneed (Tenn.) 618.

80. *Aspden's Estate*, 2 Wall. Jr. 368, 2 Fed. Cas. No. 589; *Heirs of Sharp v. Kleinpeter*, 7 La. Ann. 264; *In re Lester's Estate*, 115 Iowa 1, 87 N. W. 654.

Evidence of the attorney under whose direction the will was drawn, that the testator did not wish a certain person to receive any of his property, was held inadmissible where such person came within the description of the will as an heir at law, although at the time the testator died the law would not have made him a heir at law. *Lincoln v. Perry*, 149 Mass. 368, 21 N. E. 671, 4 L. R. A. 215.

81. *In re Holt's Estate*, 146 Cal.

which cannot be affected or altered to suit the particular case.

(b.) *Words Rendered Unintelligible by Context.* — Where from the context itself it appears that the words could not have been intended to be used in their primary sense, extrinsic evidence is admissible to show in what sense they were used by the testator,<sup>82</sup> but this evidence is apparently limited to circumstances and does not authorize the admission of declarations of intention.<sup>83</sup>

(c.) *Vague and Uncertain Terms.* — Evidence of the surrounding circumstances is admissible to show what was intended by the testator in using words having a general and indefinite meaning.<sup>84</sup>

77, 79 Pac. 585; *Cromer v. Pinckney*, 3 Barb. Ch. (N. Y.) 466.

Where the testator left property to her "nieces," parol evidence was held inadmissible to show that she intended to include in such description the stepdaughter of her brother. *In re Holt's Estate*, 146 Cal. 77, 79 Pac. 585.

**82.** *Doe v. Earl of Jersey*, 3 Barn. & C. 870, 10 E. C. L. 253; *Scott v. Neeves*, 77 Wis. 305, 45 N. W. 421; *Davidson v. Boomer*, 15 Grant Ch. (Can.) 218; *Cromer v. Pinckney*, 3 Barb. Ch. (N. Y.) 466.

"If to give the words employed their strict, primary meaning renders the will insensible, or unmeaning, with reference to extrinsic facts and circumstances, courts will then look into all the extrinsic circumstances that surrounded the testator at the time, to see whether the language of the will can be rendered sensible with reference to those circumstances by giving the words used some other proper but secondary meaning." *Daugherty v. Rogers*, 119 Ind. 254, 20 N. E. 779, 3 L. R. A. 847.

Where the testator devised property to "my heirs in portions according to the laws and statutes of the state of New York, the same as if I had died intestate," it was held that there was an ambiguity which would justify the admission of extrinsic evidence. *Armstrong v. Sheldon*, 43 App. Div. 248, 60 N. Y. Supp. 1.

**83.** Parol evidence of the verbal declarations of the testator is inadmissible to prove what he meant by the word "share," used in various items of his will. *Armistead v. Armistead*, 32 Ga. 597.

**84.** *Illinois.* — *Morrall v. Morrall*, 236 Ill. 640, 86 N. E. 578.

*Iowa.* — *Hopkins v. Grimes*, 14 Iowa 73 ("homestead").

*Kentucky.* — *Thomas v. Scott*, 24 Ky. L. Rep. 2031, 72 S. W. 1129 (house and lot); *P'Simer v. Steele*, 32 Ky. L. Rep. 647, 106 S. W. 851 ("home farm").

*Maryland.* — *Warner v. Miltenberger*, 21 Md. 264, 83 Am. Dec. 573 ("lot"); *Frick v. Frick*, 82 Md. 218, 33 Atl. 462 ("the balance of my estate").

*Missouri.* — *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302, (devise to a certain person "and family"); *Thomson v. Thomson*, 115 Mo. 56, 21 S. W. 1085, 1128 ("the land on which I now reside").

*New Jersey.* — *Holton v. White*, 23 N. J. L. 330 ("by plantation").

*New York.* — *Ryerss v. Wheeler*, 22 Wend. 148 (to explain the term "back lands").

*Ohio.* — *Black v. Hill*, 32 Ohio St. 313 ("my two farms").

*Virginia.* — *Reno v. Davis*, 4 Hen. & M. 283 (bequest of a negro woman and her "increase").

*Contra.* — *Jackson v. Still*, 11 Johns. (N. Y.) 201 ("the farm which I now occupy").

**Words Possible of Two Interpretations.** — "Where the words in question are all sensible, and have a settled meaning, but at the same time admit of two interpretations, according to the subject-matter in contemplation, a class intermediate between latent and patent ambiguities has been recognized by authority; but the more satisfactory solution of the difficulty is to assign ambiguities of this character to the class of latent ambiguities." *Schlottman v.*

**Declarations** of the testator have also been admitted in such cases.<sup>85</sup>

(d.) *Words of Local Signification.* — Words having a peculiar meaning in the locality may be shown to have been used by the testator with such a meaning.<sup>86</sup>

(e.) *Nicknames.* — The habit of the testator to refer to a person by a nickname used by him in his will may be shown.<sup>87</sup>

(f.) *Abbreviations.* — Abbreviations, ciphers, and foreign words may be explained.<sup>88</sup>

(B.) **LIBERAL RULE.** — Many cases at the present time are breaking away from the former strict and inflexible rule and are allowing the use of evidence to show in what sense the testator used the words.<sup>89</sup>

Hoffman, 73 Miss. 188, 18 So. 893, 55 Am. St. Rep. 527.

85. *Hoffner v. Custer*, 237 Ill. 64, 86 N. E. 737; *Vandiver v. Vandiver*, 115 Ala. 328, 22 So. 154.

Where a testator devised his house and lot, the word "lot" was held to be ambiguous; and evidence of the surrounding circumstances and the declarations of the testator made at the time he executed the will were admitted to show whether he used the word in a technical sense or with a broader meaning. *McElrath v. Haley*, 48 Ga. 641.

86. "Where a testator devises his lands situate in a particular parish or place, parol evidence is admissible to show what lands were then reputed to lie in such parish or place for the purpose of determining the sense of the description used by the testator. Therefore, where a testator devised all his messuages and lands in the parish of D, parol evidence was admitted to show that, although in point of fact some part of his land was situate in the parish of W, yet that, at the date of his will and death, that part was generally reputed to lie in D." *Anstee v. Nelms*, 1 H. & N. 225, 26 L. J., Exch. 5, 4 W. R. 612.

87. *Hart v. Marks*, 4 Bradf. (N. Y.) 161; *Hiscocks v. Hiscocks*, 5 Mees. & W. (Eng.) 363; *Hockensmith v. Slusher*, 26 Mo. 237; *Chambers v. Watson*, 56 Iowa 676, 10 N. W. 239.

A legacy was left by the testator to Samuel Powell. The court admitted extrinsic evidence to show that the testator used the name as

a nickname, the real name of the person being William Powell, and that the legacy was not intended for another person whose real name was Samuel Powell. *Powell v. Biddle*, 2 Dall. (U. S.) 70.

"The employment—at least if it be habitual—by a testator of doubtful words in a particular sense is a fact provable by parol evidence, not to contradict but to explain ambiguous or otherwise insensible expressions." *Flood v. Flood*, (1902) 1 Irish Rep. 538.

88. A testator devised property by the term "mod." Extrinsic evidence in the shape of the testimony of experts in the profession of the decedent was admitted to show that by this term the testator, who was a sculptor, meant models. *Goblet v. Beechey*, 2 Russ. & M. 624, reversing 8 Sim. 24, 39 Eng. Reprint 532.

Where a will is written in German and a dispute arises as to its correct translation, testimony of experts who are learned in the language is admissible. *Lehnhoff v. Theine*, 184 Mo. 346, 83 S. W. 469.

89. *Kohl v. Frederick*, 115 Iowa 517, 88 N. W. 1055; *Robb's Estate*, 37 S. C. 19, 16 S. E. 241; *Smith v. Kimball*, 62 N. H. 606; *Gould v. Chamberlain*, 184 Mass. 115, 68 N. E. 39; *Hoffner v. Custer*, 237 Ill. 64, 86 N. E. 737; *Wolfe v. Hatheway* (Conn.), 70 Atl. 645. *In re Wheeler*, 32 App. Div. 183, 52 N. Y. Supp. 943.

"Nephews." — The testator left property to his "nephew." He had a nephew of his own and his wife had a nephew of the same name. It was held that "where a word is

*c. Identification of Beneficiary.*—(1.) **In General.**—Not only the surrounding circumstances<sup>90</sup> but even direct evidence of the testator's intention<sup>91</sup> is admissible to identify the beneficiary where extrinsic evidence raises a doubt as to the person referred to by the testator.

(2.) **Description Equally Applicable to Two Persons.**—Where the descriptive terms used are equally applicable to two or more persons, parol evidence is admissible not only of the surrounding cir-

used in a will as part of a description of a person specified by name, and is applicable to persons so named in an ordinary and popular sense, as well as in a strict and primary sense, an ambiguity is raised, and the court may receive evidence of the circumstances in which the testator was placed when he executed his will, and of the sense in which he was accustomed to use the word in order to ascertain the person indicated." *Grant v. Grant*, L. R. 2 P. & D. (Eng.) 8. And see *Sherrott v. Mountford*, L. R. 8 Ch. (Eng.) 928 (nephews of wife of testator held included in term); *Cromer v. Pinckney*, 3 Barb. Ch. (N. Y.) 466 (grandnephews included); In the Goods of Ashton, (1892) P. D. (Eng.) 83 (illegitimate nephew included).

Parol evidence is admissible to show that by the term "my daughter Elizabeth" the testator intended to describe one whom he had adopted as his daughter, although not legally. But in this case it appeared that there were no legal children. *Matter of Cahn*, 3 Redf. (N. Y.) 31.

Where it appears that a testator had no legitimate children parol evidence is admissible to show that by a devise to his children he meant his illegitimate children. See *Miller v. Miller*, 30 N. Y. Supp. 116.

"Parol evidence is admissible to show a devise of property by a street number was intended to include a contiguous lot not comprehended in it, but which had been inclosed with it, and was necessary for the occupation of the premises for the purpose for which they were devoted." *Clark v. Goodridge*, 51 Misc. 140, 100 N. Y. Supp. 824.

Property was devised to "my own

right heirs." It was held that these words were ambiguous and that evidence was admissible to show that the testator lived in Pennsylvania when the will was executed, that he had property in that state, and the particular meaning given to these words by the Pennsylvania law. *Guerard v. Guerard*, 73 Ga. 506.

90. *Wilson v. Stevens*, 59 Kan. 771, 51 Pac. 903; *The Second v. The First Cong. Soc.*, 14 N. H. 327; *Blundell v. Gladstone*, 11 Sim. 467, 1 Ph. 279, 12 L. J. Ch. 225, 5 Jur. 481, 59 Eng. Reprint 953; *Willard v. Darrach*, 168 Mo. 660, 68 S. W. 1023, 90 Am. St. Rep. 468.

"There seems to be no doubt that evidence dehors the will may be resorted to to identify the beneficiaries designated by the will. It is true that a bequest can only be made by a will. But the bequest here is made by the will, i. e., to the trustees. The evidence dehors is not to make a bequest, but to ascertain and identify the beneficiaries designated by the trust clause of the will." *Jay v. Lee*, 41 Misc. 13, 83 N. Y. Supp. 579.

91. *Gallup v. Wright*, 61 How. Pr. (N. Y.) 286; *Ex parte Hornby*, 2 Bradf. (N. Y.) 420; *Brownfield v. Brownfield*, 12 Pa. St. 136, 51 Am. Dec. 590.

"The declarations of the testator may be resorted to in cases of a latent ambiguity, which arises where there are two or more persons or things, each answering exactly to the person or thing described in the will. In such an event, parol evidence of what the testator said may be lawfully adduced to show which of them he intended; but such evidence will not be allowed to show that he meant a thing different from



cumstances<sup>92</sup> but also of the intention of the testator.<sup>93</sup> Declarations of the testator may be shown.<sup>94</sup>

(3.) **Description Applying to Several in Common but Inaccurate.** Where the description applies equally to several persons but each fails to accurately fill it in regard to the same matter, extrinsic evidence of all kinds is admissible.<sup>95</sup>

(4.) **Description Partly True as to Each.**—(A.) **STRICT RULE.**—Where the language used in naming the beneficiary applies partly to one person and partly to another, evidence of the surrounding circumstances is admissible,<sup>96</sup> but direct evidence of the testator's intention is inadmissible.<sup>97</sup>

that disclosed in the will." *Griscom v. Evens*, 40 N. J. L. 402.

In *Gilchrist v. Corliss* (Mich.), 118 N. W. 938, a declaration of intention to do something for a particular society was admitted to aid the court in identifying the beneficiary of a devise in the will.

92. *Second United Presby. Church v. First United Presby. Church*, 71 Neb. 563, 99 N. W. 252; *Bodman v. American Tract Soc.*, 9 Allen (Mass.) 447.

93. *Ward v. Epsy*, 6 Humph. (Tenn.) 447.

94. *Reynolds v. Whalan*, 16 L. J. Ch. (Eng.) 434; *Charter v. Charter*, L. R. 7 H. L. (Eng.) 364; *Hiscocks v. Hiscocks*, 5 Mees. & W. (Eng.) 363.

Cases of latent ambiguity may be classed under three heads. First, when the description contained in a written instrument, of the person, thing or place, intended, is applicable with equal certainty to each of several subjects. In such a case, and probably in no other, is general parol evidence of the intention of the testator admissible. And the reason of the rule is obvious, since it would be impossible to form any general, sensible rule of interpretation, by which courts could settle such question from the face of the will itself, and they would remain undetermined, if parol proof of intention were not permitted to go to the jury. *Stokeley v. Gordon*, 8 Md. 496.

95. *Careless v. Careless*, 19 Ves. 601, 1 Mer. 384, 15 R. R. 134, 34 Eng. Reprint 639 (devise to Robert Careless, my nephew, son of Joseph Careless. Two Roberts appeared,

one son of John and one son of Thomas Careless).

Where property was devised to "my well beloved nephews John and William Willard" and there were two sets of brothers by that name, one being grandnephews and the other grandsons of the testator, extrinsic evidence is admissible to show which persons were intended by the testator, since the description was partly correct and partly incorrect. *Willard v. Darrah*, 168 Mo. 660, 68 S. W. 1023, 90 Am. St. Rep. 468.

96. *Bernasconi v. Atkinson*, 10 Hare 345, 68 Eng. Reprint 959.

**Context Must First Be Examined.** *Smith v. Smith*, 1 Edw. Ch. (N. Y.) 189.

97. In *Goods of Chappell*, L. R. (1894) P. D. (Eng.) 98; *Bernasconi v. Atkinson*, 10 Hare 345, 68 Eng. Reprint 959; *Stokeley v. Gordon*, 8 Md. 496.

Where a devise was to "Anna Maria German, wife of Jonathan German," and Anna Maria was not the wife but the daughter of Jonathan German, and his wife's name was Catharine, it was held that the question of the intention of the testator must be determined from the construction of the instrument and not from the admission of extrinsic evidence. *Stokeley v. Gordon*, 8 Md. 496.

**Leading Case.**— "A testator devised lands to his son John H. for life; and from his decease, to the testator's grandson John H., eldest son of the said John H., for life; and on his decease, to the first son of the body of his said grandson John H. in tail-male, with other re-

(B.) **LIBERAL RULE.**—In the United States direct evidence is usually admitted in such cases.<sup>98</sup>

(5.) **Description True in Part Only.**—Where the description is true only in part, as where the name is correctly given but a mistake is made in stating the relationship of a devisee, extrinsic evidence of the surrounding circumstances is admissible.<sup>99</sup>

(6.) **Exclusion of Person Answering Description.**—In many courts, where it is shown that there is a person who exactly fills the description of the will, evidence to show that such person was not the person intended by the testator is inadmissible.<sup>1</sup>

mainders over. At the time of making the will, the testator's son John H. had been twice married; by his first wife he had one son, Simon, by his second wife an eldest son, John, and other younger children, sons and daughters: *Held*, that evidence of the instructions given by the testator for his will, and of his declarations, was not admissible to show which of these two grandsons was intended by the description in the will." *Hiscocks v. Hiscocks*, 5 Mees. & W. (Eng.) 363.

98. *In re Dominici's Estate*, 151 Cal. 181, 90 Pac. 448; *Wagner's Appeal*, 43 Pa. St. 102; *Smith v. Smith*, 4 Paige Ch. (N. Y.) 271.

Where a devise was "to Mary Smith, wife of Nathaniel Smith," and it appeared that Mary Smith's husband was named Abraham Smith and that Nathaniel Smith's wife was named Sarah, extrinsic evidence was admitted to show which person was intended by the testator. *Smith v. Smith*, 1 Edw. Ch. (N. Y.) 189.

The testatrix who left a niece, Fanny R. Gibson, and a grandniece, Fanny Gibson, mother and daughter, gave \$1,000 "unto my grandniece, Fanny R. Gibson," it was held that this constituted a case of latent ambiguity and that extrinsic evidence was admissible to prove which of the persons was intended by the testatrix; and as the mother was the nearest in relationship a presumption arises that she was intended. *Gallup v. Wright*, 61 How. Pr. (N. Y.) 286.

99. *Covert v. Sebern*, 73 Iowa 564, 35 N. W. 636; *Giger v. Busch*, 122 Ill. App. 13; *Rathjens v. Merrill*, 38 Wash. 442, 80 Pac. 754.

Incorrect naming of a granddaughter in a will is a latent ambiguity and may be explained by extrinsic evidence. *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642.

Where a testator devised property to his "brother Cormac Connolly," and it appeared that he did not have a brother by that name, but that he had a brother by the name of Henry, who was dead, and another brother by the name of James, evidence was admitted to show that it was his brother James whom he intended to name. *Connolly v. Pardon*, 1 Paige Ch. (N. Y.) 291.

"Where the name, or description, or both, of the person or thing intended to be referred to, is, in some respect so far incomplete or erroneous, as not to refer with precision to any particular person or thing, in many cases the same rule has been adopted as in cases under the first head, and the widest latitude has been allowed in the introduction of extrinsic evidence; but in modern decisions much less latitude is allowed, and the practice of submitting such questions to the jury as questions of intention rather than to the court as questions of construction is unsound." *Stokeley v. Gordon*, 8 Md. 496.

1. *Fairfield v. Lawson*, 50 Conn. 501, 47 Am. Rep. 669; *In re Root's Estate*, 187 Pa. St. 118, 40 Atl. 818; *In Goods of Peel*, 39 L. J., P. 36, L. R. 2 P. 46, 22 L. T. 417.

"When the devise is to A. B., the son of C. D., such a person being in existence, no matter how clear it might be proved that the testator intended A. B., the son of E. F., such evidence would be inadmissible, because there could be no ambiguity

**A More Liberal View** as to this obtains in a few jurisdictions.<sup>2</sup>

(7.) **No Person Answering Description.** — Where no person is to be found who answers the description, extrinsic evidence is inadmissible to show to whom the testator referred.<sup>3</sup> Some cases are to be found holding the contrary view.<sup>4</sup>

(8.) **Misnomer of Charity.** — (A.) **IN GENERAL.** — The mere fact that no corporation or association is in existence which bears the exact name used by the testator, does not render the devise void for uncertainty, but evidence is admissible to show what the testator intended.<sup>5</sup> It must always appear, however, that the devise or be-

as to the meaning of the words used in the will." *Ward v. Epsy*, 6 Humph. (Tenn.) 447.

"In *Tucker and others, Executors v. Seamen's Aid Society*, 7 Metcalf 188, the testator gave a legacy to 'the Seamen's Aid Society in the city of Boston' and 'the Seamen's Friend Society' claimed the legacy. The latter offered to prove that the testator had no knowledge of the existence of the society named in the will; that he did know of the other society; was deeply interested in its objects; had contributed to its funds, and had frequently expressed a determination to give it a legacy; that he directed the scrivener who wrote his will, to insert the legacy as made to said society; but the scrivener, not knowing the existence of the society, told the testator the name of the society was 'the Seaman's Aid Society,' and the testator thereupon consented to have that name inserted. This evidence was held inadmissible, and that the society named and described in the will was entitled to the legacy." *Apel v. Byers*, 98 Pa. St. 479.

2. *In re Miller's Estate* (No. 1), 26 Pa. Super. 443; *Henderson v. Henderson*, (1905) 1 Irish Rep. 353.

Property was devised to "Samuel G., son of Captain John F. Slaughter." Parol evidence was admitted to show that at the time the will was made there was no such person in existence, though later such a person was born, and that the testator's real intention was to leave the property to Samuel G., son of Captain John F. Hawkins. *Hawkins v. Garland*, 31 Gratt. (Va.) 149, 31 Am. Rep. 722.

3. *Barnes v. Simms*, 40 N. C.

(5 Ired. Eq.) 392, 94 Am. Dec. 435; *In re Knoblauch's Will*, 31 Misc. 418, 65 N. Y. Supp. 658.

4. "In *Beaumont v. Fell*, 2 P. Wms. (Eng.) 140, a legacy given to Catherine Earnley was held good to Gertrude Yardley, proof being made that it was intended for her, and no person of the former name being known." *Evans v. Hooper's Exr.*, 3 N. J. Eq. 204.

In *Thomas v. Stevens*, 4 Johns. Ch. (N. Y.) 607, evidence was admitted to show that a person not named or described at all in the will was intended by the testator to take the legacy, where there was no person of the name used in the will.

"Where the name or description is erroneous and there is no reasonable doubt as to the person, who was intended to be named or described, the mistake will not defeat the bequest; and the same rule applies as well to corporations as to an individual." *Wilson v. Perry*, 29 W. Va. 169, 1 S. E. 302.

5. *Connecticut.* — *Brewster v. McCall*, 15 Conn. 274; *Beardsley v. American Home M. Soc.*, 45 Conn. 327.

*Illinois.* — *Missionary Soc. v. Cadwell*, 69 Ill. App. 280.

*Maine.* — *Preachers' Aid Soc. v. Rich*, 45 Me. 552.

*Massachusetts.* — *Faulkner v. National Sailors' Home*, 155 Mass. 458, 29 N. E. 645.

*New Hampshire.* — *Smith v. Kimball*, 62 N. H. 606; *Trustees v. Peaslee*, 15 N. H. 317.

*New Jersey.* — *Moore's Exr. v. Moore*, 50 N. J. Eq. 554, 25 Atl. 403; *German Pioneer Verein v. Meyer*, 70 N. J. Eq. 192, 63 Atl. 835.

*New York.* — *In re Dickinson's Estate*, 56 Misc. 232, 107 N. Y.

quest was intended for some charitable corporation or association.<sup>6</sup>

(B.) TWO OR MORE CLAIMANTS.—Where the description used does not apply with entire accuracy to any institution but applies in various particulars to several, evidence is admissible to show which was intended by the testator.<sup>7</sup>

**Slight Inaccuracy** will not justify the admission of extrinsic evidence where the testator's intention can still be drawn from the face of the will.<sup>8</sup>

(C.) SURROUNDING CIRCUMSTANCES.—(a.) *Connection With One Institution.* The knowledge of the existence of one of the institutions and his

Supp. 386; *Leonard v. Davenport*, 58 How. Prac. 384; *Lefevre v. Lefevre*, 59 N. Y. 434.

*Pennsylvania.*—*Cresson's Appeal*, 30 Pa. St. 437.

*Tennessee.*—*Gass v. Ross*, 3 Sneed 211.

*Virginia.*—*Roy's Exr. v. Rowzie*, 25 Gratt. 599.

*West Virginia.*—*Ross v. Kiger*, 42 W. Va. 402, 26 S. E. 103.

*Wisconsin.*—*Webster v. Morris*, 66 Wis. 366, 28 N. W. 353; *In re Paulson's Will*, 127 Wis. 612, 107 N. W. 484.

The testatrix directed two-fourths of the residue of her estate to be divided equally "between the home and foreign missions." Parol evidence was admitted to show that she was a member of the Presbyterian Church and contributed to its support, and from such evidence it will appear that the legacies belonged to the Boards of Home and Foreign Missions respectively of the Presbyterian Church of the United States of America. Board of Missions *v. Scovell*, 3 Dem. (N. Y.) 516.

**Devise to Institution By Its Popular Name.**—President, etc. of Deaf & Dumb Inst. *v. Norwood*, 45 N. C. (Busb. Eq.) 65.

6. Deaf & Dumb Missionary Soc. *v. Reynolds*, 9 Md. 341.

Where a legacy was left to the "Freedmen's Association," evidence that the testator told the scrivener that he wanted to give the property to a certain specified association was held inadmissible, since the case did not come within the rule which allows parol evidence to explain an ambiguity which arises as to which one of two or more persons, each answering the words in the will, the testator intended to remember, for

in this case the words used are not applicable to any known organization. *Fairfield v. Lawson*, 50 Conn. 501, 47 Am. Rep. 669.

7. *In re Pearson's Estate*, 52 Misc. 273, 102 N. Y. Supp. 965, affirmed, 109 N. Y. Supp. 1127; *Goodhue v. Clark*, 37 N. H. 525; *Keith v. Scales*, 124 N. C. 497, 32 S. E. 809.

Extrinsic evidence is admissible "when the description of the thing intended to be devised, or of the person who is intended to take, is true in part, but not in every particular. Thus, such evidence is admissible to show that by a bequest to 'The Congregational Society of Auburn,' the testator intended 'The First Congregational Society in Auburn;' and that by a bequest to 'The Congregational Foreign Missionary Society,' the testator intended 'The American Board of Commissioners for Foreign Missions.'" *Howard v. American Peace Soc.*, 49 Me. 288.

**Gift Divided Where Two Corporations Partly Answer Description and Intention is Unascertainable.**—*St. Luke's Home v. Assn. for Indigent Females*, 52 N. Y. 191, 11 Am. Rep. 697.

8. *St. Luke's Home v. Assn. for Indigent Females*, 52 N. Y. 191, 11 Am. Rep. 697; *Union Trust Co. v. St. Luke's Hospital*, 74 App. Div. 330, 77 N. Y. Supp. 528; affirmed, 175 N. Y. 505, 67 N. E. 1090, and see *In re Jeanes' Estate*, 3 Pa. Dist. 314.

**Omission From Name of Word Specifying Locality.**—"I have examined with care the cases cited by the learned counsel for the appellant, to see if there was any case that had held that the omission from

ignorance of the other<sup>9</sup> and the interest he took in the work of the one and his membership in it, may be shown.<sup>10</sup>

(b.) **PREVIOUS CONTRIBUTIONS.** — The fact that the testator had been in the habit of contributing to the support of an institution is an important circumstance to be considered.<sup>11</sup>

(9.) **Uncertain Description.** — While the beneficiary need not be directly named in the will, enough must appear either in the will itself or from the facts proved to render it reasonably certain whom the testator had in mind.<sup>12</sup>

the name of an institution of a portion of its name denoting the locality in which the institution existed, or the state which incorporated it, would make the bequest so ambiguous or uncertain as to justify the admission of extrinsic evidence; but I can find no case in which the omission of a part of the name of an institution, when the words used were identical with the remainder of the name, which held that the court was justified in receiving evidence to show that the testator intended another institution, having for its name but a part of that used as describing the institution intended." *Union Trust Co. v. St. Luke's Hospital*, 74 App. Div. 330, 77 N. Y. Supp. 528, *affirmed*, 175 N. Y. 505, 67 N. E. 1090.

9. *Bristol v. Ontario Orphan Asylum*, 60 Conn. 472, 22 Atl. 848; *Tilley v. Ellis*, 119 N. C. 233, 26 S. E. 29.

10. *Connecticut*. — *Ayres v. Weed*, 16 Conn. 291.

*Illinois*. — *Missionary Soc. v. Cadwell*, 69 Ill. App. 280.

*Massachusetts*. — *Bodman v. American Tract Soc.*, 9 Allen 447.

*Michigan*. — *Gilchrist v. Corliss*, 118 N. W. 938.

*Nebraska*. — *Second United Presby. Church v. First United Presby. Church*, 71 Neb. 563, 99 N. W. 252.

*New York*. — *Bowman v. Domestic & Foreign Miss. Soc.*, 100 App. Div. 29, 90 N. Y. Supp. 898.

*Pennsylvania*. — *The Domestic & Foreign Miss. Soc. Appeal*, 30 Pa. St. 425.

*Washington*. — *Reformed Presby. Church v. McMillan*, 31 Wash. 643, 72 Pac. 502.

Where the testatrix made a bequest to the "Christian Missionary

Society of this state," extrinsic evidence was held admissible to identify the legatee by showing that she was a member of the Church of Christ and that that church had but one missionary society which was commonly known by the name she gave it, although its legal name was "The Missionary Society of the Churches of Christ in Indiana," and therefore the legacy was not void for uncertainty. *Chappell v. Missionary Soc.*, 3 Ind. App. 356, 29 N. E. 924, 50 Am. St. Rep. 276.

11. *Button v. American Tract Soc.*, 23 Vt. 336; *Gilmer v. Stone*, 120 U. S. 586; *Wood v. Hammond*, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198; *Tilton v. American Bible Soc.*, 60 N. H. 377, 49 Am. Rep. 321; *Hinckley v. Thatcher*, 139 Mass. 477, 1 N. E. 840, 52 Am. Rep. 719.

"In defining the object of his bounty, the testator used the term Foreign Missionary Society. The auditor very properly called to his aid parol testimony to show the situation in which the testator stood when he made this bequest. From that testimony it appears that Mr. Amberson had been for many years an active member of the Petersville Methodist Episcopal Church, and that he had steadily contributed to the support of the foreign missionary work carried on by the denomination of which he was a member. It was clear that he intended his bequest should go to maintain that work, although he was mistaken as to the official name of the board which is in control of the foreign missionary efforts of the Methodist Episcopal Church." *In re Amberson's Estate*, 204 Pa. St. 397, 54 Atl. 484.

12. *Dennis v. Holsapple*, 148 Ind. 297, 47 N. E. 631, 62 Am. St. Rep.

d. *Identification of Subject-Matter.*—(1.) *In General.*—Where an ambiguity is shown to exist as to the subject-matter of a devise, evidence of the testator's intention<sup>13</sup> is admissible as well as evidence of the surrounding circumstances.<sup>14</sup>

**Same Rules Apply** in cases dealing with identification of the beneficiary,<sup>15</sup> but it has been thought best for the sake of clearness to treat the cases separately.

(2.) *Description Applicable to Two Objects.*—In cases in which the description of property devised is equally applicable to two or more parcels, extrinsic evidence is admissible not only of the circumstances<sup>16</sup> but of the testator's declarations.<sup>17</sup>

526, 46 L. R. A. 168; *Gass v. Ross*, 3 Sneed (Tenn.) 211.

Where a testatrix left property to the person who should at her request take care of her, and no person occupied this status or answered to the beneficiary therein described at the time the will was executed, it was still held that the name of the beneficiary was not left blank to such an extent that extrinsic evidence was not admissible to show that some person subsequently did take care of the testatrix and was intended by the testatrix to have her property. *Dennis v. Holsapple*, 148 Ind. 297, 47 N. E. 631, 62 Am. St. Rep. 526, 46 L. R. A. 168.

13. *Hayden v. Ewing's Devisees*, 1 B. Mon. (Ky.) 113.

A former will whether formally executed or not is admissible as a written declaration of the testator to explain a latent ambiguity in the description of property. *Thomson v. Thomson*, 115 Mo. 56, 21 S. W. 1085, 1128.

"Where from proof, *aliunde*, it appears that the testator did not own property corresponding with that described in his will, parol evidence may be resorted to by way of explanation of what was intended to be devised. In cases of *latent* ambiguity, the declarations of the testator, or his instructions for the drawing of the will, may be given in evidence to show the intention of the testator. Such proof is only excluded where there is no ambiguity, and where the attempt is to show a mistake in the drawing of the will." *Doe v. Roe*, 1 Wend. (N. Y.) 541. And see *Morgan v.*

*Burroughs*, 45 Wis. 211, 30 Am. Rep. 717.

14. *Chace v. Lampheré*, 51 Hun 524, 4 N. Y. Supp. 288; *McCall v. Gillespie*, 51 N. C. (6 Jones' L.) 533; *Morgan v. Burroughs*, 45 Wis. 211, 30 Am. Rep. 717; *Hawkins v. Garland*, 76 Va. 149, 44 Am. Rep. 158.

15. "A much larger number of these cases relate to the admissibility of such evidence to show who were the devisees or legatees intended by the testator, than to its admissibility to show what was the intended subject matter of his devise or bequest. But the same general principle is everywhere treated as applicable alike to both classes of cases. In none of the books which treat of this matter do we find these two classes of cases discussed separately, but the two are intermixed, as if there were no difference in the principle to be applied to them; and courts, in deciding cases of one class, refer to and apply decisions on the other." *American Bible Soc. v. Pratt*, 9 Allen (Mass.) 109.

16. *Douglas v. Blackford*, 7 Md. 8.

Where a devise was made to "Harrison township" and it appeared that there were several such townships, extrinsic evidence to show that the testator resided in Harrison township in Cass county and that he sustained a peculiar relation to that township different from all others of like name, was admissible. *Skinner v. Harrison Twp.*, 116 Ind. 139, 18 N. E. 529, 2 L. R. A. 137.

17. *Den v. Cubberly*, 12 N. J. L. 308.

(3.) **Description True in Part Only.**—Where the description is true in part, and false in part, extrinsic evidence is admissible.<sup>18</sup>

(4.) **Description Partly Applicable to Two Objects.**—Where the description is partly applicable to one parcel of land and partly applicable to another, any evidence should be admissible.<sup>19</sup>

(5.) **Uncertain Descriptions.**—Where all that appears is the testator's intention to devise some land, parol evidence will not be admitted to supply the description,<sup>20</sup> but where there is merely an imperfect description evidence is admissible.<sup>21</sup>

(6.) **Rejecting False Description.**—In every case in which part of the description is false, this part may be rejected<sup>22</sup> and if enough remains taken in connection with extrinsic evidence as to what property the testator actually did own, to identify the subject-matter, the devise will be given effect.<sup>23</sup> It is not necessary that the

**Leading Case.**—*Miller v. Travers*, 8 Bingh. 244, 21 E. C. L. 288, *citing* Bac. Max. 23; Hob. Rep. 32; Edward Altham's Case, 8 Rep. 155.

18. *Coleman v. Eberly*, 76 Pa. St. 197; *Miller v. Travers*, 8 Bingh. 244, 21 E. C. L. 288.

19. "Where words in a will are fairly and legitimately applicable to one thing as its name, and are equally applicable to another thing as words of description, parol evidence is admissible to show in which of the two sentences the testator was in the habit of using the words." *Boggs v. Taylor*, 26 Ohio St. 604.

20. *Crooks v. Whitford*, 47 Mich. 283, 11 N. W. 159.

21. *Sorenson v. Carey*, 96 Minn. 202, 104 N. W. 958; *Flynn v. Holman*, 119 Iowa 731, 94 N. W. 447.

"A will describing land devised as 'one-half of the remainder of my farm including the house wherein I now live' is not too indefinite to exclude identification by parol evidence." *Bell v. Couch*, 132 N. C. 346, 43 S. E. 911.

The description in a will was "I give and devise to my wife all my interest in 1029 acres of land," there being nothing to indicate that the testator had other lands, parol evidence is admissible to identify the tract in question. *Grubb v. Foust*, 99 N. C. 286, 6 S. E. 103.

Where a description is not ambiguous but is imperfect, the defect being in the omission to state the township and range, extrinsic evidence is admissible to show in what

township and range the testator owned land and that he owned no other land in the county. *Chambers v. Watson*, 60 Iowa 339, 14 N. W. 336. And see *McMahan v. Hubbard*, 217 Mo. 624, 118 S. W. 481.

22. *Riggs v. Myers*, 20 Mo. 239; *Vestal v. Garrett*, 197 Ill. 398, 64 N. E. 345.

"However many errors there may be in a description, either of a devisee or the subject of a devise, the devise will not be avoided if enough remains, after rejecting the errors, to show with certainty what was intended, when considered from the position of the testator." *Collins v. Capps*, 235 Ill. 560, 85 N. E. 934.

23. *Canada.*—*In re Shaver*, 6 Ont. 312.

*United States.*—*Allen v. Lyons*, 2 Wash. C. C. 475, 1 Fed. Cas. No. 227.

*Georgia.*—*Rogers v. Rogers*, 78 Ga. 688, 3 S. E. 451; *Johnson v. McKay*, 119 Ga. 196, 45 S. E. 992.

*Illinois.*—*Decker v. Decker*, 121 Ill. 341, 12 N. E. 750; *Douglas v. Bolinger*, 228 Ill. 23, 81 N. E. 787; *Felkel v. O'Brien*, 231 Ill. 329, 83 N. E. 170.

*Iowa.*—*Eckford v. Eckford*, 91 Iowa 54, 58 N. W. 1093, 26 L. R. A. 370; *Whitehouse v. Whitehouse*, 136 Iowa 165, 113 N. W. 759; *Stewart v. Stewart*, 96 Iowa 620, 65 N. W. 976.

*Missouri.*—*Riggs v. Myers*, 20 Mo. 239.

*Nebraska.*—*Seebrock v. Fedawa*, 33 Neb. 413, 50 N. W. 270; *St.*

will should expressly purport to dispose of property owned by the testator,<sup>24</sup> but no new term can be incorporated into the will.<sup>25</sup>

e. *Nature and Quantity of Estate.* — (1.) *Surrounding Circumstances.* — To determine the quantity of the estate devised by the will the circumstances surrounding the testator and by which he was influenced may be shown,<sup>26</sup> where the will is uncertain and ambiguous.<sup>27</sup>

(2.) *Direct Evidence.* — Direct evidence of the testator's intention

James Orphan Asylum *v.* Shelby, 75 Neb. 591, 106 N. W. 604.

*New Hampshire.* — Winkley *v.* Kaime, 32 N. H. 268.

*Ohio.* — Ashworth *v.* Carleton, 12 Ohio St. 381.

*Oregon.* — Moreland *v.* Brady, 8 Or. 303, 34 Am. Rep. 581.

24. *Leading Case.* — Patch *v.* White, 117 U. S. 210.

*Absence of Residuary Clause.* Collins *v.* Capps, 235 Ill. 560, 85 N. E. 934.

*Instructions Given by Testator Admissible.* — Creasy *v.* Alverson, 43 Mo. 13.

In Cleveland *v.* Spilman, 25 Ind. 95, land was devised as "my land, being the south half of the Northeast quarter," etc., and it appeared that the testator owned the Northwest instead of the Northeast quarter, it was held that extrinsic evidence was admissible to show what land was intended, since the will itself furnished the basis for the correction inasmuch as it contained the words "my land." But see Collins *v.* Capps, 235 Ill. 560, 85 N. E. 934.

Where a testator devised land described as "lot of land (78) in the second district of Dooly county," and it appeared that he did not own lot 78 but did own lot 68 in the district named, it was held that since the petition failed to allege that he did not own any other land than lot 68 in the second district a demurrer to the petition was properly sustained; but if it had alleged that the said lot 68 was the only lot owned by the testator evidence to prove this fact would have been admissible and might have sufficiently identified the property. Oliver *v.* Henderson, 121 Ga. 836, 49 S. E. 743.

25. See Lomax *v.* Lomax, 218 Ill. 629, 75 N. E. 1076, 6 L. R. A.

(N. S.) 942; Kurtz *v.* Hibner, 55 Ill. 514, 8 Am. Rep. 665; Bingel *v.* Volz, 142 Ill. 214, 31 N. E. 13, 34 Am. St. Rep. 64, 16 L. R. A. 321; Pocock *v.* Redinger, 108 Ind. 573, 9 N. E. 473, 58 Am. Rep. 71; Judy *v.* Gilbert, 77 Ind. 96, 40 Am. Rep. 289.

26. Wolf *v.* Van Nostrand, 2 N. Y. 436 (number of the testator's family and their various ages); Forsyth *v.* Galt, 22 U. C. C. P. 115 (ages of the testator's children). But see King *v.* Ackerman, 2 Black (U. S.) 408; Lomax *v.* Shinn, 162 Ill. 124, 44 N. E. 495 (fact that testator owned no other lands).

*Source of Property.* — Hennegar *v.* Deadrick (Tenn. Ch. App.), 54 S. W. 138.

*Quantity of Estate Owned By Testator.* — Stephen *v.* Walker, 8 B. Mon. (Ky.) 600.

*Fact That Lands Were Wild.* Sargent *v.* Towne, 10 Mass. 301. *Contra*, Charter *v.* Otis, 41 Barb. (N. Y.) 525.

*Devise of Certain Privileges.* Where the testator devised to his daughter the right to remain in his house as long as she continued unmarried and to enjoy the privileges there as she did during his lifetime, evidence was admissible to show the extent of the privileges she had enjoyed, upon the ground that parol evidence is admissible to determine the quantity of interest which is given by the testator under his will. Maeck *v.* Nason, 21 Vt. 115.

27. Robinson *v.* Randolph, 21 Fla. 629, 58 Am. Rep. 692; Doe *v.* Kinney, 3 Ind. 50.

Where the intent of the testator to pass a fee simple is apparent on the face of the will, extrinsic evidence is inadmissible to show a different intent. Spalding *v.* Huntington, 1 Day (Conn.) 8.



as shown by his declarations<sup>28</sup> or instructions<sup>29</sup> is, however, inadmissible.

f. *Blanks*.—Extrinsic evidence is inadmissible to complete a blank<sup>30</sup> in a will except in those cases in which the effect of the blank is to raise an equivocation rather than to leave the instrument incomplete.<sup>31</sup>

g. *Mistakes and Omissions*.—(1.) *In General*.—Parol evidence is inadmissible to show a mistake in the will,<sup>32</sup> unless it appears

**Rule in Shelley's Case** is a rule of law and not a rule of construction, and therefore it is inadmissible to show by extrinsic evidence, in a case where the rule applies, that the testator intended to devise only a life estate. *Brown v. Bryant*, 17 Tex. Civ. App. 454, 44 S. W. 399.

28. *McCray v. Lipp*, 35 Ind. 116 (fee or life estate); *Kirkland v. Conway*, 116 Ill. 438, 6 N. E. 59; *Gregory v. Cowgill*, 19 Mo. 415; *Gillespie v. Schuman*, 62 Ga. 252.

"The declarations of the testator, shown to have been made shortly before, and shortly after the execution of the will, if offered for the purpose of controlling the language of the devise, by showing what estate the testator intended that John should take, are incompetent and inadmissible for the purpose. True, the intent of the testator must govern, but, it is that intent expressed by the will. Such evidence may be resorted to from necessity, in cases of latent ambiguity, to prevent a devise from being declared void." *Turner v. Hallowell Sav. Inst.*, 76 Me. 527.

29. *Chappell v. Avery*, 6 Conn. 31.

30. *Engelthaler v. Engelthaler*, 196 Ill. 230, 63 N. E. 669.

31. A legacy to a person described by an initial, as to Mrs. C., admits of explanation as by showing that the testator was accustomed to speak of a particular person by the initial of her name. *Abbot v. Massie*, 3 Ves. 148, 30 Eng. Reprint 941.

A decedent appointed as an executor "Percival—of Brighton, the father." Evidence of the circumstances under which the deceased made his will and of the persons about him was admitted to show who was intended, since there

was enough of a description from which to determine whom the testator meant. In the *Goods of De-Rosaz*, 46 L. J., P. 6, 2 P. D. 66, 36 L. T. 263.

Where a testatrix devised property to "my granddaughter——," evidence was admitted to explain a latent ambiguity which arose from the fact that at the date of the will and at the date of the death of the testatrix she had three granddaughters; it was not a case of failing to complete the blank in a will. *In re Estate of Hubback*, L. R. (1905), P. D. 129.

32. *England*.—*Guardhouse v. Blackburn*, 35 L. J., P. 116, L. R. 1 P. 109, 12 Jur. (N. S.) 278, 14 L. T. 69; *Harter v. Harter*, 42 L. J., P. 1, L. R. 3 P. 11, 27 L. T. 858.

*Georgia*.—*Willis v. Jenkins*, 30 Ga. 167.

*Indiana*.—*Rapp v. Reehling*, 124 Ind. 36, 23 N. E. 777, 7 L. R. A. 498; *Bunnell v. Bunnell*, 73 Ind. 163; *Grimes' Exrs. v. Harmon*, 35 Ind. 198, 9 Am. Rep. 690; *Judy v. Gilbert*, 77 Ind. 96, 40 Am. Rep. 289; *Funk v. Davis*, 103 Ind. 281, 2 N. E. 739.

*Kentucky*.—*Allan v. Van Meter*, 1 Met. 264; *Jackson v. Payne's Exrs.*, 2 Met. 567; *Stephen v. Walker*, 8 B. Mon. 600.

*Maryland*.—*Gaither v. Gaither*, 3 Md. Ch. 158; *Cesar v. Chew*, 7 Gill & J. 127; *Stannard v. Barnum*, 51 Md. 440.

*Massachusetts*.—*Tucker v. Seamen's Aid Soc.*, 7 Met. 284.

*New Jersey*.—*Jones' Exrs. v. Jones*, 13 N. J. Eq. 236; *Nevius v. Martin*, 30 N. J. L. 465.

*Pennsylvania*.—*Iddings v. Iddings*, 7 Serg. & R. 111, 10 Am. Dec. 450; *Wallize v. Wallize*, 55 Pa. St. 242.

upon the face of the will itself<sup>33</sup> or was introduced by some fraud.<sup>34</sup>  
Omissions cannot be supplied by parol evidence.<sup>35</sup>

*South Carolina*. — Rothmaler v. Myers, 4 Desaus. 215.

*Tennessee*. — Weatherhead v. Sewell, 9 Humph. 272.

*Virginia*. — Senger v. Senger, 81 Va. 687.

**Leading Case.** — "Devise of all testator's freehold and real estates in the county of L. and city of L. Testator had no estates in the county of L.; a small estate in the city of L., inadequate to meet the charges in the will; and estates in the county of C. not mentioned in the will: *Held*, that the devisee could not be allowed to show by parol evidence, that the estates in the county of C. were devised to him in the draft of the will; that the draft was sent to a conveyancer to make certain alterations not affecting the estates in county C.; that by mistake he erased the words *county of C.*; and that testator, after keeping the altered will by him for some time, executed it without adverting to the alteration as to the county of C." *Miller v. Travers*, 8 Bingh. 244, 21 E. C. L. 288.

**33.** *Jackson v. Payne*, 2 Met. (Mass.) 567; *Skipwith v. Cabell*, 19 Gratt. (Va.) 758; *Funk v. Davis*, 103 Ind. 281, 2 N. E. 739; *Gifford v. Dyer*, 2 R. I. 99, 57 Am. Dec. 708; *McAllister v. Butterfield*, 31 Ind. 25.

"Where one item of a will devised the house and lot on which the testator resided 'being parts of lots numbered fifteen and sixteen,' etc., to his wife during her natural life, and a subsequent item of the will devised 'the same lot numbered fifteen so devised to my said wife during her lifetime' to the testator's youngest daughter, and 'to her heirs in fee simple forever,' there is such a mistake apparent on the face of the will as will permit the introduction of extrinsic evidence to show that the testator intended to devise the same property to his daughter in fee that he had in the previous item of the will devised to his wife for life." *Groves v. Culph*, 132 Ind. 186, 31 N. E. 569.

**34.** *Morrell v. Morrell*, 51 L. J.,

P. 49, 7 P. D. 68, 46 L. T. 485; *Stephen v. Walker*, 8 B. Mon. (Ky.) 600; *Collins v. Hope*, 20 Ohio 492.

The testatrix gave orders for the preparation of her will, but the paper submitted to her and executed by her contained a revocatory clause which she had not ordered in the will, and the will itself was not read over to or by her. It was held that since the revocatory clause had been introduced without her knowledge and without her instructions it should be omitted from the will. In the *Goods of Oswald*, 43 L. J., P. 24, L. R. 3 P. 162, 30 L. T. 344.

"In our view, parol evidence may be given on an issue like this, to show that the testator, either fraudulently or by mistake, has been made to express an intention that he did not entertain, for this denies the will; but that evidence, which while it admits the will so far as it goes, seeks to controvert it by showing a further intention in relation to other property, is not admissible." *Hearn v. Ross*, 4 Har. (Del.) 46.

**35.** *Alabama*. — *Abercrombie v. Abercrombie*, 27 Ala. 489.

*Iowa*. — *Whitehouse v. Whitehouse*, 136 Iowa 165, 113 N. W. 759.

*Kentucky*. — *Caldwell v. Caldwell*, 7 Bush 515; *Webb v. Webb*, 7 T. B. Mon. 626; *Tudor v. Terrell*, 2 Dana 48.

*Maryland*. — *Hawman v. Thomas*, 44 Md. 30; *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666.

*New Jersey*. — *Andress v. Weller*, 3 N. J. Eq. 604.

*New York*. — *Sturges v. Cargill*, 1 Sandf. Ch. 318; *Arthur v. Arthur*, 10 Barb. 9.

*North Carolina*. — *Taylor v. Maris*, 90 N. C. 619.

*South Carolina*. — *Rosborough v. Hemphill*, 5 Rich. Eq. 95.

Although it appears on the face of the will that certain omissions were inadvertently made, a former will cannot be introduced in evidence showing the omitted clauses, since "the courts cannot be permitted to construct wills from the materials which testators have discarded." *Brown v. Quintard*, 177

(2.) **Mistake as to Legal Import.**—The fact that the testator was mistaken as to the legal import of the words used is immaterial and cannot be shown by extrinsic evidence.<sup>36</sup>

h. *Rebutting Trust.*—Parol evidence is always admitted to rebut the existence of a resulting trust<sup>37</sup> or to create an implied trust,<sup>38</sup> but not to establish an express trust.<sup>39</sup>

3. **Question of Fact.**—The construction of the language used in a will is a question for the court,<sup>40</sup> but where extrinsic evidence of intention is admitted the question becomes one for the jury.<sup>41</sup>

## XX. CONTRACTS TO DEVISE.

1. **Burden of Proof.**—The burden rests upon the party alleging the execution of the contract to prove its existence and terms.<sup>42</sup>

2. **Declarations.**—Declarations of the testator may be admitted to determine whether the contract was made as claimed.<sup>43</sup>

N. Y. 75, 69 N. E. 225, *modifying* 79 App. Div. 635, 81 N. Y. Supp. 918.

36. *Harrison v. Morton*, 2 Swan (Tenn.) 461.

37. *Ulrich v. Litchfield*, 2 Atk. 372, 26 Eng. Reprint 625; *Love v. Buchanan*, 40 Miss. 758; *Mann v. Mann*, 1 Johns. Ch. 231; *Taylor v. Maris*, 90 N. C. 619; *Whiteman v. Whiteman*, 152 Ind. 263, 53 N. E. 225; *Iddings v. Iddings*, 7 Serg. & R. (Pa.) 111, 10 Am. Dec. 450; *Hockensmith v. Slusher*, 26 Mo. 237.

Parol evidence is admissible to show a promise of a legatee to a testator to hold the legacy for the benefit of a third person. In such case the evidence is not admitted to vary the will, but simply to show the fraud practiced by the legatee on the testator; but in such a case any declaration of intention on the part of the testator different from that expressed in the will is incompetent as evidence unless it is shown that it was communicated to the legatee, assented to by him, and that such assent was acted upon by the testator. *Vreeland v. Williams*, 32 N. J. Eq. 734.

Extrinsic evidence is admissible to show whether a legacy does or does not create a trust, although the will expressly states that it does not. *In re Spencer's Will*, 57 L. T. 519.

38. *Caldwell v. Caldwell*, 7 Bush (Ky.) 515.

39. Where a devise is absolute in form extrinsic evidence is inadmissible to show that it was to be held in trust for other persons. *Moran v. Moran*, 104 Iowa 216, 73 N. W. 617, 39 L. R. A. 204.

Where the issue is whether a spendthrift trust was created by the will, evidence respecting the circumstances attending the testatrix at the time of the execution of the will and that she had a dissipated son, is inadmissible. *Kingman v. Winchell* (Mo.), 20 S. W. 296.

40. *Underhill v. Vandervoort*, 56 N. Y. 242; *Warner v. Miltenberger*, 21 Md. 264, 83 Am. Dec. 573; *Webber v. Stanley*, 16 C. B. (N. S.) 698, 33 L. J., C. P. 217, 10 Jur. (N. S.) 657, 10 L. T. 417; *McGee v. McNeil*, 41 Miss. 17, 90 Am. Dec. 354; *Sorell v. Sorell*, 5 Ala. 245; *Bruck v. Tucker*, 42 Cal. 346.

The jury are bound to accept the legal construction put upon the words of a will by the court. *Downing v. Bain*, 24 Ga. 372.

41. *Warner v. Miltenberger's Lessee*, 21 Md. 264, 83 Am. Dec. 573.

42. *Hanly v. Hanly*, 105 App. Div. 335, 93 N. Y. Supp. 864.

43. *Harper's Estate*, 7 Pa. Dist. 532.

Declarations of the testator merely expressive of a testamentary intent to reward his son for work done for him during his life do not establish the contract to devise property to him, unless it is shown that they

**3. Weight and Sufficiency.**—Clear and satisfactory evidence is required to establish a contract to devise property.<sup>44</sup>

were communicated to the son, made for the purpose of inducing the son to render the services, and that the services were performed in consequence of such declarations. *In re Stewart's Estate*, 21 Misc. 412, 47 N. Y. Supp. 1065.

Declarations of the testatrix that she had made an arrangement with her sons to devise her property to them in return for their work and care, will sufficiently establish an oral contract to devise property. *In re Sherman's Will*, 24 Misc. 65, 53 N. Y. Supp. 376.

**44. United States.**—*Russell v. Jones*, 135 Fed. 929, 68 C. C. A. 487.

*California.*—*Owens v. McNally*, 113 Cal. 444, 45 Pac. 710.

*Illinois.*—*Klussman v. Wessling*, 238 Ill. 568, 87 N. E. 544; *Dicken v. McKinley*, 163 Ill. 318, 45 N. E. 134, 54 Am. St. Rep. 471; *Sloniger v. Sloniger*, 161 Ill. 270, 43 N. E. 1111.

*Kentucky.*—*Gross v. Newman's Admr.*, 20 Ky. L. Rep. 1910, 50 S. W. 530.

*New York.*—*Tousey v. Hastings*, 127 App. Div. 94, 111 N. Y. Supp. 344; *Pattat v. Pattat*, 93 App. Div. 102, 87 N. Y. Supp. 140; *Wilson v. Heath*, 23 Misc. 714, 53 N. Y. Supp. 166; *Apollonio v. Langley*, 106 App. Div. 40, 94 N. Y. Supp. 274.

*Pennsylvania.*—*In re Harper's Estate*, 7 Pa. Dist. 532.

**Uncontradicted Testimony Not**

**Necessarily Controlling.**—*Holmes v. Connable*, 111 Iowa 298, 82 N. W. 780.

**Contract Partly Oral and Partly Written.**—*Bird v. Pope*, 73 Mich. 483, 41 N. W. 514.

In *New York* the rule is that to establish a contract to devise property the evidence should be in writing and the writing should be produced, or if such a contract is ever based upon parol evidence it should be given or corroborated in all substantial particulars by disinterested witnesses. *Rosseau v. Rouss*, 180 N. Y. 116, 72 N. E. 916; *Shakespeare v. Markham*, 72 N. Y. 400; *Hamlin v. Stevens*, 177 N. Y. 39, 69 N. E. 118; *Hanly v. Hanly*, 105 App. Div. 335, 93 N. Y. Supp. 864.

In *Pennsylvania*.—"In order to establish a parol agreement between a father and son, to devise land to the son in consideration of his services to his father, the evidence must not only be direct, positive, express and unambiguous, but the contracting parties must have been brought face to face. The witnesses must have heard the bargain when it was made, or must have heard the parties repeat it in each other's presence. A contract is not to be inferred from the declarations of one of the parties only." *Burgess v. Burgess*, 109 Pa. St. 312, 1 Atl. 167. And see *Bash v. Bash*, 9 Pa. St. 260 (direct and positive evidence required).

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**WITHDRAWAL OF QUESTIONS OR EVIDENCE.**—See *Objections; Striking Out and Withdrawal of Evidence.*

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## **X. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION, 688**

## I. ATTENDANCE.

**1. Generally.** — **2. Security for Appearance and Taking Into Custody.** — **A. RECOGNIZANCES FOR APPEARANCE.** — **a. In General.** In criminal cases the court may require of a witness a recognizance, bidding him to appear at a future day.<sup>1</sup> And it is the duty of the United States district attorney, in criminal prosecutions by the government, where he has any doubt as to whether witnesses will attend, to have them properly recognized.<sup>2</sup> As to whether sureties

1. *Bickley v. Com.*, 2 J. J. Marsh. (Ky.) 572; *State v. Zellers*, 7 N. J. L. 220; *People v. Pettit*, 9 Misc. 280, 44 N. Y. Supp. 256; *State v. Edney*, 20 N. C. (4 Dev. & B.) 373 (the recognizance obliges the party to appear according to it, in order that public justice may not be defeated); *Comfort v. Kittle*, 81 Iowa 179, 46 N. W. 988 (order requiring a witness to enter into a recognizance for his appearance may be made by a judge at chambers, in a distant county, without notice to the witness, and without his being heard); *State v. Lane*, 11 Kan. 458 (on continuance of a criminal case in district court witness may be required to give recognizance for appearance at next term); *Gwynn v. State*, 64 Miss. 324, 1 So. 237 (circuit court may require witness subpoenaed to testify before grand jury for state to enter into recognizance to appear at a present or future term).

In *Clayborn v. Tompkins*, 141 Ind. 19, 40 N. E. 121, it was held that a justice of the peace has no jurisdiction to make an order requiring a witness to give a recognizance for his appearance, except (1) where a continuance of a criminal case is granted; (2) where a change of venue is granted; (3) and where the offense charged is a felony, and he recognizes the accused to appear at the next term of the criminal or circuit court of the county. (*Burns' R. S.* 1894, §§ 1699, 1701, 1703; *R. S.* 1881, §§ 1630, 1632, 1634). He has no power to require a witness, when subpoenaed to appear at a day in the future, to give a recognizance for his appearance on the day set for trial.

In New York, Code Cr. Proc. § 586, provides that a defendant, at

any time after an order admitting him to bail, instead of giving bail may deposit the sum mentioned in the order with the county treasurer, but there is no provision of law permitting a police justice to accept a cash deposit in lieu of bail. Since Code Cr. Proc. § 74, provides that police justices have such jurisdiction, and such only, as is specially conferred upon them by statute, such justice has no jurisdiction to accept a cash deposit as security for the attendance of a witness. *McNamara v. Wallace*, 97 App. Div. 76, 89 N. Y. Supp. 591.

**Rule Applies to Prosecuting Witness.** — In Kansas under Gen. Stat. 1889, c. 82, § 61, when a person voluntarily makes complaint before a justice of the peace or other examining magistrate, and causes a party to be arrested on a charge of felony, being a material witness for the state, the person complaining may be required to enter into recognizance. *In re Petrie*, 1 Kan. App. 184, 40 Pac. 118.

In the Federal Courts where, upon the arrest of a person as a witness in a criminal case for the United States under Act Aug. 8, 1846, § 7, great hardship will be imposed upon him when imprisoned for want of bail, he will be discharged on his own recognizance. *United States v. Lloyd*, 4 Blatchf. 427, 26 Fed. Cas. No. 15,614.

The word "Cognizance" used in a statute relating to the recognizance of a witness, should be construed as though the word "recognizance" had been used. *Comfort v. Kittle*, 81 Iowa 179, 46 N. W. 988.

2. *United States v. Durling*, 4 Bliss. 509, 25 Fed. Cas. No. 15,010.

may also be required of the witness, this depends upon the statute of the state in which the question arises.<sup>3</sup>

**At What Time Witness Is Bound to Appear.**—The witness binds himself to appear at the term of court specified in his recognizance, but at no succeeding terms.<sup>4</sup> It follows that the sureties on his bond are only liable for his failure to appear at the time specified.<sup>5</sup>

*b. Form and Requisites of Bond and Enforcement Thereof.* The form of a recognizance must follow the requirement of the statute,<sup>6</sup> but an immaterial variance between the language of its

**3. Sureties Required.**—In Alabama under Cr. Code, § 4294, a resident witness may be required to give surety. *State v. Calhoun*, 99 Ala. 279, 13 So. 425.

In California under § 878 Pen. Code, an undertaking with sureties is only required of a witness who was examined before a committing magistrate. *Ex parte Shaw*, 61 Cal. 58.

In Kansas it is held that if a justice of the peace or other committing magistrate has reason to believe that a prosecuting witness will not perform the conditions of his recognizance he may be required to enter into a recognizance with sureties. *In re Petri*, 1 Kan. App. 184, 40 Pac. 118. But a witness cannot be compelled to give recognizance with sureties on continuance of a criminal case in district court for appearance at next term, and even though the recognizance has been signed by sureties it imposes no liabilities upon them. *State v. Lane*, 11 Kan. 458.

In New York Code Cr. Proc. § 215, authorizes an examining magistrate to require a witness for the people to give "a written undertaking" that "he" will forfeit a certain sum if he fails to appear at the trial. § 216 provides for the requirement, from a witness believed to be an accomplice, of an undertaking "with such sureties" as are deemed proper. *People v. Pettit*, 19 Misc. 280, 44 N. Y. Supp. 256.

**Sureties Not Required.**—*Bickley v. Com.*, 2 J. J. Marsh. (Ky.) 572.

In Alabama on a preliminary hearing before a justice of the peace, a non-resident witness or one residing more than fifty miles from the place at which the examination is

had cannot be required to give surety for his appearance. *State v. Calhoun*, 99 Ala. 279, 13 So. 425.

In Iowa under Code 1873, § 4385, providing that recognizance for appearance of state's witnesses may be required on change of venue, the court is not authorized to require a bond with sureties. *Comfort v. Kittle*, 81 Iowa 179, 46 N. W. 988.

In Texas under White's Ann. Code Cr. Proc. art. 524a, where a witness is brought before the court and it appears to his satisfaction that the witness is unable to give security for his attendance, it is the duty of the court to accept his personal recognizance. *Ex parte Sheppard*, 43 Tex. Crim. 372, 66 S. W. 304.

**4.** In *United States v. Butler*, 1 Cranch C. C. 422, 25 Fed. Cas. No. 14,698, a witness appeared at the term mentioned in his recognizance. There was no record of a respite of the recognizance, nor a continuance of it, nor of any order for the witness to attend again. *Held*, that he was not bound to attend at the following term to which the case was continued.

**5.** *United States v. Butler*, 1 Cranch C. C. 422, 25 Fed. Cas. No. 14,698.

In *Com. v. Stephens*, 8 Ky. L. Rep. 61, a bond was executed for the appearance of a witness "at the time and place mentioned within." It did not appear what was meant by the word "within." At the next term of court the witness appeared and was told by the attorney for the commonwealth that he could go without any notice to return at a future term. It was held that the terms of the bond were complied with and sureties released.

**6.** *State Treasurer v. Woodward*, 7 Vt. 529.

condition and the provision of the statute will not affect its validity.<sup>7</sup> It is generally held that a recognizance for the appearance of witnesses to testify, must contain an acknowledgment of indebtedness to the state,<sup>8</sup> and mention the offense charged.<sup>9</sup>

In North Carolina the words of the act of 1715, prescribing that the magistrate shall take recognizances from the informer and witnesses to appear at the next court "where the matter is cognizable," and that the recognizances shall be returned into the office of "the court wherein the matter is to be tried," are merely directory as to the time and place of returning the proceedings, so that they may be acted on speedily and efficiently, for the advantage of each side.<sup>10</sup>

Under the Texas Statute a magistrate may require witnesses to give bail for their appearance, and since he is required to certify to all proceedings had before him, upon his failure to certify that bail was required in a particular instance, the bail-bond is thereby rendered unenforcible and parol evidence is inadmissible to supply its omission.<sup>11</sup>

c. *Arrest, Detention and Discharge of Witnesses.*—An examining magistrate or other court has power to detain witnesses upon a proper showing, to testify on behalf of the people in a criminal case.<sup>12</sup>

7. *State Treasurer v. Woodward*, 7 Vt. 529.

Where a magistrate is authorized by statute to "bind the prosecutor and all the material witnesses against the defendant to appear and testify at the next court having cognizance of the offense, the addition of the words "as well to the grand as the petit jury, and not depart the said court without leave" cannot vitiate it; for such would be the legal effect of the language of the statute if it had not been thus expressed in the recognizance. The defendant was required to appear at but one court, but he had no right to leave after having been examined before the grand jury. It might be necessary to call him again before the grand jury in the same case. It might be necessary to have him sworn before the petit jury. He was bound to consider himself a witness during the entire court, unless sooner discharged. *People v. Millis*, 5 Barb. (N. Y.) 511.

8. *People v. Rundle*, 6 Hill (N. Y.) 506; *Com. v. Green*, 12 Mass. 1 (an action of debt may be maintained by the commonwealth upon a forfeited recognizance).

9. *People v. Rundle*, 6 Hill (N. Y.) 506.

In *Johnson v. State*, 38 Tex. Crim. 26, 40 S. W. 982, it appeared that a recognizance had recited that the defendant stood charged with the offense of "extortion." It was held that since extortion is not an offense *eo nomine*, in stating the offense in the recognizance, the constituent elements of the offense should have been set forth.

10. The statute means only that the return shall be made to the next term of the court, in which, according to the recognizance, the party is to appear, so that the party shall not be required to appear at one term, or in one court, and the recognizance be returned to a subsequent term, or to a different court. *State v. Edney*, 20 N. C. (4 Dev. & B.) 378.

11. In a suit upon such a bond, if it appears that it was not executed until four days after the conclusion of the examining court, and after the said court had adjourned; and further, that no order requiring such bond had been entered by the magistrate, it is held that the bond is invalid, and cannot be enforced. *Foat v. State*, 28 Tex. App. 527, 13 S. W. 867.

12. *Fawcett v. Linthecum*, 7 Ohio C. C. 141; *In re Lewellen*, 104



**Presumption as to Regularity of Official Acts.** — In accordance with the presumption that public officials' acts have been properly performed, where a magistrate has committed a witness under a statute enabling him to do so in the event that sureties are not obtained for the witness' appearance, such magistrate's decision must be presumed to have been legally and regularly made, and based upon sufficient grounds. He must have found that the witness would not appear and testify unless security was given; that is, he would not discharge the duty he owed to the state of voluntarily appearing to testify in the case.<sup>13</sup>

**In California,** under the constitution, a witness cannot be unreasonably detained.<sup>14</sup>

**Discharge.** — A witness having been taken into custody and confined by reason of his inability to furnish sureties may, under certain circumstances, obtain his discharge.<sup>15</sup>

Mich. 318, 62 N. W. 554 (detention of witness not permitted on merely *ex parte* affidavits); State *v.* Grace, 18 Minn. 398.

**Detention of Infant.** — A child who has been the victim of a revolting assault may be committed to the custody of a charitable institution to appear as a witness against the assailant under Pen. Code, § 291, and such commitment is not a deprivation of the witness' constitutional liberty. *Ex parte* Bolt, 48 Misc. 175, 95 N. Y. Supp. 250.

**Arrest for Failure To Obey Subpoena.** — Where a witness is ordered arrested by a federal court upon a charge of having failed to obey a subpoena, and the witness before his apprehension flees to another district, any judge of the United States who has jurisdiction in the district to which the witness has fled may order his arrest and removal to the district in which wanted. *In re* El-lerbe, 13 Fed. 530.

**Detention of Witnesses Is Upon Civil Process.** — Persons detained as witnesses are held "upon civil process" within the meaning of § 8941, How. Stat., providing that "Prisoners arrested on civil process shall be kept in rooms separate and distinct from those in which prisoners detained on a criminal charge or conviction shall be confined." *In re* Lewellen, 104 Mich. 318, 62 N. W. 554.

**Arrest in Vacation.** — A witness who is in contempt may be arrested

upon a warrant directing the arrest in vacation, but such proceedings are authorized only in actual contempt, and when necessary to the proper administration of justice and the court may order the witness' discharge by the officers intrusted with the writ, upon bail fixed by the court. State *v.* Archer, 48 Iowa 310.

13. Markwell *v.* Warren Co., 53 Iowa 422, 5 N. W. 570.

14. *Ex parte* Dressler, 67 Cal. 257, 7 Pac. 645 (witness detained for ninety days, and after several continuances, not satisfactorily accounted for, entitled to discharge on *habeas corpus*).

15. Where a witness upon being required to enter into an undertaking with sureties, to appear and testify, fails and is committed therefor, his inability to procure sureties appearing, he may obtain a discharge and his deposition may then be conditionally taken in accordance with the statute. People *v.* Lee, 49 Cal. 37.

In United States *v.* Lloyd, 4 Blatchf. 427, 26 Fed. Cas. No. 15,614, a person was arrested on a warrant issued under § 7 of the act of August 8, 1846 (9 Stat. §§ 73, 74), as a witness on the part of the United States, in a criminal case, and imprisoned for want of bail. He was evidently painfully enfeebled in health from a severe and dangerous malady and required medical attendance. His affidavit was to the effect that he was not in possession of cer-

## II. COMPENSATION.

1. **Right to Compensation.**—A. IN GENERAL.—It is generally held that witnesses attending a judicial investigation are entitled to compensation both for their time and for traveling expenses.<sup>16</sup>

tain documents which it was desired he should produce, that he was a resident and householder, but possessed no means, and had no friends to give such security for his personal appearance in court as the government was entitled to demand. The government furnished no testimony directly contradicting any of these statements and did not prove that the witness was able to give bail for his appearance. Under these circumstances, it was ordered that the witness be discharged from imprisonment on his executing his own recognizance in \$1000 penalty.

16. *United States.*—Anderson *v.* Moe, 1 Abb. 299, 1 Fed. Cas. No. 359; The Syracuse, 36 Fed. 830; The Vernon, 36 Fed. 113; Eastman *v.* Sherry, 37 Fed. 844; Griggsby Const. Co. *v.* Louisiana, etc. R. Co., 123 Fed. 751; Hanchett *v.* Humphrey, 93 Fed. 895; Sloss Iron & S. *v.* South Carolina, etc. R. Co., 75 Fed. 106; St. Matthews Sav. Bank *v.* Fidelity, etc. Co., 105 Fed. 161; Pinson *v.* Atchison, etc. R. Co., 54 Fed. 464; Sims *v.* Schult, 40 Fed. 143; *In re* Williams, 37 Fed. 325; Cummings *v.* Akron Cement etc. Co., 6 Blatchf. 509, 6 Fed. Cas. No. 3,473; United States *v.* Sanborn, 28 Fed. 299; Cahn *v.* Munroe, 29 Fed. 675; Dennis *v.* Eddy, 12 Blatchf. 195, 7 Fed. Cas. No. 3,793; United States *v.* Williams, 1 Cranch C. C. 178, 28 Fed. Cas. No. 16,709; Dreskill *v.* Paris, 5 McLean 241, 7 Fed. Cas. No. 4,076.

*California.*—Murphy *v.* Madden, 63 Pac. 80; Beal *v.* Stevens, 72 Cal. 451, 14 Pac. 186.

*Georgia.*—Harris *v.* Early County, 96 Ga. 186, 22 S. E. 704.

*Iowa.*—Jones Co. *v.* Linn Co., 68 Iowa 63, 25 N. W. 930; Climie *v.* Appanoose County, 125 Iowa 292, 101 N. W. 98; State *v.* Willis, 79 Iowa 326, 44 N. W. 699; Perry *v.* Howe Creamery Co., 125 Iowa 415, 101 N. W. 150; Johnson County *v.* Porter, 4 G. Gr. 79.

*Kentucky.*—Brown *v.* Moore, 3 J. J. Marsh. 306.

*Massachusetts.*—Barber *v.* Parsons, 145 Mass. 203, 13 N. E. 491; Farmer *v.* Storer, 11 Pick. 241.

*Michigan.*—Hester *v.* Park, etc. Comrs., 84 Mich. 450, 47 N. W. 1097.

*Minnesota.*—State *v.* Bliss, 21 Minn. 458; Merriam *v.* Johnson, 93 Minn. 316, 101 N. W. 308.

*Missouri.*—Hoover *v.* Missouri Pac. R. Co., 115 Mo. 77, 21 S. W. 1076; Mt. Olivet Cem. Assn. *v.* Dalton, 53 Mo. App. 345; McHoney *v.* Kerwin, 56 Mo. App. 459; Wilson *v.* St. Louis, etc. R. Co., 53 Mo. App. 342.

*Montana.*—McGlaulin *v.* Wormser, 28 Mont. 177, 72 Pac. 428.

*Nebraska.*—Main *v.* Sherman County, 74 Neb. 155, 103 N. W. 1038.

*New York.*—Wheeler *v.* Lozee, 12 How. Pr. 446; Heckman *v.* Bach, 20 Abb. N. C. 401; Vence *v.* Speir, 18 How. Pr. 168; People *v.* Duell, 3 Johns. 449.

*North Carolina.*—Stern *v.* Herren, 101 N. C. 516, 8 S. E. 221; Morris *v.* Rippey, 49 N. C. (4 Jones L.) 533; Holmes *v.* Johnson, 33 N. C. (11 Ired. L.) 55; Lewis *v.* Wake County, 74 N. C. 194; Carpenter *v.* Taylor, 4 N. C. 265; Coward *v.* Jackson County, 137 N. C. 299, 49 S. E. 207.

*Oregon.*—Burrows *v.* Balfour, 39 Or. 488, 65 Pac. 1062; Crawford *v.* Abraham, 2 Or. 163; Egan *v.* Finney, 42 Or. 599, 72 Pac. 133.

*Pennsylvania.*—Cody *v.* Clelam, 1 Pa. Co. Ct. 8; Com. *v.* Smith, 4 Pa. Co. Ct. 321; Richards *v.* Clearfield County, 16 Pa. Co. Ct. 227.

*South Carolina.*—Johnson *v.* Wideman, Cheves L. 26; Coleman *v.* Curtis, 43 S. C. 1, 20 S. E. 744.

*Tennessee.*—Gray *v.* Alexander, 7 Humph. 16; Hopkins *v.* Waterhouse, 2 Yerg. 323.

*Texas.*—International, etc. R. Co. *v.* Richmond, 28 Tex. Civ. App. 513, 67 S. W. 1029.

*Vermont.*—Mattocks *v.* Wheaton, 10 Vt. 493; *In re* Consolidated Rendering Co., 80 Vt. 55, 66 Atl. 790.

In Criminal Cases it has been frequently held that witnesses for the state are not entitled to compensation for their services, such services being of that general character which every man is bound to render for his own and the general good.<sup>17</sup>

**B. RESIDENCE OF WITNESS AS AFFECTING RIGHT.**—A witness summoned from another county, district or state is entitled to fees.<sup>18</sup>

**Witness Residing Within Two Miles of Place of Trial** has been held, under the Oregon statute, not to be entitled to witness fees in a criminal case.<sup>19</sup>

**The Fact That the Deposition of a non-resident witness has been taken or may be taken does not excuse a witness from attending the trial if he has been regularly summoned. He is, therefore, upon attending entitled to witness fees.**<sup>20</sup>

*Washington.*—Christensen v. Union Trunk Line, 6 Wash. 75, 32 Pac. 1018.

*Wisconsin.*—Baumbach Co. v. Gessler, 82 Wis. 231, 52 N. W. 259.

**Witness Attending Preliminary Examination** before a justice of the peace in a criminal case is as much entitled to compensation as for appearing in court upon the main trial, under the Iowa code. Johnson County v. Porter, 4 G. Gr. (Iowa) 79.

**Prepayment Not Necessary.**—The *per diem* and mileage of a witness cannot be taxed in the costs of the judgment, unless the witness himself claims the compensation. He can demand them before he obeys the subpoena; but he does not waive his rights by not insisting on prepayment. Having made his demand before judgment entered, the party summoning him is bound to pay them, and being so bound he can tax them up in his costs. Young v. Merchants Ins. Co., 29 Fed. 273.

17. Israel v. State, 8 Ind. 467; O'Kane v. People, 46 Ill. App. 225.

**A Witness Duly Served With a Subpoena** in a criminal case cannot justify a failure to obey the writ on the ground that he has demanded his fees, and they were not paid. Huckins v. State, 61 Neb. 871, 86 N. W. 485.

**Poor Witness Entitled to Compensation.**—*Ex parte* Manning. 1 Caines (N. Y.) 59.

**Witness Entitled to Compensation Only in Case of Conviction.**—Shawnee County v. Ballinger, 20 Kan. 590.

18. Angell v. Union County, 8 Ill. App. 244; Nichols v. Doty, 3 Cow. (N. Y.) 352 (witness from Vermont entitled to fifty cents under 2 Rev. Laws p. 29, entitling witness from foreign country to that amount per day).

In Young v. Merchants' Ins. Co., 29 Fed. 273, it was held that all parts of the State of Southern Carolina are within the jurisdiction of the circuit court of the eastern district. The court does not know, in the sense which affects its jurisdiction, either the Eastern or Western district. A witness attending from the Western district is entitled to fees no matter what the distance from the place of trial.

19. In Oregon, Act 1885, provides that "in all criminal actions and proceedings witnesses residing within two miles of the place of trial, or the place where they are required to appear and testify, shall not be entitled to receive either witness fees or mileage." In Daly v. Multnomah County, 14 Or. 20, 12 Pac. 11, it was held that such act was not in conflict with Const., art. 1, § 18, providing that "particular services" of any man shall not be demanded without just compensation.

20. Where a witness after being subpoenaed removes temporarily from the county in which the suit is pending, although his deposition is then taken, if he returns before the termination of the trial he is bound to attend and thus he comes entitled to witness fees. Allbright v. Corley, 54 Tex. 372.

In Alabama. § 2801 of the code

C. NECESSITY AND SUFFICIENCY OF SUBPOENA. — a. *In General.* The general rule supported by the weight of authority is to the effect, that a witness is entitled to compensation, although not attending under a valid subpoena;<sup>21</sup> but there is authority holding that a witness is not entitled to fees or mileage unless regularly subpoenaed or recognized.<sup>22</sup>

b. *Attendance on Request.* — There are many cases holding that where a witness attends court voluntarily on request of one of the parties and not in response to a subpoena, he is nevertheless en-

provides that the evidence of a witness may be taken by deposition "when the witness resides more than one hundred miles from the place of trial, etc., but this statute does not require that the evidence shall be taken by deposition. It the witness reside in the state, and is subpoenaed, he is entitled to his mileage and *per diem*, as other witnesses. Alabama, etc., R. Co., *v* Rushing, 103 Ala. 542, 15 So. 853.

21. *United States* — *United States v. Williams*, 1 Cranch C. C. 178, 28 Fed. Cas. No. 16,709; *Dreskill v. Parish*, 5 McLean 241, 7 Fed. Cas. No. 4,076; *Anderson v. Moe*, 1 Abb. 299, 1 Fed. Cas. No. 359; *Dennis v. Eddy*, 12 Blatchf. 195, 7 Fed. Cas. No. 3,793; *The Vernon*, 36 Fed. 113; *Griggsby Const. Co. v. Louisiana*, etc. R. Co., 123 Fed. 751; *St. Matthews Sav. Bank v. Fidelity*, etc. Co., 105 Fed. 161; *In re Williams*, 37 Fed. 325; *Cummings v. Akron Cement etc. Co.*, 6 Blatchf. 509, 6 Fed. Cas. No. 3,473; *United States v. Sanborn*, 28 Fed. 299; *Cahn v. Monroe*, 29 Fed. 675; *Hanchett v. Humphrey*, 93 Fed. 895; *Power v. Semmes*, 1 Cranch C. C. 247, 19 Fed. Cas. No. 11,360 (witness attending pursuant to summons served by private person entitled to fees).

*Iowa*. — *Jones Co. v. Linn Co.*, 68 Iowa 63, 25 N. W. 930.

*Massachusetts*. — *Barber v. Parsons*, 145 Mass. 203, 13 N. E. 491; *Farmer v. Storer*, 11 Pick. 241.

*Montana*. — *McGlaulin v. Wormser*, 28 Mont. 177, 72 Pac. 428.

*Oregon*. — *Crawford v. Abraham*, 2 Or. 163; *Egan v. Finney*, 42 Or. 599, 72 Pac. 133.

*Pennsylvania*. — *Com. v. Smith*, 4 Pa. Co. Ct. 321; *Cody v. Clelam*, 1 Pa. Co. Ct. 8; *Lagrosse v. Curran*, 10 Phila. 140 (a witness attending

without subpoena, and not called to testify, is entitled to his costs, where a subpoena has been taken out, but its service has been waived, and where it does not appear that his testimony was needed).

*South Carolina*. — *Johnson v. Wideman*, 1 Cheves 26 (witnesses attending upon a subpoena ticket alone, without writ, entitled to fees from party cast in the suit).

*Tennessee*. — *Hopkins v. Waterhouse*, 2 Yerg. 323.

*Vermont*. — *Mattocks v. Wheaton*, 10 Vt. 493.

22. *Alaska*. — *Graeco-Russian Church v. Cohen*, 1 Alaska 32.

*Arizona*. — *Hereford v. O'Connor*, 5 Ariz. 258, 52 Pac. 471.

*Iowa*. — *Warnstaff v. Louisa County*, 76 Iowa 585, 41 N. W. 195.

*Missouri*. — *McHoney v. Kerwin*, 56 Mo. App. 459; *Herson v. Chicago*, etc. R. Co., 18 Mo. App. 439.

*North Carolina*. — *Lewis v. Wake County*, 74 N. C. 194; *Meredith v. Kent*, 1 N. C. 28; *Stern v. Herren*, 101 N. C. 516, 8 S. E. 221.

*Texas*. — *Manuel v. State*, 45 Tex. Crim. 96, 74 S. W. 30; *Harris v. Coleman*, 8 Tex. 278; *Sapp v. King*, 66 Tex. 570, 1 S. W. 466 (witness attending in obedience to void subpoena not entitled to compensation).

Where a statute provides that no subpoena for a non-resident witness for the state shall be issued, unless the same shall be signed by the clerk of the court and the solicitor-general of the circuit, a non-resident witness attending under a subpoena issued by the clerk of the court alone must be treated in law as a mere volunteer, and not as attending in obedience to the mandate of a lawful process. He is therefore neither entitled to a *per diem* or mileage

titled to fees,<sup>23</sup> and especially so where he has been examined.<sup>24</sup>

**D. ATTENDANCE AT COURT.**—a. *In General.*—As a rule a witness is not entitled to compensation for his services, unless it appear that he was in actual attendance at the trial.<sup>25</sup> A witness if not actually present must, at his own risk, keep himself sufficiently informed of the state of business to be able to be actually present when his services are required.<sup>26</sup>

b. *Necessity for Swearing.*—Although a witness has not been sworn at a trial, he is entitled to fees for travel and attendance, where his attendance has been regularly proved,<sup>27</sup> and where it appears that his attendance was necessary.<sup>28</sup>

**E. DOUBLE PAY.**—The law is generally opposed to double pay for the same service, and so where one receives per diem and mileage as a juror he is not entitled to receive at the same time per

allowance. *Harris v. Early County*, 96 Ga. 186, 22 S. E. 704.

**23.** *The Vernon*, 36 Fed. 113; *Eastman v. Sherry*, 37 Fed. 844; *Pinson v. Atchison*, etc. R. Co., 54 Fed. 464; *Burrow v. Kansas City*, etc. R. Co., 54 Fed. 278; *International & G. N. R. Co. v. Richmond*, 28 Tex. Civ. App. 513, 67 S. W. 1029; *Price v. M'Gee*, 1 Brev. (S. C.) 455 (witnesses called and sworn at the trial, if it be not done fraudulently and collusively, in order to increase costs, are entitled to their costs, though not subpoenaed).

**Per Diem Allowance Restricted to Days Case Is Actually on Calendar.** Witnesses who come from a distance at the request of parties, without subpoena, are entitled to the allowance for traveling expenses, and to the per diem allowance provided by statute; but the per diem allowance is to be restricted to the days during which the case is actually on the day calendar of the court sitting for trials, and actually in session, and the witnesses are in attendance. *Vence v. Speir*, 18 How. Pr. (N. Y.) 168.

*Contra.*—*Thompson v. Hodges*, 10 N. C. (3 Hawks) 318; *McHoney v. Kerwin*, 56 Mo. 459; *Fisher v. Burlington*, etc. R. Co., 104 Iowa 588, 73 N. W. 1070.

**24.** *Lagrosse v. Curran*, 10 Phila. (Pa.) 140; *Com. v. Smith*, 4 Pa. Co. Ct. 321; *DeBenneville v. DeBenneville*, 1 Binn. (Pa.) 46.

**25.** *United States.*—*Pringle v. The Michigan*, 52 Fed. 509.

*Maine.*—*Kennedy v. Wright*, 34 Me. 351.

*Mississippi.*—*Marshall Co. v. Tidmore*, 74 Miss. 317, 21 So. 51.

*New York.*—*Vence v. Spier*, 18 How. Pr. 168; *Booth v. Smith*, 3 Wend. 107.

*Oregon.*—*Crawford v. Abraham*, 2 Or. 163.

*Pennsylvania.*—*Cody v. Clelam*, 1 Pa. Co. Ct. 8; *Shutt v. Canon*, 5 Pa. Dist. 167.

*Texas.*—*McArthur v. State*, 41 Tex. Crim. 847, 57 S. W. 847.

**Witness Subpoenaed To Attend Before Grand Jury** is not entitled to fees merely because, in answer to the writ, he went to the courthouse or building in which the grand jury were sitting. *Dunn v. Douglas County*, 61 Neb. 179, 85 N. W. 56.

**26.** *Kennedy v. Wright*, 34 Me. 351.

**27.** *Schuler v. Minneapolis St. R. Co.*, 76 Minn. 48, 78 N. W. 881.

**28.** *Schuler v. Minneapolis St. R. Co.*, 76 Minn. 48, 78 N. W. 881; *Berryhill v. Carney*, 76 Minn. 319, 79 N. W. 170 (affidavit simply stating that a witness was a material one, and was in attendance necessarily—not sufficient—should have stated facts showing necessity of attendance).

"Fees of witnesses actually in attendance, though not called to testify, are properly taxed, where, if a certain state of facts had been shown by the other party, such party would have been compelled to call such witness." *Com. v. Swisher*, 3 Pa. Dist. 662.

diem as a witness.<sup>29</sup> In one instance, however, it was held that where a witness was recognized and attended court for a defendant, having been sworn and sent before the grand jury for the government, he was entitled to be paid by the latter for his attendance on the trial.<sup>30</sup> But a defendant under recognizance, who has also been bound over as a witness for the government in another case, is entitled to receive per diem and mileage as such witness.<sup>31</sup> And where the attendance of defendants or their witnesses is not required on the first day of the term by the rules and practice of the court, but only the attendance of grand jurors and witnesses for the commonwealth, one attending as a witness for the commonwealth at such time, although bound over by recognizance to the sessions as defendant in another case, is entitled to witness fees for that day, as well as for single mileage.<sup>32</sup>

F. FAILURE OR INABILITY TO TESTIFY. — Where a witness subpoenaed to testify to some matter competent and relevant to the issue, attends court, and remains in attendance without notice that his presence is not required, he is entitled to compensation for such attendance.<sup>33</sup> And the fact that he was not sworn,<sup>34</sup> or not examined,<sup>35</sup> will not relieve the party summoning from his liability to

29. In *Ex parte Turner*, 32 Fed. 372, it was held that where a plaintiff in a case attended the trial thereof under recognizance and for a portion of such time also served as grand juror, he was only entitled to receive per diem as a witness for the time while acting exclusively in that capacity.

*Contra.* — *Edwards v. Bond*, 5 McLean 300, 8 Fed. Cas. No. 4,294.

30. *Ex Parte Johnson*, 1 Wash. C. C. 47, 13 Fed. Cas. No. 7,367.

31. In *re Addis*, 28 Fed. 794, so holding upon the ground that since the person so summoned as a witness owes no duty to the government in attending court as a defendant, if he is summoned by the government as a witness, he is entitled to per diem and mileage as such.

*Contra.* — *Com. v. Lovett*, 2 Pa. Co. Ct. 375; *Com. v. Smith*, 4 Pa. Co. Ct. 321.

32. *Com. v. Smith*, 4 Pa. Co. Ct. 321.

33. *Gunnison v. Gunnison*, 41 N. H. 121, 77 Am. Dec. 764.

34. *Com. v. Smith*, 4 Pa. Co. Ct. 321; *Gunnison v. Gunnison*, 41 N. H. 121, 77 Am. Dec. 764; *DeBenneville v. DeBenneville*, 1 Binn. (Pa.) 46; *Leigh v. Hodges*, 4 Ill. 15; *Schuler*

*v. Minneapolis St. R. Co.*, 76 Minn. 48, 78 N. W. 881.

35. *United States.* — *Clark v. American Dock etc. Co.*, 25 Fed. 641; *Hathaway v. Roach*, 2 Woodb. & M. 63, 11 Fed. Cas. No. 6,213; *Burrow v. Kansas City, etc. R. Co.*, 54 Fed. 278.

*Illinois.* — *Leigh v. Hodges*, 4 Ill. 15.

*Massachusetts.* — *Farmer v. Storer*, 11 Pick. 241.

*Minnesota.* — *Schuler v. Minneapolis St. R. Co.*, 76 Minn. 48, 78 N. W. 881.

*New Hampshire.* — *Gunnison v. Gunnison*, 41 N. H. 121, 77 Am. Dec. 764.

*New York.* — *Andrews v. Bates*, 5 Johns. 351; *Baker v. Brill*, 15 Johns. 260; *Fuller v. Mattice*, 14 Johns. 357; *Watts v. Van Ness*, 1 Hill 76.

*North Carolina.* — *Holmes v. Johnson*, 33 N. C. (11 Ired. L.) 55; *Carpenter v. Taylor*, 4 N. C. 265.

*Pennsylvania.* — *First Nat. Bank v. Broadhead*, 8 Pa. Co. Ct. 536; *In re Goodman's Estate*, 6 Pa. Co. Ct. 254; *Com. v. Smith*, 4 Pa. Co. Ct. 321; *Cody v. Clelam*, 1 Pa. Co. Ct. 8; *DeBenneville v. DeBenneville*, 1 Binn. 46.

**Witnesses' Testimony Admitted Before Heard.** — Where issue has

pay such witness' fees. But a witness who is incompetent to testify,<sup>36</sup> or whose testimony is immaterial and irrelevant,<sup>37</sup> is not entitled to compensation unless he has actually been examined.<sup>38</sup>

**G. EFFECT OF CONTINUANCE OR POSTPONEMENT.**—A witness who attends court in obedience to summons is entitled to fees, though not examined by reason of the continuance or adjournment of the cause.<sup>39</sup> But a witness is entitled to compensation for attendance only, and so where a witness upon being subpoenaed goes to the nearest railway station for the purpose of taking passage to

been joined, and the points in controversy fixed, it is the duty of the plaintiff, or the party on whom is the burden to summon his witnesses, to have them present to testify. If at the trial, the other party admit the particular points to be proved by such witnesses, they nevertheless are entitled to per diem and mileage,—that is to say, their per diem up to the admission of their testimony. If a second trial is had and no stipulation or entry is made on the record that the facts admitted on the first trial will be admitted on the second, and if there is no assurance, verbal or otherwise, given to this effect, such witnesses will also be entitled to fees on the second trial. *Young v. Merchants' Ins. Co.*, 29 Fed. 273.

36. *Cody v. Clelam*, 1 Pa. Co. Ct. 8; *Com. v. Lucas*, 24 Pa. Co. Ct. 126.

**Witnesses Incapacitated by Reason of Intoxication.**—*Fritz v. Fritz*, 5 Pa. Dist. 676; *Murray v. Willis-ton*, 6 N. B. (Can.) 492.

37. *Cody v. Clelam*, 1 Pa. Co. Ct. 8; *Com. v. Lucas*, 24 Pa. Co. Ct. 126; *Eakin v. Fulmer*, 4 Pa. Co. Ct. 319 (rule applicable even though witness has been subpoenaed in good faith for the purpose of testifying to matters believed to be material and important).

Fees are not allowed to witnesses subpoenaed to testify to the character of one of the parties for veracity, in the event that it would be attacked, where no such attack was made or was even imminent. *First Nat. Bank v. Broadhead*, 8 Pa. Co. Ct. 536.

38. *Gray v. Alexander*, 7 *Humph. (Tenn.)* 16, holding that where a witness had been examined he was entitled to compensation for his services, although it appeared

that he was incompetent by reason of his being security for an appeal, and further that it does not necessarily follow that a witness was not examined because he appears of record to have been incompetent, since his incompetency may have been waived.

39. *Fish v. Farwell*, 33 Ill. App. 242; *Young v. Merchants' Ins. Co.*, 29 Fed. 273; *Moulton v. Townsend*, 16 How. Pr. (N. Y.) 306.

Where a witness was not subpoenaed until the night of the first day of the circuit court for the reason that he could not sooner be found, and went to court the next morning, but arrived about an hour after the cause had been postponed, it was held that there having been no laches chargeable to the party or witness, he having been subpoenaed and having attended in good faith, he was entitled to his fees. Besides he arrived in time to have been sworn if the cause had been tried. *Clark v. Staring*, 4 How. Pr. (N. Y.) 243.

*In re Williams*, 37 Fed. 325. In this case a person, under subpoena as a witness for the United States, attended court. The case was continued, and the witnesses were verbally instructed to attend at the next term. In the mean time he removed his residence into another state. Without further summons he attended court and was used as a witness by the United States. It was held that he was entitled to per diem and mileage from his place of residence even though it was out of the state and district, and more than one hundred miles from the place at which the trial was held.

**Non-Resident Witness Delayed by Accident** from reaching the place of trial on the first day, but arriv-

the county seat and there receives a telegram announcing the postponement of the cause, he is entitled to no compensation.<sup>40</sup>

**Duty To Be Present When Postponement Announced.** — Since it is the duty of a witness to be present during the trial of the cause for which subpoenaed, if a witness is not present in court when the case is postponed or continued, and so fails to hear the announcement of such postponement or continuance, it is his own fault; and he is not justified in charging for his attendance during the time for which the cause was postponed.<sup>41</sup>

**H. PERSONS ENTITLED TO COMPENSATION. — a. Parties. — (1.) In General.** — A party to an action, though a competent witness, is generally not entitled to compensation when testifying in his own behalf, and it is immaterial whether the party have an interest in the suit or not.<sup>42</sup>

ing the second before the opening of court, and before the cause was reached on the calendar, entitled to fees though by consent the cause had been adjourned on the first day. *Anonymous*, 3 Hill (N. Y.) 457.

40. *Shutt v. Canon*, 17 Pa. Co. Ct. 463, 5 Pa. Dist. 167.

41. *Robison v. Banks*, 17 Ga. 211.

42. *United States*. — *Roundtree v. Rembert*, 71 Fed. 255; *Street v. The Progresso*, 48 Fed. 239; *Nichols v. Brunswick*, 3 Cliff. 88, 18 Fed. Cas. No. 10,239.

*California*. — *Beal v. Stevens*, 72 Cal. 451, 14 Pac. 186.

*Illinois*. — *Bonner v. People*, 40 Ill. App. 628.

*Indiana*. — *Godwin v. Smith*, 68 Ind. 301.

*Minnesota*. — *Barry v. McGrade*, 14 Minn. 286.

*New Hampshire*. — *George v. Starrett*, 40 N. H. 135; *Whitney v. Pierce*, 40 N. H. 114; *Young v. Tilden*, 3 N. H. 74.

*New York*. — *Cornell v. Potter*, 15 How. Pr. 278; *Christy v. Christy*, 6 Paige 170; *Case v. Price*, 9 Abb. Pr. 111, 17 How. Pr. 348; *Perry v. Livingston*, 6 How. Pr. 404; *Bronner v. Frauenthal*, 20 How. Pr. 355, 12 Abb. Pr. 183; *Logan v. Thomas*, 11 How. Pr. 160; *Steere v. Miller*, 30 How. Pr. 7, *affirming* 28 How. Pr. 266.

*North Carolina*. — *Penny v. Brink*, 75 N. C. 68.

*Pennsylvania*. — *Fisher v. Selden*, 4 Pa. Co. Ct. 392; *Bell v. Dawes*, 9 Pa. Co. Ct. 636; *Cody v. Clelam*, 1 Pa. Co. Ct. 8.

*Tennessee*. — *Grub v. Simpson*, 6 Heisk. 92.

*Texas*. — *Gause v. Edminston*, 35 Tex. 69; *Texas M. R. Co. v. Parker*, 28 Tex. Civ. App. 116, 66 S. W. 583.

**Petitioners for an Inquisition in Lunacy** are parties and therefore not entitled to witness fees and mileage. *In re Hogg*, 17 Pa. Co. Ct. 509.

**Member of a Firm** called to testify in an action brought by the receiver of such firm is not entitled to witness fees, such action being in reality an action by the firm. *Leonard v. Smith*, 4 Pa. Dist. 249.

**A Third Party** required by order made in proceedings supplementary to execution, to attend and submit to an examination relative to property in his possession belonging to the judgment debtor, is to be considered a party as concerns such special finding and therefore not entitled to witness fees as a condition to his obedience to the order. *Heckman v. Bach*, 20 Abb. N. C. (N. Y.) 401. But see *Keith Bros. v. Stiles*, 92 Wis. 15, 64 N. W. 860, 65 N. W. 860, *holding* that a nominal party is entitled to witness fees since his interest in the result, if any, is slight. And *Smith v. Smith*, 146 Mich. 686, 110 N. W. 59, 111 N. W. 342, which was a divorce suit, *holding* that the successful party was entitled to mileage and per diem during the hearing. And also *Querissle v. Hilliard*, 3 Abb. Pr. (N. Y.) 31, *holding* that a defendant examined as a witness on his own behalf was entitled to fees, it not ap-



(2.) **English Rule.** — In England a plaintiff is entitled to fees when testifying as a necessary witness in his own behalf, on the ground that he is entitled to reimbursement for all reasonable expenses necessary to the enforcement of a just demand.<sup>43</sup> And there are cases holding that a defendant when examined or cross-examined by a plaintiff is also entitled to witness fees.<sup>44</sup>

(3.) **Party Acting in Representative Capacity.** — The rule is equally applicable where a party is acting as such in a representative capacity; thus a party suing as agent, attorney, assignee, superintendent, etc., of another, is not entitled to witness fees, although testifying in the cause.<sup>45</sup>

(4.) **Party's Near Relatives.** — A husband, wife, parent or child of a party to an action is generally held not to be a party to the suit and therefore is not barred from a claim to witness fees,<sup>46</sup> although

pearing that it was indispensable for him to appear at the trial as a party. See also *Shannon v. Brosins*, 9 Pa. Dist. 167; *Rogers v. Chamberlain*, 7 Abb. Pr. (N. Y.) 652; *Hanna v. Dexter*, 15 Abb. Pr. (N. Y.) 135; *Logan v. Brooks*, 8 Abb. Pr. (N. Y.) 127, 17 How. Pr. 29.

**Compensation Allowed.** In a proceeding to lay out a highway, to remonstrants acting as witnesses for another remonstrant, who appears as sole party plaintiff on an appeal. *Reader v. Smith*, 88 Ind. 440. And in an action against a sheriff to recover cotton seized as the property of a third person, under an agricultural lien, the lienee appearing as a witness in defense of the sheriff is entitled to fees, the action being against the sheriff. *Winsmith v. Dewberry*, 14 S. C. 554. Where defendant is summoned to appear and answer interrogatories relative to notes disclosed by a trustee, this is a new proceeding, tending to a different result from the original suit; the order of court, requiring his attendance, is of the nature of a subpoena or summons to a witness, and is therefore reasonable that he should be allowed the fees for his travel and attendance as a witness. *Hurd v. Fogg*, 22 N. H. 98.

A legal plaintiff who has made a *bona fide* assignment of his claim to an equitable plaintiff before suit brought and has testified on the trial as a witness is entitled to compensation, having no right or interest in the suit. *Tagg v. Bowman*, 3 Pa. Co. Ct. 300. Where some of the

defendants in separate actions, which have subsequently been consolidated for trial, are subpoenaed as witnesses by another defendant in one of the cases thus consolidated, the party subpoenaing them is entitled, on a judgment in his favor, to tax costs for the attendance of such witnesses. *Gray's Harbor Boom Co. v. McAmman*, 21 Wash. 465, 58 Pac. 573.

<sup>43</sup>. *Howes v. Barber*, 18 Q. B. 588, 21 L. J. I. B. 254, 16 Jur. 614; *Fox v. Toronto, etc. R. Co.*, 7 Ont. Pr. 157; *Dowdell v. Australian R. M. Steam Nav. Co.*, 3 El. & Bl. 902, 77 E. C. L. 901.

<sup>44</sup>. *Street v. Faulkner*, 15 U. C. Q. B. 116; *Davey v. Durrant*, 24 Beav. (Eng.) 493; *Bolkow v. Foster*, 7 Ont. Pr. 388; *Young v. English*, 7 Beav. (Eng.) 10.

<sup>45</sup>. *Rhoades v. Bank*, 12 Phila. (Pa.) 391; *Fisher v. Selden*, 4 Pa. Co. Ct. 392; *Eakin v. Fulmer*, 4 Pa. Co. Ct. 319; *Grub v. Simpson*, 6 Heisk. (Tenn.) 92; *Freck v. Barclay*, 5 Pa. Dist. 587.

**Next Friend** in whose name a suit is brought is a party to the suit and accordingly not entitled to costs as a witness. *Bambrey v. Baltimore & O. P. Co.*, 6 Pa. Co. Ct. 145.

**Directors of a Limited Partnership Association** are entitled to costs for attendance as witnesses at the trial of a cause to which the association is a party, but directors who are also managers are not so entitled. *Sharpless v. Pikeland Creamery*, 1 Pa. Co. Ct. 42.

<sup>46</sup>. *Griffith v. Montandon*, 4

the rule is otherwise as to a husband or wife in jurisdictions where the community property system has been adopted.<sup>47</sup>

(5.) **Co-Parties.** — Parties attending solely as witnesses, on behalf of a co-plaintiff or co-defendant, sworn and examined as to matters concerning which they are not jointly interested or liable, are entitled to fees.<sup>48</sup>

(6.) **Parties Examined on Behalf of Opposite Parties.** — Where a party is compelled to attend court to be examined in behalf of an adverse party, he is entitled to witness fees.<sup>49</sup> But where a party voluntarily attends the trial without being subpoenaed by the opposite party, and while there is called as a witness by the latter, he is not entitled to compensation.<sup>50</sup>

b. **Attorneys at Law.** — It has been held that a member of the bar in actual practice in the court where he is called as a witness is not entitled to witness fees,<sup>51</sup> although the better rule seems to be that an attorney at law is entitled to compensation as a witness

Idaho 75, 35 Pac. 704; *Bell v. Dawes*, 9 Pa. Co. Ct. 636; *Curry v. Philips*, 14 Pa. Co. Ct. 479; *Matter of Griffen*, 2 Ben. 209, 11 Fed. Cas. No. 5,810; *Kauffman v. Manor Twp.*, 11 Pa. Co. Ct. 304 (children entitled to witness fees in action brought by father to recover damages for death of wife).

While a wife is, in a sense, interested in an action prosecuted or defended by her husband, it is not such a legal interest as will prevent the recovery of witness' fees where she is a necessary or material witness in the case. *Anderson v. Ferguson-Bach Sheep Co.*, 12 Idaho 418, 86 Pac. 41.

**Prior to the Married Woman's Property Acts** a husband who was joined for conformity in a suit by the wife could not recover witness fees, because he was a party. *Sewards v. Elliott*, 3 Pa. Co. Ct. 72.

**Husband Acting as Attorney in Fact for Wife**, managing and conducting a suit for her is not entitled to witness fees. *Freck v. Barclay*, 5 Pa. Dist. 587.

47. The wife of a party to a suit, though it involves his separate property, is interested in the result; for if judgment be rendered against him for costs, it would affect the community property to that extent, and she would be considered a party as to its binding effect. *Texas M. R. Co. v. Parker*, 28 Tex. Civ. App. 116, 66 S. W. 583.

Presumption seems to be in an action against a husband or wife in relation to property that the subject of the action is community property, nothing appearing to the contrary, and therefore if either spouse acts as a witness in the case, although not a formal party, he or she is considered a party so as to be precluded from obtaining witness fees. *Hereford v. O'Connor*, 5 Ariz. 258, 52 Pac. 471; *Cole v. Angel* (Tex. Civ. App.), 28 S. W. 93.

48. *Van Dusen v. Bissell*, 29 How. Pr. (N. Y.) 481; *Penny v. Brink*, 75 N. C. 68. See also *Smith v. Smith*, 146 Mich. 686, 110 N. W. 59, 111 N. W. 342; *Barry v. McGrade*, 14 Minn. 286 (defendant only entitled to fees as a witness when attending solely as a witness for his co-defendants).

49. *Street v. The Progresso*, 48 Fed. 239; *George v. Starrett*, 40 N. H. 135; *Bonner v. People*, 40 Ill. App. 628; *Goodwin v. Smith*, 68 Ind. 301; *Penny v. Brink*, 75 N. C. 68. But see *Whitney v. Pierce*, 40 N. H. 114, holding that before an auditor, neither party is entitled to fees as a witness, whether testifying in his own favor or for his adversary.

50. *Beal v. Stevens*, 72 Cal. 451, 14 Pac. 186. See also *Gause v. Edmington*, 35 Tex. 69.

51. *McWilliams v. Hopkins*, 1 Whart. (Pa.) 276; *Johnson v. Atlantic & N. P. R. Co.*, 1 Pa. Co. Ct.

when acting as such,<sup>52</sup> even when attending court on professional business,<sup>53</sup> unless he is attorney of record for one of the parties to the action on the trial of which he is called to testify.<sup>54</sup>

**c. Public Officers.**—In the absence of statute,<sup>55</sup> public officers generally, when acting as witnesses, are, as a rule, entitled to fees as other witnesses,<sup>56</sup> with the exception of those officials whose duty

10; *Com. v. Lucas*, 24 Pa. Co. Ct. 126.

**Attorney Devoting Greater Portion of Time to Another Profession** is entitled to fees upon attending court as a witness. *Com. v. Lucas*, 24 Pa. Co. Ct. 126.

<sup>52.</sup> *Parks v. Brewer*, 14 Pick. (Mass.) 192.

**In England** under the Bankruptcy Rules, 1886, r. 71, a solicitor having been summoned as a witness before the registrar of a county court in a bankruptcy proceeding is entitled to compensation as a witness. *Chamberlain v. Stoneham*, 24 Q. B. D. (Eng.) 113.

<sup>53.</sup> *Abbott v. Johnson*, 47 Wis. 239, 2 N. W. 332.

**In Massachusetts** an attorney attending court on professional business and also pursuant to a subpoena, is only entitled to a day's pay for attendance on the day on which he testifies; but he is entitled to pay for any time he is detained as a witness waiting to testify, after having finished his professional business. *Parks v. Brenner*, 14 Pick. (Mass.) 192.

<sup>54.</sup> *L. E. Waterman Co. v. Lockwood*, 128 Fed. 174; *Barry v. McGrade*, 14 Minn. 286; *Freck v. Barclay*, 5 Pa. Dist. 587; *Abbott v. Johnson*, 47 Wis. 239, 2 N. W. 332. In *Jones v. Botsford*, 17 N. Bruns. 581, it was held that an attorney in the cause was not entitled to a fee as a witness, though he filed an affidavit stating that he would not have attended the trial had it not been necessary for him to be present as such.

**In New York** an attorney of record is entitled to a witness fee for the day on which he was sworn and testified, but not to mileage. *Taaks v. Schmidt*, 25 How. Pr. (N. Y.) 340. But see *Crummer v. Huff*, 1 Wend. (N. Y.) 24.

<sup>55.</sup> Under U. S. Rev. Stat. § 850 any clerk or other officer of the

United States summoned on behalf of the government is entitled only "to his necessary expenses, stated in items, and sworn to, in going, returning, and attendance on the court." Under § 873 the same rule is observed when an officer of the United States is summoned and attends as a witness for the defendant, at the expense of the government. Clerks in war department and in Internal Revenue office not allowed compensation for attendance as witnesses under § 850. *United States v. Sanborn*, 28 Fed. 299.

**Marshal's Clerk** not entitled to witness fees under same section. *Duval v. United States*, 23 Ct. Cl. 102. But clerk of a postmaster receiving a fixed salary with no allowance for clerk hire is not an officer of the United States within the meaning of § 850 and is therefore entitled to compensation. *In re Waller*, 49 Fed. 271.

<sup>56.</sup> *Com. v. Philadelphia County Comrs.*, 6 Binn. (Pa.) 397.

**Recorder of Deeds** entitled to compensation as a witness since his daily attendance at his office is not compulsory and since his attendance at court can only be brought about by subpoena. *Com. v. McArdle*, 3 Pa. Dist. 258. See also *In re Nelson*, 2 Ch. Chamb. (Can.) 252.

**Trustees of the Poor** entitled to compensation for attending as witnesses. *Taylor v. Trustees of Poor*, 1 Penne. (Del.) 247, 40 Atl. 116.

**Public Officer** entitled to compensation when attending upon the superior court as a witness, and is not precluded therefrom by a constitutional provision that the compensation of a public officer shall not be increased or diminished during his term of office, since such provision was intended to prevent extra compensation for duties connected with the office itself. *State v. Saillard*, 22 Wash. 267, 60 Pac. 651. See also

it is to attend court,<sup>57</sup> although the latter are precluded from receiving witnesses' fees only for time while actually engaged in court duties.<sup>58</sup>

d. *Officers, Agents or Members of Corporation.* — Officers, agents or members of a corporation who are material witnesses and in attendance in obedience to subpoena are entitled to witness fees and mileage, on the trial of a cause in which the corporation is a party. There is no good reason why this should be otherwise. They are not parties to the suit, although they may be indirectly interested.<sup>59</sup>

Davis v. Schuylkill Co., 27 Pa. Co. Ct. 177.

**Kansas City Policeman** entitled to fees as a witness in police courts of said city. Freeholder's charter forbidding an officer receiving a salary to receive fees or other compensation not applicable to one whose compensation is fixed by board of police commissioners. *State v. Gifford*, 70 Mo. App. 522.

**Jailer.** — *Ellison v. Stevenson*, 6 T. B. Mon. (Ky.) 271.

<sup>57.</sup> *Wintermute v. Smith*, 1 Bond 210, 30 Fed. Cas. No. 17,897. See also *Com. v. McArdle*, 3 Pa. Dist. 258.

**Police Officer** testifying in a police court not entitled to fees as a witness in addition to compensation for attendance. *Healy v. Hillsborough*, 70 N. H. 588, 49 Atl. 89.

**Constables** cannot draw witnesses' pay for the first day of the term. *Cody v. Clelam*, 1 Pa. Co. Ct. 8.

**An Officer in Charge of a Prisoner** if entitled to fees as officer, is not entitled to fees as a witness. *Starmont v. Cummins*, 120 Mich. 629, 79 N. W. 897.

**A Deputy Clerk** is an officer of the court and is not entitled to per diem and mileage when used as a witness for the government in a case tried in the court in which he is officiating. But a marshal's clerk employed in his office, keeping his accounts, is not an officer of the court and is entitled to fees and mileage, if used as a witness for the government. *Ex parte Burdell*, 32 Fed. 681.

<sup>58.</sup> **A Justice of the Peace** attending as a witness for the commonwealth is entitled to his daily pay, except for one day during each court, when he is bound to attend for the purpose of returning his recognizances. *Com. v. Philadelphia*

County Comrs., 6 Binn. (Pa.) 397. See also *Cody v. Clelam*, 1 Pa. Co. Ct. 8.

**A Deputy Marshal** is an officer of the court, but unless he be actually engaged in waiting upon the court, he is entitled to per diem and mileage if he be summoned as a witness for the government. *Ex parte Burdell*, 32 Fed. 681.

<sup>59.</sup> *Chickasaw, etc. F. Ins. Co. v. Weller*, 98 Iowa 731, 68 N. W. 443; *Wilson v. Mutual F. Ins. Co.*, 1 Pa. Co. Ct. 11; *Johnson v. Atlantic & N. P. R. Co.*, 1 Pa. Co. Ct. 10; *Fisher v. Selden*, 4 Pa. Co. Ct. 392; *Skinner Engine Co. v. Webb*, 5 Pa. Co. Ct. 480; *Sattler v. Machine Co.*, 9 Pa. Dist. 73. See also *Sharpless v. Pikeland Creamery*, 1 Pa. Co. Ct. 42.

**Officers of a Public Corporation**, attending as witnesses in the latter's behalf, entitled to fees. *Taylor v. Trustees of Poor*, 1 Penne. (Del.) 247, 40 Atl. 116.

**Former Agent** of a corporation who attends as a witness, and assists counsel in the management of the trial, is entitled to witness fees, where the corporation is no longer represented by such witness. *Skinner Engine Co. v. Webb*, 5 Pa. Co. Ct. 480.

**President of a Corporation** failing to attend in obedience to a subpoena or to object to compensation paid, will be required to attend at a subsequent date at his own expense. *George T. Smith Co. v. Greely*, 11 Ont. Pr. 345.

But see *American Diamond Drill Co. v. Sullivan Mach. Co.*, 32 Fed. 552, holding that where officers of a defendant corporation in an infringement suit appearing as witnesses before a master for the purpose of furnishing an account in obedience to an order of the court,

**1. LIMITATION OF NUMBER OF WITNESSES.**—The number of witnesses for whom compensation will be allowed is sometimes limited.<sup>60</sup>

**2. Nature of Services and Amount of Compensation.**—**A. IN GENERAL.**—The amount of compensation to which a witness is entitled both for services and mileage is generally regulated by statute,<sup>61</sup> but even where a statute exists, a witness entering into a contract to serve gratuitously, is bound thereby.<sup>62</sup> In the absence of statute, a reasonable amount is allowed, or the parties may enter into a special contract in relation thereto.<sup>63</sup>

**Double Compensation** in the absence of statute<sup>64</sup> is not allowed,<sup>65</sup> but a witness who is summoned by each party is entitled to compensation from each.<sup>66</sup>

are not entitled to mileage and per diem fees on the ground that they are representatives of the defendant.

**60. In South Carolina** under Gen. Stat. §2192, mileage and per diem will be allowed for but three witnesses to each issue raised in the action in which they are subpoenaed. *Young v. Merchants' Ins. Co.*, 29 Fed. 273.

**In Texas** it is provided by Rev. Stat., art. 1423, that the fees of more than two witnesses to any fact shall not be allowed in any cause, but this statute does not apply to criminal cases. *Tracy v. State* (Tex. Crim.), 24 S. W. 897.

**61. United States.**—*Carter v. Sweet*, 84 Fed. 16.

**Arkansas.**—*Pulaski County v. Downer*, 10 Ark. 588.

**Georgia.**—*Floyd County Comrs. v. Black*, 65 Ga. 384 (witnesses allowed \$2 per day for attendance on Superior court, but in the absence of special statutory provision they are not allowed same amount for attending a committing trial).

**New Hampshire.**—*Mathes v. Bennett*, 21 N. H. 204.

**North Carolina.**—*Stern v. Herren*, 101 N. C. 516, 8 S. E. 221.

**Pennsylvania.**—*Bradley v. Vernon*, 166 Pa. St. 603, 31 Atl. 330; *McDonald v. Alliance Coal Min. Co.*, 8 Pa. Co. Ct. 460; *DeHaven v. Merath*, 7 Pa. Co. Ct. 388.

**South Carolina.**—*Bratton v. Clendenin*, Harp. 454.

**Texas.**—*Gulf, etc. R. Co. v. Mitchell*, 21 Tex. Civ. App. 463, 51 S. W. 662.

And see also the statutes of the various states.

**Witness Serving Under Subpoena Duces Tecum.**—In New York under Act 1840, c. 386, allowing but fifty cents per day to witnesses of whatever class, a witness subpoenaed under a *subpoena duces tecum* cannot be allowed any more. *In re Corwin*, 6 Abb. N. C. (N. Y.) 437.

**Statute Not Retrospective.**—An act declaring that between certain dates witnesses for a territory, in criminal cases, shall be paid certain fees, is prospective, and does not cover services rendered during the month preceding its passage. *People v. Clayton*, 5 Utah 598, 18 Pac. 628; *People v. Pypier*, 6 Utah 160, 21 Pac. 722.

**Witness Fees Taxable as Costs.** See "Persons Liable, Payment and Recovery," *infra*, II, 3, A, and C.

**62. Carville v. Reynolds, 9 Ala. 969.**

**63. Burrow v. Kansas City, etc. R. Co.**, 54 Fed. 278.

**64. Double Fees for Non-Resident Witnesses.**—In Oregon it is provided by statute that witnesses subpoenaed from out of the county where the court is sitting shall be entitled to double fees, although it is held that this has no application to criminal cases. *Sargent v. Umatilla Co.*, 13 Or. 442, 11 Pac. 225.

**65. Com. v. Lovett**, 2 Pa. Co. Ct. 375 (witness attending before a committing magistrate and afterwards in court, in the same case on the same day, not allowed compensation for attendance before the magistrate).

**66. Pearce v. Person**, 5 N. C. (1 Murphy L.) 188.

**Agreements for Extra Compensation.** — It has been held that in the absence of a special agreement for extra compensation, a witness is not entitled to more than the statutory fees,<sup>67</sup> although it is generally held that a witness is not entitled to more than statutory fees even in view of a special agreement for more, these decisions being based upon the ground that such an agreement is against public policy.<sup>68</sup>

**B. COMPENSATION FOR ATTENDANCE.** — *a. In General.* — A witness is entitled to his fees during the whole time of his actual necessary attendance in court for the purpose of testifying in the cause for which he has been called,<sup>69</sup> and generally only for such time,<sup>70</sup> but in the case of non-resident witnesses, or witnesses living at a distance from the place of trial, attendance may be necessary on

<sup>67.</sup> *Holbrook v. Cooley*, 25 Minn. 275.

See *In re Shaddock*, 2 Mart. O. S. (La.) 207, holding witness not entitled to daily compensation for time lost by missing a passage to a port, where he does not reside.

<sup>68.</sup> *England.* — *Collins v. Godefroy*, 1 D. P. C. 326, 1 B. & Ad. 950, 9 L. J. (O. S.) K. B. 158; *Stanley v. Jones*, 7 Bing. 369, 20 E. C. L. 165.

*Connecticut.* — *Dodge v. Stiles*, 26 Conn. 463.

*Illinois.* — *Walker v. Cook*, 33 Ill. App. 561; *Smith v. McLaughlin*, 77 Ill. 596.

*Kansas.* — *Union Pac. R. Co. v. Harris*, 29 Kan. 275.

*New York.* — *Fuller v. Mattice*, 14 Johns. 357.

*Ohio.* — *Pengelly v. Ashland County*, 11 Ohio Dec. 620.

*Pennsylvania.* — *Ramschasel's Estate*, 24 Pa. Super. 262.

*Vermont.* — *House v. Barber*, 10 Vt. 158.

<sup>69.</sup> *United States.* — *Schott v. Benson*, 1 Blatchf. 564, 21 Fed. Cas. No. 12,479; *United States v. Williams*, 1 Cranch C. C. 178; *Dennis v. Eddy*, 12 Blatchf. 195, 7 Fed. Cas. No. 3,793; *Archer v. Hartford F. Ins. Co.*, 31 Fed. 660; *Pinson v. Atchison*, etc. R. Co., 54 Fed. 464; *In re Addis*, 28 Fed. 794; *Whipple v. Cumberland Cotton Mfg. Co.*, 3 Story 84, 29 Fed. Cas. No. 17,515.

*Alabama.* — *Alabama, etc. R. Co. v. Rushing*, 103 Ala. 542, 15 So. 853.

*Arizona.* — *Hereford v. O'Connor*, 5 Ariz. 258, 52 Pac. 471.

*Iowa.* — *State v. Willis*, 79 Iowa 326, 44 N. W. 699; *Hardin v. Polk County*, 39 Iowa 661; *Fisher v. Burlington*, etc. R. Co., 104 Iowa 588, 73 N. W. 1070.

*Mississippi.* — *Perkins v. Delta Pine L. Co.*, 66 Miss. 378, 6 So. 210.

*New Hampshire.* — *Gunnison v. Gunnison*, 41 N. H. 121, 77 Am. Dec. 764.

*New York.* — *Muscott v. Runge*, 27 How. Pr. 85; *Wheeler v. Lozee*, 12 How. Pr. 446.

*North Carolina.* — *Holmes v. Johnson*, 33 N. C. (11 Ired. L.) 55; *Carpenter v. Taylor*, 4 N. C. 265; *Hayle v. Cowan*, 2 N. C. (1 Hayw.) 21.

*Pennsylvania.* — *Dwight v. People*, 1 Pa. Co. Ct. 141; *Dellinger v. Dellinger*, 1 Pa. Co. Ct. 13; *Shutt v. Canon*, 5 Pa. Dist. 167; *Sluchko v. Luzerne County*, 16 Pa. Co. Ct. 221, 4 Pa. Dist. 418; *Wilson v. Mutual F. Ins. Co.*, 1 Pa. Co. Ct. 11; *Lagrosse v. Curran*, 10 Phila. 140.

*Washington.* — *Christensen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018.

*Wisconsin.* — *Baumbach Co. v. Gessler*, 82 Wis. 231, 52 N. W. 259.

<sup>70.</sup> *Crawford v. Abraham*, 2 Or. 163; *Ehle v. Bingham*, 4 Hill (N. Y.) 595; *In re Crane*, 6 Fed. Cas. No. 3,352 (resident witness not entitled to fees for days on which he was ready to attend); *Andrews v. Cressy*, 2 Minn. 67 (one witness living one mile distant, one ten, and two twelve, in attendance on third

days other than those on which the trial actually takes place, and compensation for such attendance must be allowed.<sup>71</sup>

b. *Attendance Over Sunday.*—Witnesses from a distance are entitled to fees for attendance on Sunday when detained over that day.<sup>72</sup>

c. *Attendance During Continuance or Postponement.*—A witness is generally entitled to compensation for his attendance at court during the time for which the trial has been continued or postponed,<sup>73</sup> although when a cause is called on the first day of the term and one of the parties has the trial postponed for want of material witnesses, if such party subsequently obtain a verdict he will not be entitled to more than one day's fees to witnesses.<sup>74</sup>

C. *TIME SPENT IN TRAVELING TO AND FROM PLACE OF TRIAL.* It has been held that a witness is not entitled to compensation for time occupied in going to and returning from court. His only compensation is said to be his prescribed mileage,<sup>75</sup> but the contrary has also been held.<sup>76</sup>

In England no compensation is allowed witnesses for time spent in traveling to and from the place of trial except in the case of pro-

day of term where cause is set for ninth day, are not necessarily in attendance for six days).

**Time Occupied by a Witness in Conference With Counsel** before the day fixed for trial or his attendance cannot be taxed as a "day's attendance in court." *Pringle v. The Michigan*, 52 Fed. 509.

71. *Andrews v. Cressy*, 2 Minn. 67; *Wheeler v. Ruckman*, 5 Robt. (N. Y.) 702; *McFall's Case*, 2 Mart. O. S. (La.) 171 (resident of Kentucky summoned as a witness while in New Orleans and compelled to wait till the meeting of the court, entitled to pay while detained since the time was too short to permit his going home and returning).

72. *Schott v. Benson*, 1 Blatchf. 564, 21 Fed. Cas. No. 12,479; *Muscott v. Runge*, 27 How. Pr. (N. Y.) 85.

73. *Whipple v. Cumberland Mfg. Co.*, 3 Story 84, 29 Fed. Cas. No. 17,515; *Hance v. McCormick*, 1 Cranch C. C. 522, 11 Fed. Cas. No. 6,009; *Hathaway v. Roach*, 2 Woodb. & M. 63, 11 Fed. Cas. No. 6,213.

**Witness Failing To Hear Announcement of Postponement** by reason of his absence from court, not justified in attending afterwards

and charging for his attendance. *Robison v. Banks*, 17 Ga. 211.

**Witnesses Must Be Excused To Relieve Litigants From Costs.** Where the civil docket has been laid aside, and the criminal docket taken up, this does not amount to the discharge of a witness in a civil cause. The witness cannot know how long it may occupy the court, or whether the civil docket may not be called before it is finally disposed of. If litigants would be relieved from the payment of costs they must at least excuse their witnesses from attending. *Marsh v. Branch Bank*, 10 Ala. 57.

**Resident Witness** not entitled to fees during adjournment. *Smith v. Smith*, 146 Mich. 686, 110 N. W. 59, 111 N. W. 342.

74. *Titus v. Bullen*, 6 Wend. (N. Y.) 562.

75. *Carter v. Sweet*, 84 Fed. 16; *Pringle v. The Michigan*, 52 Fed. 509; *Hathaway v. Roach*, 2 Woodb. & M. 63, 11 Fed. Cas. No. 6,213; *Speigner v. Cooner*, 9 Rich. L. (S. C.) 120.

76. *Nichols v. Doty*, 3 Cow. (N. Y.) 352; *Rogers v. Rogers*, 2 Paige (N. Y.) 458; *Wilkie v. Chadwick*, 13 Wend. (N. Y.) 49; *Lamb v. Coe*, 19 Wend. (N. Y.) 127; *Vene-*

fessional men, such as lawyers, physicians, engineers and surveyors.<sup>77</sup>

**D. COMPENSATION DURING DETENTION OF WITNESSES.**—In most states it is provided by statute that a witness for the state in a criminal prosecution must furnish security for his appearance at the trial of the case for which he is wanted, and in the event of refusal or failure to do so, he shall be committed. It is usually further provided that a witness is entitled to fees for each day's "attendance at court."<sup>78</sup> It is generally held that statutes relating to fees for each day's "attendance at court" must be strictly construed, and that a witness who has been detained is not entitled to compensation during the time for which he has been so detained, and this whether the witness' inability to furnish security arises from misfortune, through being a stranger in the community, or from his own bad character, by reason of which no one will become bound for him.<sup>79</sup>

**Distinction.**—**Inability Arising From Misfortune or Bad Character.** It has been held that if a witness be committed because of inability to furnish recognizance and if such inability arises from his misfortune rather than from any fault, his detention will be treated as a constructive attendance on the court and he will be entitled to compensation for the term of his detention.<sup>80</sup> On the other hand if the witness' inability to obtain security results from his own misconduct or bad character, he will not be entitled to a per diem fee.<sup>81</sup>

**E. COMPENSATION FOR ATTENDANCE IN SEVERAL ACTIONS.**—**a. General Rule.**—The general rule is that, in the absence of a rule of court, or special order, or stipulation of parties, a witness attend-

tian Blind Co. v. Nesbit, 13 Pa. Co. Ct. 330; McArthur v. State, 41 Tex. Crim. 635, 57 S. W. 847.

77. Nokes v. Gibbon, 26 L. J. Ch. 208, 3 Jur. (N. S.) 282, 5 W. R. 216; Willis v. Peckham, 1 Brod. & B. 515, 5 E. C. L. 171; Collins v. Godefroy, 1 B. & Ad. 950, 20 E. C. L. 514; Pritchard v. Walker, 3 Car. & P. 212, 14 E. C. L. 274.

78. See the statutes of the various states.

79. Marshall Co. v. Tidmore, 74 Miss. 317, 21 So. 51; State v. Walsh, 44 N. J. L. 470; Morin v. Multnomah County, 18 Or. 163, 22 Pac. 490; Sluchko v. Luzerne County, 16 Pa. Co. Ct. 221; Howard v. Beaver County, 6 Pa. Co. Ct. 397; Shutt v. Canon, 5 Pa. Dist. 167; State v. Greene, 91 Wis. 500, 65 N. W. 181 (general rule adhered to as stated in the text, but emphasis seems to be laid upon the fact that the case

for which the witness was detained never came to trial).

Compare People v. Pettit, 19 Misc. 280, 44 N. Y. Supp. 256, holding that where a witness has been detained on an illegal commitment he is not entitled to fees during the time of such detention.

80. *In re* Higginson's Case, 1 Cranch C. C. 73, 12 Fed. Cas. No. 6,471; Hall v. Somerset Co., 82 Md. 618, 34 Atl. 771, 51 Am. St. Rep. 484, 32 L. R. A. 449; Robinson v. Chambers, 94 Mich. 471, 54 N. W. 176, 20 L. R. A. 57; *s. c.*, 94 Mich. 473, 54 N. W. 176. See also McFall's Case, 2 Mart. O. S. (La.) 171; Hutchins v. State, 8 Mo. 288; State v. Stewart, 4 N. C. 524.

81. Markwell v. Warren County, 53 Iowa 422, 5 N. W. 570; Hall v. Somerset County, 82 Md. 618, 34 Atl. 771, 51 Am. St. Rep. 484, 32 L. R. A. 449. See also Marshall Co. v. Tidmore, 74 Miss. 317, 21 So. 51.



ing in more than one cause, at the same time, is entitled to full pay in each cause.<sup>82</sup>

b. *Parties Different.* — In other cases it is held that a witness summoned in several causes, and attending upon all at the same time, is entitled to compensation in each when the parties are different.<sup>83</sup>

c. *Compensation Irrespective of Number of Suits.* — Still another line of decisions holds that a witness' pay is to be determined by the time during which he is in attendance, without regard to the number of suits in which he has been summoned, or called to testify.<sup>84</sup>

82. *United States.* — *Waterman Co. v. Lockwood*, 128 Fed. 174; *The Vernon*, 36 Fed. 113; *Archer v. Hartford F. Ins. Co.*, 31 Fed. 660; *Wooster v. Handy*, 23 Fed. 49.

*Arkansas.* — *Pulaski County v. Downer*, 10 Ark. 588; *Springfield & M. R. Co. v. Lambert*, 42 Ark. 121 (in civil cases compensation allowed for every case but in criminal cases, where costs are paid by county witnesses are allowed pay in but one case, no matter in how many they are summoned or called to testify).

*Georgia.* — *Robison v. Banks*, 17 Ga. 211.

*Illinois.* — *O'Kane v. People*, 46 Ill. App. 225.

*Maine.* — *Eames v. Black*, 72 Me. 263.

*Massachusetts.* — *Day v. Berkshire Woolen Mills*, 1 Gray 420; *Taylor v. Vermont*, etc. R. Co., 1 Gray 422; *Barber v. Parsons*, 145 Mass. 203, 13 N. E. 491 (witnesses summoned in one cause although requested to attend in more are entitled to one traveling fee only, but are entitled to per diem in each).

*New York.* — *Hicks v. Brennan*, 10 Abb. Pr. 304; *Vence v. Speir*, 18 How. Pr. 168; *Willink v. Reckle*, 19 Wend. 82.

*Texas.* — *Flores v. Thorn*, 8 Tex. 377.

*Wisconsin.* — *McHugh v. Chicago*, etc. R. Co., 41 Wis. 79.

In *Tennessee* it is provided by statute that "no witness can prove attendance at any term of the court in more than two criminal cases." In *State v. O'Haver*, 15 Lea (Tenn.) 46, it was held that no exception could be grafted on the

statute, though the terms had lengthened and a witness had testified in cases tried at different times during the term.

In *Vermont* when several causes are between the same parties and the witness is subpoenaed in but one, he is entitled to compensation in but that one. *House v. Barber*, 10 Vt. 158.

83. *Parker v. Bigler*, 1 Fish. Pat. Cas. 285, 18 Fed. Cas. No. 10,726; *Young v. Merchants' Ins. Co.*, 29 Fed. 273; *Archer v. Hartford Fire Ins. Co.*, 31 Fed. 660; *Findley v. Wyser*, 1 Stew. (Ala.) 23; *Robinson v. Bank*, 17 Ga. 211; *Taylor v. Vermont*, etc. R. Co., 1 Gray (Mass.) 422.

84. *Iowa.* — *Hardin v. Polk County*, 39 Iowa 661; *Meffert v. Dubuque*, etc. R. Co., 34 Iowa 430.

*Oregon.* — *Howe v. Douglas County*, 3 Or. 488; *Crawford v. Abraham*, 2 Or. 163 (attendance in each successive will case will reach back only to the final dispositions of the preceding case).

*Pennsylvania.* — *Com. v. Cozens*, 1 Ashm. 265; *Keller v. Clinton County*, 4 Pa. Dist. 216; *Horne v. Harrington*, 6 Watts 331; *Batdorff v. Eckert*, 3 Pa. St. 267; *Curtis v. Buzzard*, 15 Serg. & R. 21; *In re McCullough*, 12 Phila. 576; *Com. v. Lovett*, 2 Pa. Co. Ct. 375 (witness attending before committing magistrate and afterwards the same day in court in the same case not allowed witness fees for attendance before the magistrate).

*Tennessee.* — *Hopkins v. Waterhouse*, 2 Yerg. 323.

Where Several Actions Are Consolidated at one term, and at a

F. ADDITIONAL COMPENSATION TO EXPERTS. — a. *In General.* Whether an expert witness is entitled to extra compensation depends upon local statutes. In some jurisdictions it is held that he is so entitled,<sup>85</sup> in others that he is entitled to no more than any other witness.<sup>86</sup>

subsequent term judgment has been entered "against both parties, plaintiffs and defendants, for their costs in each case," the witnesses summoned are entitled to prove but one attendance, and in one action. *Mills Co. v. Lytle*, 118 N. C. 837, 24 S. E. 530.

85. *California.* — See *Faulkner v. Hendy*, 79 Cal. 265, 21 Pac. 754.

*Colorado.* — *Board Comrs. v. Lee*, 3 Colo. App. 177, 32 Pac. 841 (county board may make special contract with expert witnesses necessary in criminal cases).

*District of Columbia.* — *United States v. Cooper*, 21 D. C. 491 (practical miners are expert witnesses and are entitled to extra compensation as such).

*Iowa.* — *Snyder v. Iowa City*, 40 Iowa 646 (expert witness entitled to extra compensation, the amount of which is to be fixed by the court).

*Louisiana.* — *Harrison v. City of New Orleans*, 40 La. Ann. 509, 4 So. 133 (an expert appointed by one to make researches deemed necessary for his defense must be paid by him).

*Massachusetts.* — *Attorney-General Petitioner*, 104 Mass. 537 (under the statutes, a medical expert who attends a criminal trial and testifies on behalf of the defendant may be allowed a reasonable compensation therefor, if approved by the attorney-general).

*Minnesota.* — *LeMere v. McHale*, 30 Minn. 470, 15 N. W. 682 (allowance of extra compensation left to discretion of trial court by statutory provision); *Farmer v. Stillwater W. Co.*, 86 Minn. 59, 90 N. W. 10.

*North Carolina.* — *State v. Dollar*, 66 N. C. 626 (court authorized by statute to allow reasonable fee to expert in addition to usual fee for attendance).

*New York.* — *People v. Montgomery*, 13 Abb. Pr. (N. S.) 207 (district attorney has power to arrange for the attendance of expert wit-

nesses for special compensation, and amount paid cannot affect regularity of trial although it may reflect upon credibility of witness); *In re Mayor*, etc. of New York, 72 App. Div. 113, 76 N. Y. Supp. 137 (counsel to corporation of city of New York not authorized to fix compensation of witnesses in proceedings to acquire title to real estate; compensation must be fixed upon proof of value of service in manner prescribed by statute).

*In re Roelker*, 1 Spur. 276, 20 Fed. Cas. No. 11,995, the decision was placed upon the ground that to compel a person to attend merely because he is accomplished in a particular science, art, or profession, would subject the same individual to be called upon in every case in which any question in his department of knowledge is to be solved, and that the most eminent physicians might be compelled merely for the ordinary witness fees to attend from the remotest part of the district and give their opinion in every trial in which a medical question arose.

86. *Arkansas.* — *Flinn v. Prairie Co.*, 60 Ark. 204, 29 S. W. 459, 46 Am. St. Rep. 168, 27 L. R. A. 669; *Clark County v. Kerstan*, 60 Ark. 508, 30 S. W. 1046.

*Illinois.* — *North Chicago St. R. Co. v. Zeigler*, 182 Ill. 9, 54 N. E. 1006, 74 Am. St. Rep. 157; *Dixon v. People*, 168 Ill. 179, 48 N. E. 108, 39 L. R. A. 116; *North Chicago*, etc. R. Co. v. *Zeigler*, 78 Ill. App. 463; *Smith v. McLaughlin*, 77 Ill. 596.

*Indiana.* — *Indiana Rev. Stat.* 1894, § 512, provided that an expert witness may be compelled to testify without extra compensation, thus changing the rule laid down in *Buchman v. State*, 59 Ind. 1, 26 Am. Rep. 75, and *Dills v. State*, 59 Ind. 15, although in *Gaston v. Marion County*, 3 Ind. 497, it was held that a physician was not entitled to compensation for traveling and giving

In England the authorities are somewhat conflicting. In a great many cases extra compensation for loss of time is allowed to physicians and attorneys only when acting as witnesses.<sup>87</sup> In other cases the rule is extended so as to include other expert witnesses.<sup>88</sup> The modern rule seems to leave the allowance of reasonable compensation to expert witnesses to the discretion of the court.<sup>89</sup>

b. *Testimony as to Matters of Fact and That Requiring Preparation.*—In many cases the compensation of the witness is determined by the class or character of his testimony. It is held that if a witness' testimony is based upon accumulated knowledge, acquired by study and experience, he is, in the discharge of his duty

evidence in obedience to subpoena at a coroner's inquest beyond that of an ordinary witness.

*Nebraska.*—Main v. Sherman County, 74 Neb. 155, 103 N. W. 1038.

As a Reason for the Rule that an expert witness should be allowed no more than the fees of an ordinary witness, in *Ex parte Dement*, 53 Ala. 389, 25 Am. Rep. 611, the court said: "And the same principle which justifies the bringing of the mechanic from his workshop, the merchant from his store houses, the broker from the exchange, or the lawyer from his engagements, to testify in regard to some matter which he has learned in the exercise of his art or profession, authorizes the summoning of a physician, or surgeon, or skilled apothecary, to testify of a like matter, when relevant to a cause pending for determination in a judicial tribunal."

87. *Lowry v. Doubleday*, 5 Maule & S. 159, note; *Severn v. Olive*, 6 Moore 253, 3 Br. & B. 72, 23 R. R. 365; *Moor v. Adam*, 5 Maule & S. 156; *Lopes v. De Tastet*, 7 Moore 120, 3 Br. & B. 292; *May v. Selby*, 4 Scott (N. R.) 727, 4 Man. & G. 142, 1 D. (N. S.) 702, 6 Jur. 52, 11 L. J. C. P. 223; *Mackley v. Chillingworth*, 46 L. J. C. P. Div. 484, 2 C. P. Div. 273, 36 L. T. N. S. 514, 25 W. R. 650; *Nolan v. Copeman*, 42 L. J. Q. B. 44, L. R. 8 Q. B. 84, 27 L. T. N. S. 789, 21 W. R. 263; *Hawkins v. Rigby*, 29 L. J. C. P. 228, 6 Jur. (N. S.) 1208, 8 C. B. N. S. 271, 2 L. T. 243; *Murphy v. Nolan*, Ir. R. T. Eq. 498. See also *Chamberlain v. Stoneham*, 59 L. J.

Q. B. 95, 24 Q. B. Div. 113, 61 L. T. 560, 38 W. R. 107; *Hale v. Bates*, El. Bl. & El. 575, 28 L. J. Q. B. 14, 4 Jur. (N. S.) 1106; *Clark v. Gill*, 1 Kay & J. 19, 23 L. J. Ch. 711, 2 W. R. 652.

88. *Loneragan v. Royal Exch. Assur. Co.*, 7 Bing. 729, 20 E. C. L. 308; *Nokes v. Gibbon*, 26 L. J. Ch. 208, 3 Jur. (N. S.) 282, 5 W. R. 216; *Ellington v. Clark*, 58 L. T. 818; *Moseley v. Victoria Rubber Co.*, 57 L. T. 142; *Duke of Beaufort v. Ashburnham*, 13 C. B. (N. S.) 598, 32 L. J. C. P. 97, 9 Jur. (N. S.) 822, 7 L. T. 710, 11 W. R. 267; *Nokes v. Gibbon*, 26 L. J. Ch. 208, 3 Jur. (N. S.) 282, 5 W. R. 216; *Webb v. Page*, 1 Car. & K. 23, 47 E. C. L. 23; *Parkinson v. Atkinson*, 31 L. J. C. P. 199; *Batley v. Kynock*, 44 L. J. Ch. 565, L. R. 20 Eq. 632, 33 L. T. N. S. 45; *In re Working Men's Mut. Soc.*, 51 L. J. Ch. 850, L. R. 21 Ch. Div. 831, 47 L. T. 645, 30 W. R. 938; *Robb v. Connor*, Ir. R. 9 Eq. 373.

In *Webb v. Page*, 1 Car. & K. (Eng.) 23, 47 E. C. L. 23, it was held that there is a distinction between the case of a man who sees a fact and is called upon in a court of justice to prove it, and of the one who is selected by a party to give his opinion on a matter with which he is peculiarly conversant from the nature of his employment in life, as without the testimony of the former justice must stop, but there is no such necessity for the evidence of the latter and therefore the party who selects him must pay him.

89. *Mackley v. Chillingworth*, 46 L. J. C. P. Div. 484, 2 C. P. Div. 273, 25 W. R. 650, 36 L. T. 514;

as a citizen, compellable to attend court, in obedience to process, and testify as to what he may know, without extra compensation. If, on the other hand, he has been required to make any examination or preliminary preparation, or has been compelled to attend the trial and listen to testimony to be better enabled to give his testimony as an expert, he is, for service of this character, entitled to extra compensation.<sup>90</sup>

*c. Refusal To Testify Is Contempt.*—Where the fees which witnesses are entitled to receive are fixed by statute regardless of their calling or profession, it is of course contempt for an expert witness to refuse his testimony on the ground that he has not been paid extra;<sup>91</sup> but in jurisdictions where an expert witness is held entitled

*Turnbull v. Janson*, L. R. 3 C. P. Div. 264, 47 L. J. C. P. 384, 26 W. R. 815.

90. *Arkansas.*—*Flinn v. Prairie County*, 60 Ark. 204, 29 S. W. 459, 46 Am. St. Rep. 168, 27 L. R. A. 669; *St. Francis County v. Cummings*, 55 Ark. 419.

*Colorado.*—*Board Comrs. v. Lee*, 3 Colo. App. 177, 32 Pac. 841.

*Georgia.*—*Schofield v. Little*, 2 Ga. App. 286, 58 S. E. 666.

*Illinois.*—*Walker v. Cook*, 33 Ill. App. 561.

*Indiana.*—*Buchman v. State*, 59 Ind. 1, 26 Am. Rep. 75. But see *Burns' Rev. Stats.* 1894, § 512.

*Iowa.*—*Snyder v. Iowa City*, 40 Iowa 646.

*New York.*—*People v. Montgomery*, 13 Abb. Pr. (N. S.) 207.

*Texas.*—*Summers v. State*, 5 Tex. App. 365, 374, 32 Am. Rep. 573 (medical expert having made post mortem examination may be compelled to testify as to the result, though extra compensation is refused; but he could not have been compelled to make an examination without extra pay).

A Surveyor, attending as a witness, is entitled to no more compensation than another witness, except in cases where there has been a view. *Lyon v. Wilkes*, 1 Cow. (N. Y.) 591.

In *Minnesota* it is provided by statute "that the judge of any court of record in this state, before whom any witness is summoned or sworn and examined as an expert in any profession or calling, may in his discretion, allow such fees or compensation as in his judgment may be

just and reasonable." This statute was designed to apply only to cases where witnesses are called to testify to an opinion founded on special study or experience in any profession or calling, or to make scientific or professional examination of some matter connected with the issues involved in the case, and then state the results, and not to cases where a witness skilled in some profession or calling is called upon to testify as to facts within his personal knowledge, although he may have acquired his knowledge of the facts while in the ordinary practice of his profession, and although his professional skill may have enabled him to observe such facts more intelligently and narrate them more correctly. *LeMere v. McHale*, 30 Minn. 410, 15 N. W. 682; *Anderson v. Minneapolis*, etc. R. Co., 103 Minn. 184, 114 N. W. 744. But where physicians and surgeons are engaged to treat and examine an injured person for the purpose of acquiring the knowledge necessary to qualify them as expert witnesses, they are not necessarily disqualified as such by the fact that they also treated the patient professionally. *Anderson v. Minneapolis*, etc. R. Co., 103 Minn. 184, 114 N. W. 744.

*Missouri.*—*Burnett v. Freeman*, 125 Mo. App. 683, 103 S. W. 121 (physician not entitled to extra compensation, unless required to perform special services; agreement to pay extra, invalid as against public policy).

91. *Dixon v. People*, 168 Ill. 179, 48 N. E. 108, 39 L. R. A. 116; *Ex parte Dement*, 53 Ala. 389, 25 Am.

to extra compensation, it is no contempt for him to refuse to testify where he has not been paid.<sup>92</sup>

G. MILEAGE AND EXPENSES. — a. *In General.* — The law is now well settled that a witness who, in good faith, attends court, whether he comes in obedience to subpoena, or at the mere request of a party, is entitled to an allowance for traveling expenses.<sup>93</sup>

Rep. 611. See also *Wright v. People*, 112 Ill. 540; *Summers v. State*, 5 Tex. App. 365, 32 Am. Rep. 573.

In *Minnesota* where the statute allows the judge to allow to an expert witness "such fees or compensation as in his judgment, may be just and reasonable," has reference to an allowance to be made after the witness has been summoned and dismissed without being sworn or examined, or after he has been so sworn and examined, and not before. A refusal of a witness, on the ground that he had not been paid the compensation of an expert, is therefore unjustifiable. *State v. Teipner*, 36 Minn. 535, 32 N. W. 678.

92. *Buchman v. State*, 59 Ind. 1, 26 Am. Rep. 75; *Dills v. State*, 59 Ind. 15 (but see *Indiana Rev. Stat.* 1894, § 512); *People v. Montgomery*, 13 Abb. Pr. N. S. (N. Y.) 207; *United States v. Howe*, 26 Fed. Cas. No. 15,404a.

93. *United States.* — *Anderson v. Moe*, 1 Abb. 299, 1 Fed. Cas. No. 359; *Cummings v. Akron Cement, etc. Co.*, 6 Blatchf. 509, 6 Fed. Cas. No. 3,473; *Dennis v. Eddy*, 12 Blatchf. 197, 7 Fed. Cas. No. 3,793; *United States v. Sanborn*, 28 Fed. 299; *The Vernon*, 36 Fed. 113; *The Syracuse*, 36 Fed. 830; *In re Williams*, 37 Fed. 325; *Eastman v. Sherry*, 37 Fed. 844; *Burrow v. Kansas City, etc. R. Co.*, 54 Fed. 278; *Pinson v. Atchison R. Co.*, 54 Fed. 464; *Sloss I. & S. Co. v. South Carolina G. R. Co.*, 75 Fed. 106; *Hanchett v. Humphrey*, 93 Fed. 895; *St. Matthew's Sav. Bank v. Fidelity, etc. Co.*, 105 Fed. 161; *Grigbsby Const. Co. v. Louisiana & N. W. R. Co.*, 123 Fed. 751.

*Alabama.* — *Alabama, etc., R. Co. v. Rushing*, 103 Ala. 542, 15 So. 853.

*California.* — *Beal v. Stevens*, 72 Cal. 451, 14 Pac. 186.

*Idaho.* — *Anderson v. Ferguson-*

*Bach Sheep Co.*, 12 Idaho 418, 86 Pac. 41.

*Illinois.* — *Doppelt v. Columbia Paper Stock Co.*, 99 Ill. App. 207; *Chicago City R. Co. v. Burke*, 102 Ill. App. 661.

*Iowa.* — *Casley v. Mitchell*, 121 Iowa 96, 96 N. W. 725; *Climie v. Appanoose County*, 125 Iowa 292, 101 N. W. 98.

*Massachusetts.* — *Farmer v. Storer*, 11 Pick. 241.

*Michigan.* — *Smith v. Smith*, 146 Mich. 686, 110 N. W. 59, 111 N. W. 342.

*Missouri.* — *Ferguson, etc. Lumb. Co. v. Tiedex Co.*, 130 Mo. App. 269, 109 S. W. 850; *Wilson v. St. Louis, etc. R. Co.*, 53 Mo. App. 342; *Mt. Olivet Cem. Assn. v. Dalton*, 53 Mo. App. 345.

*Montana.* — *McGlauffin v. Wormser*, 28 Mont. 177, 72 Pac. 428; *Great Falls Meat Co. v. Jenkins*, 33 Mont. 417, 84 Pac. 75.

*New Hampshire.* — *Gunnison v. Gunnison*, 41 N. H. 121, 77 Am. Dec. 764.

*New Jersey.* — *Henry v. Walton*, 52 N. J. L. 370, 19 Atl. 791.

*New York.* — *Wheeler v. Lozee*, 12 How. Pr. 446; *Clarks v. Starling*, 4 How. Pr. 234.

*North Carolina.* — *Coward v. Jackson County*, 137 N. C. 299, 49 S. E. 207.

*Oregon.* — *Sargent v. Umatilla Co.*, 13 Or. 442, 11 Pac. 225; *Egan v. Finney*, 42 Or. 599, 72 Pac. 133; *Crawford v. Abraham*, 2 Or. 163; *Burrows v. Balfour*, 39 Or. 488, 65 Pac. 1062.

*Pennsylvania.* — *Rebert v. Eline*, 21 Pa. Co. Ct. 431; *Com. v. McArdle*, 3 Pa. Dist. 258; *Wilson v. Mutual F. Ins. Co.*, 1 Pa. Co. Ct. 11; *Feree v. Strome*, 1 Yeates 303.

*South Carolina.* — *Coleman v. Curtis*, 43 S. C. 1, 20 S. E. 744.

*Vermont.* — *Albany v. Derby*, 30 Vt. 718.

*Washington.* — *Christensen v.*

**Resident Witnesses** since their traveling expenses are infinitesimal are not entitled to a mileage allowance.<sup>94</sup>

**A Foreign Witness** recognized or subpoenaed at the place of trial is not entitled to mileage.<sup>95</sup>

b. *From Whence Mileage Allowed.* — It is sometimes held that a witness is entitled to mileage from his residence only,<sup>96</sup> but there are other cases holding that mileage may be taxed from his temporary residence or place of business.<sup>97</sup> And where one comes from a distant city to the city of his residence to testify, in order that he may be entitled to mileage fees it must appear that he came for the sole purpose of testifying and that he actually returned to the city from whence he came.<sup>98</sup>

**A Voluntary Witness** or one who attends court without subpoena or request though he comes a long distance and testifies, and is a necessary witness, cannot recover mileage.<sup>99</sup>

c. *By What Route Mileage Taxable.* — It is held that the mileage of witnesses must be computed by the route usually traveled,<sup>1</sup> provided that no more mileage can be allowed than for the miles actually traveled.<sup>2</sup> Where there are two well known and commonly traveled railroad routes; mileage should be taxed by the shortest

Union Trunk Line, 6 Wash. 75, 32 Pac. 1018; *Carlson v. Van De Venter*, 19 Wash. 32, 52 Pac. 323.

*Wisconsin.* — *Baumbach Co. v. Gessler*, 82 Wis. 231, 52 N. W. 259.

**A County Is Not Liable** for the mileage of a witness subpoenaed to attend a preliminary examination of a person accused of crime, where the subpoena was issued and served before the complaint was lodged with the magistrate, and before the accused was arrested. *Warnstaff v. Louisa County*, 76 Iowa 585, 35 N. W. 604.

**Mileage Taxable as Costs.** — See "PERSONS LIABLE, PAYMENT AND RECOVERY," *infra*, II, 3.

94. *Chicago City R. Co. v. Burke*, 102 Ill. App. 661; *Jackson v. Hoagland*, 1 Wend. (N. Y.) 69. See also *Graeco-Russian Church v. Cohen*, 1 Alaska 32.

95. *Dowling v. Bush*, 6 How. Pr. (N. Y.) 410; *Niagara Bank v. Austin*, 6 Wend. (N. Y.) 548; *McFall's Case*, 2 Mart. O. S. (La.) 171.

96. *Marks v. Fields* (Tex. Civ. App.), 29 S. W. 664.

**Witness Summoned at Point Nearer Than Place of Residence** where he was at the time on business, entitled to mileage fees from

place of residence. *Pike v. Nash*, 16 How. Pr. (N. Y.) 53.

97. *Clarks v. Staring*, 4 How. Pr. (N. Y.) 243.

98. *Sargent v. Warren*, 41 Hun (N. Y.) 103.

99. *Graeco-Russian Church v. Cohen*, 1 Alaska 32; *Stern v. Herren*, 101 N. C. 516, 8 S. E. 221.

1. *United States.* — *Hunter v. Russell*, 59 Fed. 964.

*Montana.* — *State v. Ramsey*, 11 Mont. 245, 28 Pac. 258.

*Massachusetts.* — *Melvin v. Whiting*, 13 Pick. 184.

*Pennsylvania.* — *Com. v. Heiges*, 4 Pa. Dist. 184; *Com. v. Fairman*, 6 Pa. Dist. 744; *Com. v. Boyer*, 7 Pa. Dist. 175; *Cody v. Clelam*, 1 Pa. Co. Ct. 8; *Rebert v. Eline*, 21 Pa. Co. Ct. 431; *Venetian Blind Co. v. Nesbit*, 13 Pa. Co. Ct. 330.

**Witness May Travel by Longer Route** than the usual one at his election, but mileage must be computed by the shorter and usual route. *Johnson v. A. & N. P. R. Co.*, 1 Pa. Co. Ct. 10. See also *Com. v. Fairman*, 6 Pa. Dist. 744; *State v. Ramsey*, 11 Mont. 245, 28 Pac. 258.

2. *Crawford v. Abraham*, 2 Or. 163; *Com. v. Heiges*, 4 Pa. Dist. 184; *Lyon County v. Chase*, 24 Kan. 774.

and most direct one,<sup>3</sup> and where there are two usually traveled routes, one by rail and the other by turnpike, mileage should be taxed according to the route traveled.<sup>4</sup>

d. *Travel Outside State, County or District.* — (1.) **Outside State.** It is generally held that a witness subpoenaed or coming on request from another state is entitled to mileage only from the line of the state in which the trial is had, in the ordinary route from his place of residence to the place of holding the court; he is not entitled to mileage beyond the state line, because ample provision has, in most instances, been made for the taking of depositions, and because process of the court is ineffectual beyond the state borders.<sup>5</sup> But a witness residing without the state who has been duly subpoenaed in the state where the trial is had, or who has entered into a recognizance under an order of court, and has complied therewith, is en-

**The Route Actually Traveled** in any particular case, if shorter than the usual route, will govern. *Cody v. Clelam*, 1 Pa. Co. Ct. 8.

3. *Venetian Blind Co. v. Nesbit*, 13 Pa. Co. Ct. 330.

4. *Rebert v. Eline*, 21 Pa. Co. Ct. 431.

5. *Illinois.* — *Fish v. Farwell*, 33 Ill. App. 242.

*Maine.* — *Kingfield v. Pullen*, 54 Me. 398.

*Massachusetts.* — *Melvin v. Whiting*, 13 Pick. 184; *White v. Judd*, 42 Mass. 293.

*Missouri.* — *State v. Wilder*, 196 Mo. 418, 95 S. W. 396; *Buckman v. Missouri*, etc. R. Co., 121 Mo. App. 299, 98 S. W. 820.

*New York.* — *Howland v. Lenox*, 4 Johns. 311; *Elliott v. Lewis*, 3 Edw. Ch. 40.

*Oregon.* — *Crawford v. Abraham*, 2 Or. 163.

*Pennsylvania.* — *Com. v. Boyer*, 20 Pa. Co. Ct. 638.

*Washington.* — *Carlson Bros. & Co. v. Van De Vanter*, 19 Wash. 32, 52 Pac. 323.

But See *Contra*, *Albany v. Derby*, 30 Vt. 718, holding that a party is entitled to tax costs for the mileage of a witness coming from his place of residence in Canada.

**Rule in Iowa.** — In *Westfall v. Madison County*, 62 Iowa 427, 17 N. W. 614, it was held that where a witness, in a civil case, is subpoenaed from beyond the jurisdiction of the court, although his mileage cannot be taxed to the party

who did not subpoena him, he may recover it from the party who did subpoena him, as for services rendered and expenses incurred at his request. In a criminal case, where he is subpoenaed from beyond the state lines to testify on behalf of the state in a case where the defendant is found not guilty, if he obeys the subpoena he may recover of the county, in addition to his mileage within the state, mileage at the same rate for the distance from his place of residence to the state line, on the same theory which allows him mileage in a civil case of the party subpoenaing him. To the same effect, see *Climie v. Appanoose County*, 125 Iowa 292, 101 N. W. 98.

In *Casley v. Mitchell*, 121 Iowa 96, 96 N. W. 725, it was held that where the personal presence of a witness is necessary, as for the purpose of identification and the like, the mileage actually traveled by such witness is properly taxable as costs, and this irrespective of whether he came from within or without the state. See also *State v. Willis*, 79 Iowa 326, 44 N. W. 699; *Westfall v. Madison County*, 62 Iowa 427, 17 N. W. 614.

In *State v. Willis*, 79 Iowa 326, 44 N. W. 699, a foreign witness for defendant had not been subpoenaed but attended at the request of defendant's attorney, although it appeared that the court had made an order for summoning him. It was held that such order was not an

titled to mileage from his place of residence.<sup>6</sup> So also where a witness has been summoned or recognized, and afterwards removed to another state, he is entitled to mileage from his actual residence.<sup>7</sup>

(2.) **Outside County.**—It is sometimes held that a witness is not bound to obey a subpoena for his attendance outside of his own county. If he does attend court upon the trial of any cause, out of his own county, his attendance is voluntary, and he is not entitled to mileage.<sup>8</sup> In other cases it is held that although a witness residing without the county is not obliged to attend in response to a subpoena, nevertheless the privilege of disobeying the subpoena is personal to the witness, and if he sees fit to waive the privilege and attend to testify he is entitled to his mileage for actual and necessary travel within the state, the same as any other witness who has attended under compulsory process.<sup>9</sup>

**A Witness Appearing by Request** from without the county and who gives important testimony is entitled to mileage.<sup>10</sup>

(3.) **Outside District.**—In the federal courts there is some conflict of authority as to whether witnesses who live within the district, but over 100 miles distant from the place where the court is held, can charge mileage for a distance of over 100 miles. Some of the courts have held that the mileage ought to be confined to

order or request of the court to such witness to attend, and therefore such witness was not entitled to mileage.

6. *Hutchins v. State*, 8 Mo. 288; *State v. Seibert*, 130 Mo. 202, 32 S. W. 670; *State v. Wilder*, 196 Mo. 418, 95 S. W. 396; *Dutcher v. Justices Inferior Court*, 38 Ga. 214. See also *Doppelt v. Columbia Paper Stock Co.*, 99 Ill. App. 207.

7. *State v. Stewart*, 4 N. C. 524; *Gunnison v. Gunnison*, 41 N. H. 121, 77 Am. Dec. 764. *Contra*, *Lyon County v. Chase*, 24 Kan. 774.

8. *Hereford v. O'Connor*, 5 Ariz. 258, 52 Pac. 471. See also *In re Hughbanks*, 44 Kan. 105, 24 Pac. 75.

9. *Anderson v. Ferguson-Bach Sheep Co.*, 12 Idaho 418, 86 Pac. 41; *Henry v. Walton*, 52 N. J. L. 370, 19 Atl. 791. See also *Perkins v. Delta Pine L. Co.*, 66 Miss. 378, 6 So. 210.

**In Oregon** the statute provides that a witness is not obliged to attend at a place without the county and more than twenty miles from his residence, unless his attendance be ordered on affidavit of a party that his testimony is material, which order shall be endorsed on the sub-

poena and the witness paid double fees. *Egan v. Finney*, 42 Or. 599, 72 Pac. 133; *Burrows v. Balfour*, 39 Or. 488, 65 Pac. 1062; *Sargent v. Umatilla Co.*, 13 Or. 442, 11 Pac. 225; *Crawford v. Abraham*, 2 Or. 163.

In *Crawford v. Abraham*, 2 Or. 163, it is said: "Mileage will be allowed, of course, to witnesses residing beyond the reading of an ordinary subpoena within the state, unless objection is made thereto, in which case a showing must be made to sustain that item, equivalent to that which is necessary under § 785 (now § 795) of the code, to procure a special subpoena. It would certainly be better for a party to pay such single mileage for a witness, than to force a party to procure a special subpoena, and thereby incur, under § 785, the liability to pay double mileage and attendance."

In *Egan v. Finney*, 42 Or. 599, 72 Pac. 133, it was held that where witnesses from without the county are not properly served with subpoena, they are not entitled to double mileage, though they attend and testify.

10. *Egan v. Finney*, 42 Or. 599, 72 Pac. 133.



100 miles, for the reason that § 863, Rev. St., provides for the taking of the testimony of any witness by deposition *de bene esse* when the witness lives at a greater distance from the place of trial than 100 miles.<sup>11</sup> The true rule upon this subject, as gleaned from all the authorities, is substantially to the effect that the acts of Congress were intended to, and do, allow mileage from any point that could be legally reached by subpoena, viz., at any place within the district regardless of distance, or at any point without the district to the extent of 100 miles from the place where the court is held,<sup>12</sup> although there are cases holding that a witness residing without the district is entitled to mileage irrespective of the distance from which he may come.<sup>13</sup>

**A Witness Summoned at the Place of Trial** although residing in another district may be allowed mileage for returning to his home, but not for coming to the court.<sup>14</sup>

**In the State Courts** a witness coming from without the district is generally held entitled to mileage from his residence although he may not be compelled to attend.<sup>15</sup>

*e. Effect of Continuance or Postponement.*—Where a case is suspended for a few days by agreement of parties or by order of court, the witnesses upon going to their residences and returning on the adjourned day are generally held to be entitled to an allowance for such extra mileage, although not to their per diem while absent.<sup>16</sup>

### 3. Persons Liable, Payment and Recovery. — A. PERSONS LIABLE.

*a. In General.*—Each party to a suit is, in the first instance, responsible to his witnesses for the fees due them for their attend-

11. *Smith v. Chicago, etc. R. Co.*, 38 Fed. 321; *Sloss I. & S. Co. v. South Carolina, & R. Co.*, 75 Fed. 106.

12. *Anonymous*, 5 Blatchf. 134, 1 Fed. Cas. No. 432; *Beckwith v. Easton*, 4 Ben. 357, 3 Fed. Cas. No. 1,212; *Dreskill v. Parish*, 5 McLean 241, 7 Fed. Cas. No. 4,076; *Spaulding v. Tucker*, 2 Sawy. 50, 22 Fed. Cas. No. 13,221; *The Leo*, 5 Ben. 486, 15 Fed. Cas. No. 8,252; *Buffalo Ins. Co. v. Providence & Stonington S. S. Co.*, 29 Fed. 237; *The Vernon*, 36 Fed. 113; *Eastman v. Sherry*, 37 Fed. 844; *Burrow v. Kansas City, etc. R. Co.*, 54 Fed. 278; *Hunter v. Russell*, 59 Fed. 964; *Pinson v. Atchison, etc. R. Co.*, 54 Fed. 464; *Hanchett v. Humphrey*, 93 Fed. 895; *The Syracuse*, 36 Fed. 830; *Sims v. Shult*, 40 Fed. 143; *Street v. The Progresso*, 48 Fed. 239; *Griggsby Const. Co. v. Louisiana, etc. R. Co.*, 123 Fed. 751;

*United States v. Small*, 3 Wash. Ter. 478, 17 Pac. 739.

13. *Prouty v. Draper*, 2 Story 199, 20 Fed. Cas. No. 11,447; *United States v. Sanborn*, 28 Fed. 299; *Whipple v. Cumberland Cotton Mfg. Co.*, 3 Story 84, 29 Fed. Cas. No. 17,515; *Edwards v. Bond*, 5 McLean 300, 8 Fed. Cas. No. 4,294.

14. *Woodruff v. Barney*, 1 Bond 528, 2 Fish. Pat. Cas. 244, 30 Fed. Cas. No. 17,986.

15. *Speigner v. Cooner*, 9 Rich. L. (S. C.) 120; *Alabama, etc. R. Co. v. Rushing*, 103 Ala. 542, 15 So. 853; *Briggs v. Rumely Co.*, 96 Iowa 202, 64 N. W. 784.

16. *In re Griffin*, 2 Ben. 209, 10 Fed. Cas. No. 5,810; *Union Pac. R. Co. v. Harris*, 29 Kan. 275; *Harman v. Shank*, 3 Pa. Dist. 813; *Com. v. Swisher*, 3 Pa. St. 662; *Koch v. Peters*, 97 Wis. 492, 73 N. W. 25; *Com. v. Smith*, 4 Pa. Co. Ct. 321.

ance,<sup>17</sup> but at the same time the party in whose favor judgment is rendered is generally entitled to execution for all his costs, including witness fees, against the adverse party,<sup>18</sup> with certain exceptions where it is held that the party calling a witness is alone liable for

But see *Eakin v. Fulmer*, 4 Pa. Co. Ct. 319; *Hoffman v. New York R. Co.*, 50 N. Y. Super. Ct. 512.

17. *United States*.—*In re Williams*, 37 Fed. 325; *United States v. Williams*, 1 Cranch C. C. 178; *Dreskill v. Parish*, 5 McLean 241, 7 Fed. Cas. No. 4,076; *The Vernon*, 36 Fed. 113; *The Syracuse*, 36 Fed. 830; *Burrow v. Kansas City, etc. R. Co.*, 54 Fed. 278; *United States v. Sanborn*, 28 Fed. 299; *Cummings v. Akron Cement, etc. Co.*, 6 Blatchf. 509, 6 Fed. Cas. No. 3,473.

*Georgia*.—*Crozier v. Berry*, 27 Ga. 346.

*Illinois*.—*Boyd v. Humphries*, 53 Ill. App. 422; *Carpenter v. People*, 8 Ill. 147.

*Iowa*.—*Donnelly v. Johnson County*, 7 Iowa 419.

*Kansas*.—*Bennett v. Kroth*, 37 Kan. 235, 15 Pac. 221, 1 Am. St. Rep. 248.

*Mississippi*.—*Hall v. Moore*, 70 Miss. 75, 11 So. 655; *Perkins v. Delta Pine L. Co.*, 66 Miss. 378, 6 So. 210.

*New Hampshire*.—*Gunnison v. Gunnison*, 41 N. H. 121, 77 Am. Dec. 764.

*North Carolina*.—*Carter v. Wood*, 33 N. C. (11 Ired. L.) 22; *Taylor v. Cawthorne*, 17 N. C. (2 Dev. Eq.) 221; *Costin v. Baxter*, 29 N. C. (7 Ired. L.) 111; *State v. Whithed*, 7 N. C. (3 Murphy's L.) 223.

*Pennsylvania*.—*Maher v. Mitchell*, 1 Pa. Co. Ct. 570.

*South Carolina*.—*Bagley v. Clement*, 2 McCord 244.

*Tennessee*.—*Hopkins v. Waterhouse*, 2 Yerg. 323; *Burson v. Mahoney*, 6 Baxt. 304.

*Texas*.—*Anderson v. McKinney*, 22 Tex. 653; *Sapp v. King*, 66 Tex. 570, 1 S. W. 466.

There is a tacit obligation on the part of a party litigant, to pay legal fees of witnesses whom he has summoned. In fact the law presumes that he does pay them, for if he casts his adversary in the suit, he,

and not the witness, gets a judgment for his costs. There is no privity of contract between a witness and an adverse party. A witness must look for his indemnity to the party at whose instance he was summoned, just as the latter would have looked to him for his damages, had the witness refused to answer questions propounded to him. *Smith v. Shreveport*, 10 La. Ann. 582. See also *Bagley v. Clement*, 2 McCord (S. C.) 244.

A Justice Is Not Liable to be sued by witnesses for their fees. They must look to the party by whom they are subpoenaed. *Andrews v. Bates*, 5 Johns. (N. Y.) 351.

In *North Carolina* by constitutional provision, defendants in criminal cases cannot be compelled to pay necessary witness fees unless found guilty. This leaves defendants still liable for payment of such witnesses as they may summon who are not necessary for their defense. As to their necessary witnesses the constitutional provision deprives them of their common law right to look to defendant for payment, and places them, in the absence of some legislative enactment, upon the footing state's witnesses formerly held, and others still hold, of serving without compensation. *State v. Massey*, 104 N. C. 877, 10 S. E. 608.

18. *Anderson v. McKinney*, 22 Tex. 653; *Carter v. Wood*, 33 N. C. (11 Ired. L.) 22; *Boyd v. Humphries*, 53 Ill. App. 422; *Crozier v. Berry*, 27 Ga. 346; *Bagley v. Clement*, 2 McCord (S. C.) 244.

Rule Applicable in Criminal Cases.—*State v. Bliss*, 21 Minn. 458. See also *De Soto Co. Comrs. v. Howell*, 51 Fla. 160, 40 So. 192.

Traveling Expenses During Adjournment Are Not Taxable where such adjournment was brought about by agreement of the parties, although the witnesses' continued attendance will be allowed. *Hathaway v.*

his fees,<sup>19</sup> and under certain limitations sometimes prescribed by law.<sup>20</sup>

b. *Liability of State or County.*—One summoned or recognized to appear as a witness in a public prosecution on the people's behalf is generally entitled to receive from the state or county his fees for travel and attendance.<sup>21</sup> As to the defendant's witnesses they are usually entitled under statutory enactments to collect their fees from the state or county,<sup>22</sup> especially in the event of an acquittal.<sup>23</sup>

Roach, 2 Woodb. & M. 63, 11 Fed. Cas. No. 6,213.

19. *Sherman v. Brown*, 4 Yerg. (Tenn.) 561 (party summoning witness to prove matter inadmissible in evidence alone liable for fees); *Barton v. Bird*, 1 Overt. (Tenn.) 66 (party not responsible for fees of adverse party's witnesses attending before setting of case for hearing); *Loftis v. Baxter*, 66 N. C. 340 (attendance of a witness, summoned and attending, but neither sworn, tendered or examined, should be taxed against the party summoning); *Crozier v. Berry*, 27 Ga. 346 (where a witness is rejected for incompetency, the cost for his attendance can only be collected of the party at whose instance he was subpoenaed); *Bagley v. Clement*, 2 McCord (S. C.) 244 (where a case is decided in favor of a party by whom a witness was called, upon failure to have his attendance taxed, he cannot, in an action against the other party, recover for the same, there being no privity of contract).

20. *Fees of Two Witnesses Only* to any one fact allowed in bill of costs. *Anderson v. McKinney*, 22 Tex. 653.

*Fees of Three Witnesses Only* allowed to prove any one fact. *Davis v. Melvin*, 1 Ind. 136.

21. *People v. Pyper*, 6 Utah 160, 21 Pac. 722; *Ex parte Mitchell*, 17 N. H. 501; *Schamel v. Washington County*, 82 Md. 128, 34 Atl. 839; *Cassidy v. Palo Alto County*, 58 Iowa 125, 12 N. W. 231 (where case is dismissed because of prosecuting witness' failure to appear and testify, any other witness for the prosecution may recover of the county his legal fees, though the prosecuting witness and the defendant may both be solvent).

*Witness Not Entitled to Fees* where he has been subpoenaed by a magistrate before the arrest of the defendant, the magistrate having no jurisdiction and therefore no authority to issue subpoenas until an arrest. *Warnstaff v. Louisa County*, 76 Iowa 585, 41 N. W. 195.

*Witness Has No Claim on County* for his fees until the question of the county's liability for costs is passed upon by the court. *Young v. Buncombe Co.*, 76 N. C. 316.

*Witness Summoned Before Grand Jury* to testify in behalf of the state received compensation from the state and not from the county. *State v. Edwards*, 13 Fla. 573.

*Where No Indictment Is Found* the compensation of witnesses summoned must be paid by county and not by state. *State v. Treadway*, 3 Lea (Tenn.) 55.

*Witnesses in Criminal Cases Not Entitled to Compensation in Some Jurisdictions.*—See note 21, *ante*.

22. *Wheelock v. Madison County*, 75 Iowa 147, 39 N. W. 243 (witnesses subpoenaed on defendant's behalf by order of court or magistrate before whom the case was pending, such order being made upon a satisfactory showing that the testimony of the witness was material to the defense, are entitled to payment from the county). *Contra*, *Hewerkle v. Gage County*, 14 Neb. 18, 14 N. W. 549.

*Not in Case of Conviction.* *Schamel v. Washington County*, 83 Md. 128, 34 Atl. 839.

*Rule in North Carolina.*—See note 17, next preceding.

23. *People v. Pyper*, 6 Utah 160, 21 Pac. 722; *Buckman v. Alexander*, 24 Fla. 46, 3 So. 817; *Schamel v. Washington County*, 83 Md. 128, 34 Atl. 839 (defendant's witnesses

**B. AFFIDAVITS, CERTIFICATES AND ACCOUNTS. — a. Affidavits.** In some jurisdictions, in order that a party may tax fees for attendance and travel of a witness, he must prove the same by the witness' affidavit.<sup>24</sup> The affidavit should give the name, residence, distance traveled, should specify the term at which the witness attended and the time occupied,<sup>25</sup> although it is not necessary that the materiality of the witness should in the first instance be stated; nor is it necessary that the party's or attorney's affidavit should be produced to this effect.<sup>26</sup>

**An Affidavit Shown To Be False** is presumed to have been corruptly made, although such presumption may be repelled by proof.<sup>27</sup>

**b. Certificates.** — In some states it is the duty of the clerk of the court to issue certificates to witnesses, setting forth the amount of compensation to which they are entitled.<sup>28</sup> Such certificates are

entitled to fees from county where defendant has been discharged, or fined only fifteen cents, or acquitted); *Climie v. Appanoose County*, 125 Iowa 292, 101 N. W. 98 (in case defendant is adjudged not guilty, it is provided by statute that fees of witnesses shall be paid by the county upon a certificate of the clerk showing amount of services to which they are entitled. Fees taxed must be allowed by board of supervisors and no authority is vested in them to disallow such a claim on the ground that fees were improperly taxed); *De Soto Co. Comrs. v. Howell*, 51 Fla. 160, 40 So. 192 (witnesses themselves may bring action to enforce payment against county; defendant not a proper party plaintiff unless he has advanced to his witnesses their fees).

**Where Indictment Has Been Quashed** defendant's witnesses cannot collect fees of county; statute provides that county is only responsible when defendant "shall be acquitted, a *nolli prosequi* entered, or judgment arrested." *State v. Massey*, 104 N. C. 877, 10 S. E. 608.

**Rule in North Carolina.** — See note 17, next preceding.

**24.** *Jackson v. Scott*, 6 Johns. (N. Y.) 330; *Fish v. Farwell*, 33 Ill. App. 242; *Freebie v. Graves*, 114 Ga. 418, 40 S. E. 243. See also *State v. Ramsey*, 11 Mont. 245, 28 Pac. 258; *Grant v. Union Pac. R. Co.*, 6 Utah 270, 21 Pac. 996.

**25.** *Ehle v. Bingham*, 4 Hill (N.

Y.) 595; *Thompson v. Hodges*, 10 N. C. (3 Hawks) 318; *Jeffery v. Hursh*, 58 Mich. 246, 25 N. W. 176, 27 N. W. 7; *Dickinson v. Seaver*, 44 Mich. 624, 7 N. W. 182 (affidavit should show that the witness attended in that capacity and traveled as charged for that purpose, and not as a party to assist, by counsel or otherwise, in the conduct of the cause).

**26.** *Willink v. Reckle*, 19 Wend. (N. Y.) 82.

**27.** *Kennedy v. Wright*, 34 Me. 351; *Chesley v. Brown*, 11 Me. 143.

**28.** *Climie v. Appanoose County*, 125 Iowa 292, 101 N. W. 98; *State v. Ramsey*, 11 Mont. 245, 28 Pac. 258; *Alston v. Yerby*, 108 Ala. 480, 18 So. 559; *Herr v. Seymour*, 76 Ala. 270; *State v. Greene*, 91 Wis. 500, 65 N. W. 181.

**In South Carolina** the statute provides that no fees or other compensation shall be allowed to any witness bound over or summoned to testify in the court of general sessions, unless the circuit judge who tried the case shall certify that such witness was material. In *Eustace v. Greenville County*, 42 S. C. 190, 20 S. E. 88, it was held that a certificate that a witness "was regularly bound over as a material witness," signed by the clerk of the court, and marked "approved" by the circuit judge, was not a compliance with the statute. See also *Hellams v. Greenville County*, 32 S. C. 441, 11 S. E. 211.

**In Georgia** claims of non-resident

held to be *prima facie* evidence of a valid claim, in an action to recover for compensation due.<sup>29</sup>

C. PAYMENT, RECOVERY OF FEES PAID, FORFEITURES AND PENALTIES. — a. *Payment*. — A witness attending court may refuse to be sworn or to testify until his fees have been paid.<sup>30</sup>

Under the Federal Statute witnesses coming from beyond the jurisdiction of the court are not entitled to the whole of their traveling expenses, but this does not prohibit the attorney general from procuring the attendance of witnesses living beyond the process of the court by paying their traveling expenses out of the miscellaneous expense fund under his control.<sup>31</sup>

b. *Recovery of Fees Paid*. — Where a witness after having been subpoenaed, fails to attend or leaves court without permission before the trial, the fee paid him to secure attendance may be recovered;<sup>32</sup> but where a case is settled or put off, the witness is under no obligation to refund, although he is excused from attending.<sup>33</sup>

c. *Forfeitures and Penalties for Claiming Excessive Fees*. — It is

witnesses for the state can be lawfully paid only when such claims, both for attendance and the number of miles traveled, are verified by the witness on the subpoena, and such attendance and mileage certified by the solicitor general; hence a certificate, made by the solicitor, that he certifies to the attendance of his own knowledge, and to the mileage on the affidavit of the witness, is not sufficient to compel payment of the claim. A certificate in the words used, as to the mileage, makes the correctness of that claim rest alone on the affidavit of the witness. The law requires not only the affidavit of the witness as to his attendance and mileage, but the correctness of the claim for mileage as well as attendance to be certified by the prosecuting officer. *Freeble v. Graves*, 114 Ga. 418, 40 S. E. 243.

29. *United States*. — *In re Crane*, 6 Fed. Cas. No. 3,352.

*Alabama*. — *Burns v. Howard*, 68 Ala. 352; *Ward v. Chavers*, 115 Ala. 427, 22 So. 116; *Carville v. Reynolds*, 9 Ala. 969; *Marsh v. Branch Bank*, 10 Ala. 57; *Hill v. White*, 1 Ala. 576.

*Mississippi*. — *Perkins v. Delta Pine L. Co.*, 66 Miss. 378, 6 So. 210.

*Texas*. — *Flores v. Thorn*, 8 Tex. 377; *Crawford v. Crain*, 19 Tex. 145; *Houston & G. N. R. Co. v. Jones*, 46 Tex. 133.

Certified Subpoena Accounts are

*prima facie* evidence of the number of days for which payment is due to a witness. *Robinson v. Banks*, 17 Ga. 211.

30. *Kipp v. Dawson*, 59 Minn. 82, 60 N. W. 845; *Hurd v. Swan*, 4 Denio (N. Y.) 75.

31. *Douglass v. United States*, 21 Ct. Cl. 462.

32. *Dowling v. Bush*, 6 How. Pr. (N. Y.) 410; *Ford v. Monroe*, 6 How. Pr. (N. Y.) 204; *In re Wetmore*, 19 N. Bruns. 639; *Ehle v. Bingham*, 4 Hill (N. Y.) 595; *Martin v. Andrews*, 7 El. & Bl. 1, 90 E. C. L. 1, 2 Jur. (N. S.) 1121; *Pease v. Bamford*, 96 Me. 23, 51 Atl. 234.

Where an Insufficient Sum Is Tendered to a witness at the time of service through inadvertence or mistake, he is not obliged to obey the subpoena; but he cannot upon refusal to attend court on that ground retain what has been paid him. *Pease v. Bamford*, 96 Me. 23, 51 Atl. 234.

Where Witnesses Are Subpoenaed and Paid by Both Parties, the party against whom costs are taxed may recover from the witnesses not the sum which he himself has paid them, but that which they had improperly and fraudulently received a second time and which was ultimately collected from him. *Johnson v. Wide-man*, Cheves L. (S. C.) 26.

33. *Ford v. Monroe*, 6 How Pr. (N. Y.) 204.

held that a statute providing that a witness who claims more than is due him forfeits all his fees and must pay four times the amount claimed to the injured party, does not apply to a case where an execution has been issued by the clerk for excessive fees, such issuance not being a "claim by the witness" for them.<sup>34</sup>

**D. ACTIONS AND OTHER REMEDIES. — a. In General.** — In the absence of a statute, a witness may bring an ordinary common law action of debt against the party by whom he was summoned to recover his fees as a witness,<sup>35</sup> and it is not necessary for him to await the result of an execution against the successful party.<sup>36</sup> Where a witness sues for fees, the subpoena served on him is competent evidence to prove that he was subpoenaed and should be shown or its absence accounted for.<sup>37</sup>

**b. Assignment of Claims.** — A witness may transfer his certifi-

<sup>34</sup>. *State v. Everett*, 93 Ga. 575, 20 S. E. 73.

<sup>35</sup>. *Hill v. White*, 1 Ala. 576; *Utt v. Long*, 6 Watts & S. (Pa.) 174; *Wetherspoon v. Killough*, Mart. & Y. (Tenn.) 38; *Hall v. Moore*, 70 Miss. 75, 11 So. 655. See also *State v. Graves*, 13 Wash. 485, 43 Pac. 376; *First Nat. Bank v. Custer County*, 7 Mont. 464, 17 Pac. 551. But see *Strein v. Zeigler*, 1 Watts & S. (Pa.) 259, holding that upon an indictment for forcible entry, and an acquittal of the defendants without any finding by the jury on the subject of costs, an action will not lie by a witness on behalf of the commonwealth, to recover his costs from the prosecutor who subpoenaed him.

**A Statute Requiring a Witness To Claim Fees at the Same Term** at which he attended does not deprive the witness of his constitutional right to compensation; it merely points out the remedy which is to be pursued. *Lannah v. Multnomah County*, 3 Or. 187.

**Where Two Joint Plaintiffs Subpoena a Witness**, either or both may be sued by the witness for fees due. *Wetherspoon v. Killough*, Mart. & Y. (Tenn.) 38.

**Admissibility of Clerk's Taxation of Costs.** — In an action against the winning party to a suit to recover for attendance as a witness in his favor, the clerk's taxation of costs in the suit, including the attendance of the plaintiff, is admissible in evidence as tending to show that the

plaintiff did attend as a witness, though it does not appear that either the defendant or his counsel were present at the taxation. *Hamilton v. Gray*, 67 Vt. 233, 31 Atl. 315, 48 Am. St. Rep. 811.

**Order of Court Directing Payment.** The order of a circuit or district court directing payment of witness' fees is a summary method for ascertaining and paying them, and a protection to the marshal who makes such payments, but is in no sense an adjudication and fixes no rights, and is not therefore conclusive evidence for the witness. *Duval v. United States*, 23 Ct. Cl. 102.

**As a Defense** to an action to recover for services as a witness, it may be shown that such services were rendered gratuitously. *Stadel v. Stadel*, 40 Kan. 646, 20 Pac. 475.

**In Texas** under the act of 1846 a witness has a claim directly against the party summoning him for fees. As soon as the service is rendered he may maintain an action for the same. *Flores v. Thorn*, 8 Tex. 377. See also *Houston & G. N. R. Co. v. Jones*, 46 Tex. 133.

<sup>36</sup>. *Hill v. White*, 1 Ala. 576; *Utt v. Long*, 6 Watts & S. (Pa.) 174; *Wetherspoon v. Killough*, Mart. & Y. (Tenn.) 38; *Houston & G. N. R. Co. v. Jones*, 46 Tex. 133; *Flores v. Thorn*, 8 Tex. 377.

**Rule Otherwise Under Statutes.** *Belden v. Snead*, 84 N. C. 243; *Standley v. Hodges*, 1 N. C. 413.

<sup>37</sup>. *Flores v. Thorn*, 8 Tex. 377; *Harris v. Coleman*, 8 Tex. 278.

cate for fees and the holder can sustain an action therefor;<sup>38</sup> but in such action it is competent for defendant, notwithstanding the certificate, to show that the witness agreed, before the services were rendered, to attend gratuitously.<sup>39</sup>

c. *Taxation of Fees*.—A witness has a right to have his fees taxed in the bill of costs, against the party adjudged to pay the same,<sup>40</sup> which right must be exercised through the agency of a party to the suit<sup>41</sup> some time before the issue of execution.<sup>42</sup>

### III. COMPELLING CALLING OF WITNESSES AND PRODUCTION OF EVIDENCE.

1. *In General*.—As a rule it is not necessary for the state to call all the witnesses to a transaction. The prosecution may make out its case, or at least put on evidence thought to be sufficient for that purpose, without calling all witnesses who are cognizant of the facts.<sup>43</sup>

38. *Findley v. Wyser*, 1 Stew. (Ala.) 23; *Burns v. Howard*, 68 Ala. 352. See also *Lopez v. United States*, 24 Ct. Cl. 84.

In *Bollin v. Blythe*, 46 Fed. 181, it was held that a claim by a United States witness for attendance in a federal court is a claim not against the government, but against the marshal, and is therefore not within the statute (Rev. Stat. § 3477) prohibiting assignments. An assignee of witnesses' certificates may bring an action on the bond of the marshal who received the money in his official capacity with which to pay witnesses, but failed to do so.

39. *Carville v. Reynolds*, 9 Ala. 969.

40. *Hardy v. DeLeon*, 7 Tex. 466.

In *Pennsylvania* witness fees are not taxable in road cases. *In re Lebanon & D. Road*, 8 Pa. Co. Ct. 461.

*Not Applicable to Witnesses for Unsuccessful Party*.—A statute providing that a party recovering costs may have the amount of his witnesses' fees taxed for which execution may issue, has no application to witnesses for the unsuccessful party. *Hall v. Moore*, 70 Miss. 75, 11 So. 655.

A Party who, under order of court, acts as a witness and testifies relative to a negotiable note disclosed by a trustee is entitled to fees and to judgment and execution for

them as costs. *Hurd v. Fogg*, 22 N. H. 98.

*Defense of Illegal Taxation Creates New Issue*.—Where an execution is issued for costs due witnesses, and the defendant meets it with an affidavit of illegality on the ground that the witnesses have claimed, and procured the execution to issue for, more fees than they are entitled to receive, when the execution and affidavit are returned to court, the issue thus made is in the nature of a motion to have costs retaxed, and should be tried by the court on the evidence. *State v. Everett*, 93 Ga. 575, 20 S. E. 73.

41. *State v. Oliver*, 50 Mo. App. 217. See also *Ballard v. Murphy* (Tex. App.), 15 S. W. 42, holding that where a judgment has been entered for a witness' fees in the cause in which they accrued, the witness himself cannot sustain an action against the defeated party to recover such fees unless it is alleged and proved that the judgment had become dormant.

An appeal cannot be taken by a witness from an order retaxing his fees, since he is not a party to the judgment. *Boyd v. Humphries*, 53 Ill. App. 422.

42. *Hardy v. DeLeon*, 7 Tex. 466.

43. *United States*.—*United States v. Bennett*, 17 Blatchf. 357, 24 Fed. Cas. No. 14,572.

**Epecially Where the Prosecution Has Rested Its Case** has the defense no right to require the court to direct that the prosecution call and examine other witnesses then in court.<sup>44</sup>

**Prosecuting Officer's Discretion.**—In a great many cases it is said that a large measure of discretion must be allowed the prosecuting officer in the matter of calling witnesses.<sup>45</sup>

**Court's Discretion.**—In others it is held to be within the discretion of the trial court as to whether the prosecution shall be compelled to call a certain witness.<sup>46</sup>

**2. Witnesses Indorsed on Indictment.**—As a rule the state is not required to place upon the stand all persons whose names are

*California.*—See also *People v. Jim Ti*, 32 Cal. 60.

*Massachusetts.*—*Com. v. Haskell*, 140 Mass. 128, 2 N. E. 773.

*Michigan.*—See also *People v. Higgins*, 127 Mich. 291, 86 N. W. 812.

*Missouri.*—*State v. McAfee*, 148 Mo. 370, 50 S. W. 82.

*Montana.*—*State v. Bloor*, 20 Mont. 574, 52 Pac. 611.

*New York.*—*People v. Sharp*, 9 N. Y. St. 155.

*Texas.*—*Sanders v. State* (Tex. Crim.), 112 S. W. 938; *McCrear v. State*, 49 Tex. Crim. 228, 94 S. W. 899.

It is no objection that the state fails to introduce a witness where the opportunities are as good for the defendant to introduce such witness, as for the state, and where there is no evidence that the witness in question actually saw the affair under consideration, or that his testimony would be of any more value than that of a witness introduced. *Lee v. State*, 2 Ga. App. 481, 58 S. E. 676.

In *State v. Hudson*, 110 Iowa 663, 80 N. W. 232, it was held that the state need not call all the witnesses examined before the grand jury, though the witnesses called testify to only a part of the transaction and it appears that there are other witnesses not called who have knowledge of the entire affair.

In *Michigan* the prosecution cannot be compelled to call witnesses other than those who can testify as to the *res gestae*. *People v. Grant*, 111 Mich. 346, 69 N. W. 647; *People v. McCarron*, 121 Mich. 1, 79 N. W. 944; *People v. Savant*, 112 Mich.

297, 70 N. W. 576; *People v. Marrs*, 125 Mich. 376, 84 N. W. 284; *Bonker v. People*, 37 Mich. 4; *People v. Wright*, 90 Mich. 362, 51 N. W. 517; *People v. Pope*, 108 Mich. 361, 66 N. W. 213; *People v. Hughes*, 116 Mich. 80, 74 N. W. 309.

On a prosecution for the illegal selling of liquor, where a witness for the prosecution testifies that on a designated date he purchased liquor at the accused's place of business, that he saw other sales made to identified persons, the court's refusal to require the prosecution to present such designated persons as witnesses is not error, since they are not *res gestae* witnesses within the meaning of the rule requiring such witnesses to be produced and examined by the prosecution. *People v. Moore* (Mich.), 118 N. W. 742.

44. *State v. Tighe*, 27 Mont. 327, 71 Pac. 3; *People v. Robertson*, 67 Cal. 646, 8 Pac. 600; *State v. Eaton*, 75 Mo. 586; *People v. Cunningham*, 6 Park. Crim. (N. Y.) 398. See also *Territory v. Thomason*, 4 N. M. 154, 13 Pac. 223.

45. *State v. Eaton*, 75 Mo. 586; *State v. McAfee*, 148 Mo. 370, 50 S. W. 82; *State v. Martin*, 24 N. C. (2 Ired. L.) 101; *State v. Baxter*, 82 N. C. 602 (discretion will not be interfered with except in a clear case of abuse); *Com. v. Karamarkovic*, 218 Pa. St. 405, 67 Atl. 650; *Hill v. Com.*, 88 Va. 633, 14 S. E. 330, 29 Am. St. Rep. 744; *State v. Morgan*, 35 W. Va. 260, 13 S. E. 385.

46. *Carlisle v. State*, 73 Miss. 387, 19 So. 207; *United States v. Bennett*, 17 Blatchf. 357, 24 Fed. Cas.



indorsed upon the indictment or information.<sup>47</sup> The prosecution has never been required to do any more than have the witnesses in court, in order that the defendant may, if he wish, examine them

No. 14,572; *Phillips v. State*, 22 Tex. App. 139, 2 S. W. 601, (refusal not error where it does not appear that the testimony in question was material).

47. *England*.—*Reg. v. Simmonds*, 1 Car. & P. 84, 11 E. C. L. 322; *Reg. v. Whithead*, 1 Car. & P. 67, 11 E. C. L. 316.

*Florida*.—*Selph v. State*, 22 Fla. 537.

*Idaho*.—*State v. Ride*, 7 Idaho 762, 66 Pac. 87 (though it may be the duty of the court to compel the state to call witnesses whose names appear on an indictment, a refusal is not reversible error where the defendant could, by process, compel the attendance of the witness and call him before the jury himself, and where it does not appear that he made any such effort).

*Illinois*.—*Carle v. People*, 200 Ill. 494, 66 N. E. 32, 93 Am. St. Rep. 208; *Bressler v. People*, 3 N. E. 521; s. c., 117 Ill. 422, 8 N. E. 62.

*Iowa*.—*State v. Helm*, 92 Iowa 540, 61 N. W. 246; *State v. Dillon*, 74 Iowa 653, 38 N. W. 525.

*Kansas*.—*State v. Campbell*, 73 Kan. 688, 85 Pac. 784, 9 L. R. A. (N. S.) 533.

*Louisiana*.—*State v. Forbes*, 111 La. 473, 35 So. 710.

*Michigan*.—*People v. Quick*, 18 N. W. 375; *People v. Henshaw*, 52 Mich. 564, 18 N. W. 360; *People v. Resh*, 107 Mich. 251, 65 N. W. 99 (no error in refusing to compel calling of witness by prosecution where it appeared that his name had been placed on information at request of defendant and that he had subsequently been called and examined by him); *People v. Berry*, 107 Mich. 256, 65 N. W. 98 (refusal to compel calling of witness no error where proof of the fact to which he was to testify became unnecessary). See *People v. Baker*, 112 Mich. 211, 70 N. W. 431; *People v. Savant*, 112 Mich. 297, 70 N. W. 576.

*Minnesota*.—*State v. Sheltrey*, 100

Minn. 107, 110 N. W. 353; *State v. Smith*, 78 Minn. 362, 81 N. W. 17.

*Mississippi*.—*Morrow v. State*, 57 Miss. 836.

*Montana*.—*State v. Russell*, 13 Mont. 164, 32 Pac. 854.

*Pennsylvania*.—*Com. v. Keller*, 191 Pa. St. 122, 43 Atl. 198 (no error in refusing to compel the calling of even an eye-witness, his name appearing on the indictment, where the prosecuting attorney had stated that he had called all eye-witnesses and the fact that other witnesses had testified that the witness in question was an eye-witness had not been called to the court's attention).

*Texas*.—*Steele v. State*, 1 Tex. 142.

*Utah*.—*People v. Robinson*, 6 Utah 101, 21 Pac. 403; *People v. Oliver*, 4 Utah 460, 11 Pac. 612 (no error in refusing to compel production of absent witness whose name appears on an indictment, or dismissal of prosecution where other witnesses testified to material facts).

*Virginia*.—*Clark v. Com.*, 90 Va. 360, 18 S. E. 440.

*West Virginia*.—*State v. Cain*, 20 W. Va. 679.

*Wyoming*.—*Johnson v. State*, 8 Wyo. 494, 58 Pac. 761.

But see *United States v. Dowden*, 1 Hayw. & H. 145, 25 Fed. Cas. No. 14,990a, holding that the district attorney should have every witness whose name is on the back of an indictment examined, if he is a material witness, not otherwise.

**Practice of Calling Witnesses Indorsed on Indictment Rule of Professional Behavior.**—During the early part of the last century the custom grew up of calling all the witnesses the names of whom the statute required to be indorsed upon the indictment as having testified before the grand jury. This indorsement was required as a matter of fairness, in order to give the accused notice of the witnesses who had appeared against him. But the practice was merely a rule of professional behavior, and was never rec-

as his own.<sup>48</sup> But those witnesses whose names appear on the indictment or information who were present at the transaction under consideration, or who can give direct evidence on any material branch of it, should always be called,<sup>49</sup> unless, possibly, where too numerous.<sup>50</sup>

**3. Eye-Witnesses to the Offense.** — A. **ENGLISH RULE.** — In England it is held that every eye-witness to a transaction ought to be called, and, even if they give different accounts, it is fit that the jury should hear their evidence so as to draw their own conclusions as to the truth of the matter.<sup>51</sup>

B. **MODIFIED RULE.** — The English rule in a modified form has been adopted in the American states, and according to this no duty rests upon the prosecution in a criminal case to produce and swear as witnesses for the state all the eye-witnesses to the transaction, where the testimony of the witnesses called, or some of them, is direct and positive, and apparently covers the entire transaction.<sup>52</sup>

ognized as a rule of law. *State v. Sheltrey*, 100 Minn. 107, 110 N. W. 353.

**Discretionary To Allow Comment on Failure To Call.** — The state is not required to call all the persons whose names are indorsed upon an indictment. If not called by the state, the witness may be called by the defendant, and the failure of either party to call the witness may, in the discretion of the court, be commented upon by either counsel before the jury. *State v. Sheltrey*, 100 Minn. 107, 110 N. W. 353.

**Waiver.** — Where the defendant examines a witness marked upon the indictment, he thereby waives any right that he may have to compel the state to call the same witness. *Morrow v. State*, 57 Misc. 836.

**48. England.** — *Reg. v. Woodhead*, 2 Car. & K. 520, 61 E. C. L. 519; *Reg. v. Bull*, 9 Car. & P. 22, 38 E. C. L. 19; *Rex v. Bodle*, 6 Car. & P. 186, 25 E. C. L. 347; *Reg. v. Vincent*, 9 Car. & P. 91, 38 E. C. L. 48.

**Michigan.** — *People v. Deitz*, 86 Mich. 419, 49 N. W. 296; *People v. Hughes*, 116 Mich. 80, 74 N. W. 309; *Wellar v. People*, 30 Mich. 16.

**Minnesota.** — *State v. Sheltrey*, 100 Minn. 107, 110 N. W. 353, citing 1 Arch. Crim. Pr. & Pl. 503; *Roscoe Crim. Ev.* 128.

**49. Wellar v. People**, 30 Mich. 16.

In *People v. Gordon*, 40 Mich. 716, which was a prosecution for

burglary, the prosecution had in court a witness named on the information, convicted of the same charge, who was in the custody of the law and who must necessarily have known the facts. It was held that their suppression of this positive testimony which they were on every consideration of justice bound to produce, entitled the prisoner to every inference that could be drawn from it.

**50. Wellar v. People**, 30 Mich. 16.

No error in refusing to compel the calling of even an eyewitness whose name appears on an indictment where sixteen witnesses of the same character had already been examined. *Com. v. Keller*, 191 Pa. St. 122, 43 Atl. 198.

**51. Reg. v. Holden**, 8 Car. & P. 606, 34 E. C. L. 547; *Reg. v. Bull*, 9 Car. & P. 22, 38 E. C. L. 19; *Reg. v. Chapman*, 8 Car. & P. 558, 34 E. C. L. 523.

In England the rule was established at a time when the right of persons accused of crime to be represented by counsel was denied, or greatly abridged, and hence the rule found greater support in justice and necessity than at present. *State v. McGahey*, 3 N. D. 293, 55 N. W. 753.

**52. Arizona.** — *Haldeman v. Territory*, 7 Ariz. 120, 60 Pac. 876.

**California.** — *People v. Robertson*, 67 Cal. 646, 8 Pac. 600.

If, however, the testimony introduced relates expressly or by implication to but a part of the *res gestae* or whole transaction, and if it appears that the evidence of the rest of the transaction is attainable, the court may properly require its production.<sup>53</sup>

*Florida*.—Selph *v.* State, 22 Fla. 537.

*Indiana*.—Winsett *v.* State, 57 Ind. 26; Keller *v.* State, 123 Ind. 110, 23 N. E. 1138, 18 Am. St. Rep. 318.

*Iowa*.—State *v.* Hudson, 110 Iowa 663, 80 N. W. 232; State *v.* Middleham, 62 Iowa 150, 17 N. W. 446.

*Michigan*.—People *v.* Wright, 90 Mich. 362, 51 N. W. 517; People *v.* Harris, 95 Mich. 87, 54 N. W. 648; People *v.* Kindra, 102 Mich. 147, 60 N. W. 458; Thomas *v.* People, 39 Mich. 309; Bonker *v.* People, 37 Mich. 4; People *v.* Marrs, 125 Mich. 376, 84 N. W. 284; People *v.* McArron, 121 Mich. 1, 79 N. W. 944.

*Minnesota*.—State *v.* Sheltrey, 100 Minn. 107, 110 N. W. 353; State *v.* Smith, 78 Minn. 362, 81 N. W. 17.

*Mississippi*.—Hale *v.* State, 72 Miss. 140, 16 So. 387.

*Missouri*.—State *v.* Johnson, 76 Mo. 121; State *v.* David, 131 Mo. 380, 33 S. W. 28; State *v.* Harlan, 130 Mo. 381, 32 S. W. 997; State *v.* Eaton, 75 Mo. 586.

*New York*.—People *v.* Fitzpatrick, 5 Park. Crim. 26. See also People *v.* Wiggins, 92 N. Y. 656.

*North Dakota*.—State *v.* McGahay, 3 N. D. 293, 55 N. W. 753.

*Pennsylvania*.—Com. *v.* Keller, 191 Pa. St. 122, 43 Atl. 198; Com. *v.* Rhoads, 23 Pa. Super. 512.

*South Carolina*.—State *v.* Clark, 4 Strobb. L. 311.

*South Dakota*.—State *v.* Kapefino, 20 S. D. 591, 108 N. W. 335.

*Texas*.—Lord *v.* State (Tex. Crim.), 113 S. W. 762; Freeman *v.* State, 46 Tex. Crim. 318, 81 S. W. 953; Thompson *v.* State (Tex. Crim.), 89 S. W. 1081; Jackson *v.* State (Tex. Crim.) 24 S. W. 896; Alanis *v.* State (Tex. Crim.), 81 S. W. 709; Robinson *v.* State (Tex. Crim.), 57 S. W. 811; Wheeler *v.* State (Tex. App.), 5 S. W. 160; McCandless *v.* State, 42 Tex. Crim. 655, 62 S. W. 745; McGrew *v.* State (Tex. Crim.),

49 S. W. 226; Mayes *v.* State, 33 Tex. Crim. 33, 24 S. W. 421; Gibson *v.* State, 23 Tex. App. 414, 5 S. W. 314; Williford *v.* State, 36 Tex. Crim. 414, 37 S. W. 761.

*Virginia*.—Clark *v.* Com., 90 Va. 360, 18 S. E. 440.

*Washington*.—State *v.* Payne, 10 Wash. 545, 39 Pac. 157.

*West Virginia*.—State *v.* Cain, 20 W. Va. 679.

*Wyoming*.—Ross *v.* State, 8 Wyo. 351, 57 Pac. 924.

#### Prosecuting Officer's Discretion.

As to whether all the eye-witnesses to a transaction should be called to testify it has been held that this is a matter which prosecuting officers acting conscientiously in the discharge of their duty must determine for themselves. State *v.* Stewart, 117 La. 476, 41 So. 798; State *v.* Martin, 24 N. C. (2 Ired. L.) 101; State *v.* Morgan, 35 W. Va. 260, 13 S. E. 385.

<sup>53</sup> *Michigan*.—People *v.* Germaine, 101 Mich. 485, 60 N. W. 44; People *v.* Swetland, 77 Mich. 53, 43 N. W. 779; People *v.* Kenyon, 93 Mich. 19, 52 N. W. 1033; Hurd *v.* People, 25 Mich. 405; People *v.* Kindra, 102 Mich. 147, 60 N. W. 458; People *v.* McCullough, 81 Mich. 25, 45 N. W. 515; Maher *v.* People, 10 Mich. 212.

*Montana*.—Territory *v.* Hanna, 5 Mont. 248, 5 Pac. 252.

In Thomas *v.* People, 39 Mich. 309, a saloonist fired a pistol through his door in trying to keep a disorderly crowd out. He was charged with an assault with intent to kill. His son and another were the only ones in the saloon when the shot was fired. The stranger had been subpoenaed and called, but did not respond. The court said: "No effort seems then to have been made to produce him, and no impediment in doing so is shown. The prosecution now attempt an excuse for this failure by saying that he was only one of several witnesses of the transaction, so that his testimony

**C. COURT'S DISCRETION.**—There is some authority holding that it is discretionary with the trial court whether the state shall be required to call to the stand all of the eye-witnesses.<sup>54</sup>

**D. WHERE EVIDENCE IS CIRCUMSTANTIAL.**—Where the evidence adduced by the prosecution in a criminal case is entirely circumstantial and it appears that there were eye-witnesses to the transaction under consideration, it is reversible error to refuse to compel the prosecution to call and examine such witnesses.<sup>55</sup>

**4. Witnesses Summoned or Present.**—The state cannot be compelled to call all its witnesses who have been summoned or who are present. If the defendant desires the testimony of such witness, the court may, at the defendant's request, order him to remain, or the defendant may cause him to be subpoenaed in his own behalf.<sup>56</sup>

**5. Witnesses Unfavorable to the Prosecution.**—A prosecuting officer should not for the purpose of obtaining an improper conviction refuse and neglect to call unfavorable witnesses. It is the duty of the court, in case of any attempt of the prosecuting officer to prejudice the defendant by the suppression of testimony, to require

could only have been cumulative. The excuse, under the circumstances of the case, is not sufficient. Besides the actors in the affray, McCacklin was the only person who appears to have been in a position to see what took place inside the saloon, and, presumptively he could have given evidence of high importance. In some particulars his evidence, in all probability, would have stood alone."

In *People v. Deitz*, 86 Mich. 419, 49 N. W. 296, which was an assault with intent to do great bodily harm, there were four persons engaged in the affray—two on each side. The prosecutor called the two on one side. The court refused to require the prosecution to swear the other party to the affray, not on trial, and who was present in court, and also refused to require the prosecution to produce three women who witnessed the difficulty from a porch of a house thirty-five rods distant, and who were sworn on the preliminary examination. The case was reversed and the court said: "We think the better rule is that it is incumbent on the prosecution not only to have the witnesses present in court, but to have them sworn in behalf of the people, and he may then examine them much or little, as he chooses. It affords the de-

fense an opportunity to cross-examine without prejudicing their case by the bias of the witness, if he should have any."

**54. *Wheeler v. State*** (Tex. App.), 5 S. W. 160; *State v. Payne*, 10 Wash. 545, 39 Pac. 157; *Territory v. Hanna*, 5 Mont. 248, 5 Pac. 252; *State v. Tighe*, 27 Mont. 327, 71 Pac. 3; *Com. v. Keller*, 191 Pa. St. 122, 43 Atl. 198.

**55. *Thompson v. State***, 30 Tex. App. 325, 17 S. W. 448; *Donaldson v. Com.*, 95 Pa. St. 21.

See also *State v. Metcalf*, 17 Mont. 417, 43 Pac. 182, *holding* that where in a prosecution for homicide the evidence relied on is entirely circumstantial, it is error for the state to fail to call a witness who though not an eye-witness was near enough to hear a conversation between defendant and deceased immediately preceding the transaction.

**56. *Florida***.—*Selph v. State*, 22 Fla. 537.

*Kansas*.—*State v. Campbell*, 73 Kan. 688, 85 Pac. 784, 9 L. R. A. (N. S.) 533.

*Michigan*.—*Thomas v. People*, 39 Mich. 309.

*Missouri*.—*State v. Billings*, 140 Mo. 193, 41 S. W. 778.

*North Carolina*.—*State v. Lucas*, 124 N. C. 825, 32 S. E. 962.

*Texas*.—*Williford v. State*, 36

the prosecution to call such witnesses.<sup>57</sup> But where no prejudice results to a defendant there is no error in the court's refusing to require a prosecutor to call an unfavorable witness.<sup>58</sup>

**6. Accomplices.**— There is no rule of law requiring the prosecution to call accomplices as witnesses. This is and must be a matter resting in the sound discretion of the prosecuting officer.<sup>59</sup>

**7. Compelling or Permitting Consultation Between Counsel and Witness.**— Although counsel for an accused is generally allowed to consult with his own witnesses before placing them on the stand,<sup>60</sup> and the district attorney with the state's witnesses, the

Tex. Crim. 414, 37 S. W. 761; *Whitehead v. State*, 49 Tex. Crim. 123, 90 S. W. 876.

*Virginia.*— *Gaines v. Com.*, 88 Va. 682, 14 S. E. 375; *Hill v. Com.*, 88 Va. 633, 14 S. E. 330, 29 Am. St. Rep. 744.

57. *People v. Etter*, 81 Mich. 570, 45 N. W. 1109; *State v. Stewart*, 117 La. 476, 41 So. 798; *Hurd v. People*, 25 Mich. 405. See also *Ross v. State*, 8 Wyo. 351, 57 Pac. 924; *State v. Barrett*, 33 Or. 194, 54 Pac. 807.

"A public prosecutor is not a plaintiff's attorney, but a sworn minister of justice, as much bound to protect the innocent as to pursue the guilty, and he has no right to suppress testimony. The fact that he is compelled to call these witnesses, when he may not always find them disposed to frankness, entitles him, when it appears necessary, to press them with searching questions. By this means, and by laying all the facts before the jury, they are quite as likely to get at the truth as if he were allowed to impeach the witnesses who disappoint him." *Wellar v. People*, 30 Mich. 16.

**Calling Defendant Himself.**— In *Com. v. Pratt*, 137 Mass. 98, upon the question as to whether the government should be required, on the offer and request of defendant to testify, to call him as a witness to prove his own signature, the court said: "We are of opinion that the government had the right to proceed in the proof of its case as if the defendant could not be a witness. It could not compel him to testify. He was 'deemed a competent witness,' 'at his own request, but not otherwise.' St. 1870, c. 393,

§ 1, Pub. Sts. c. 169, § 18. We do not think the method in which the government should prove its case was dependent upon his option. The purpose of the statute was to grant a privilege to the defendant, and not, at his election, to impose an obligation upon the government. The defendant had the full benefit of the statute, by testifying in defense as fully as he saw fit upon all parts of the case."

58. *Bozeman v. State*, 34 Tex. Crim. 503, 31 S. W. 389; *People v. Goldberg*, 39 Mich. 545.

The refusal of the state, on a second trial, to call certain witnesses whose testimony on a former trial had been impeached, there being many other reliable witnesses by which the same facts could be proven, is not a suppression of evidence, nor prejudicial to the rights of the defendant. *Argabright v. State*, 62 Neb. 402, 87 N. W. 146.

59. *People v. Resh*, 107 Mich. 251, 65 N. W. 99; *People v. McCullough*, 81 Mich. 25, 45 N. W. 515; *People v. Considine*, 105 Mich. 149, 63 N. W. 196; *People v. Baker*, 112 Mich. 211, 70 N. W. 431. See also *Alanis v. State* (Tex. Crim.), 81 S. W. 709.

60. *White v. State*, 52 Miss. 216; *Shaw v. State*, 79 Miss. 21, 30 So. 42; *Allen v. State*, 61 Miss. 627.

But see *Hudson v. State*, 137 Ala. 60, 34 So. 854, where it appeared that as a witness for defendant was getting in the witness chair, defendant's counsel stated that he had not had an opportunity to talk to the witness, and asked to be allowed to speak to her privately before examining her, but the court refused. It was held that this was a matter

latter<sup>61</sup> cannot be compelled to disclose to defendant or his counsel what facts he will testify to.<sup>62</sup>

**8. Compelling Witness To Ascertain Facts.**— It has been said that the court may compel a witness to answer a proper question, but not to procure information necessary to answer it,<sup>63</sup> thus an expert cannot be compelled to qualify himself to give an opinion;<sup>64</sup> but if after so doing he reduces his opinion to writing, he can be compelled to refresh his recollection by referring to the same.<sup>65</sup> However, it has been held not erroneous to direct a state's witness to retire from the court room into a room by himself for the purpose of examining certain papers, with a view to identifying and explaining them in his evidence.<sup>66</sup>

#### IV. CONFRONTATION OF WITNESSES.

**Confront.**— Webster defines "confront" as follows: "(1) To stand facing or in front of; to face. (2) To stand in direct opposition; to oppose. (3) To sit face to face for examination and discovery of the truth; to sit together for comparison; to compare."<sup>67</sup>

within the court's discretion and that there did not appear to have been any abuse of the same.

In *Hudson v. State*, 44 Tex. Crim. 251, 70 S. W. 764, it was held not an abuse of discretion to refuse defendant's counsel an allowance of more than five minutes to talk with a witness where it appeared that the witness had been in town when the case was tried for a week before the trial, and where there was nothing to indicate that she failed to state anything in behalf of defendant that she had stated previously to his counsel prior to going upon the stand.

**61.** *Hatchell v. State*, 47 Tex. Crim. 380, 84 S. W. 234.

**62.** *Cahn v. State*, 27 Tex. App. 709, 11 S. W. 723; *Withers v. State*, 23 Tex. App. 396, 5 S. W. 121.

In *Creswell v. State*, 14 Tex. App. 1, the court said: "While we think that, ordinarily, it would be proper and just to afford to a defendant the opportunity to confer with the witnesses in the case about their knowledge of the facts, and that it would be right for witnesses to fully state to the defendant or his counsel what their testimony would be, still, we know of no rule of law

by which witnesses can be compelled so to do."

In *Wilkerson v. State* (Tex. Crim.), 57 S. W. 956, the witness sought to be interrogated was the principal in a murder, having turned state's evidence in this prosecution which was brought against another charged as an accomplice. It was held not error to refuse to compel the principal to submit to an interview with defendant and his counsel. This decision seems to have been based upon the narrow ground that the principal could not be compelled to speak on matters which might tend to incriminate himself.

**63.** *People v. Ching Hing Chang*, 74 Cal. 389, 16 Pac. 201.

**64.** *Stevens v. Worcester*, 196 Mass. 45, 81 N. E. 907; *Schofield v. Little*, 2 Ga. App. 286, 58 S. E. 666; *Com. v. Cochran*, 31 Pa. Co. Ct. 344. See *Barrus v. Phaneuf*, 166 Mass. 123, 44 N. E. 141, 32 L. R. A. 619.

**65.** *Stevens v. Worcester*, 196 Mass. 45, 81 N. E. 907.

**66.** *Kunde v. State*, 22 Tex. App. 65, 3 S. W. 325.

**67.** **Confrontation in Criminal Law** has been defined to be "the act of setting a witness face to face with the prisoner, in order that the latter may make any objection he

**1. Constitutional Provisions.**—The constitution of the United States and of a great majority of the states of the Union guarantee that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him.<sup>68</sup> In some juris-

has to the witness, or that the witness may identify the accused. Black, Law. Dict. "Confrontation;" Anderson, Law. Dict. "Confront;" Bouvier's Law Dict. (Rawle's Revision) "Confrontation."

**68. United States.**—The constitution of the United States provides (amendments, art. 6) that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him, and this without exception, not if they can be produced, nor if they be within the jurisdiction, but absolutely and on all occasions. *United States v. Angell*, 11 Fed. 34. *Alabama.*—*Anderson v. State*, 89 Ala. 12, 7 So. 429 (Const., art. 1, § 7).

*Arkansas.*—*Gore v. State*, 52 Ark. 285, 12 S. W. 564, 5 L. R. A. 832 (Const., art. 2, § 10).

*California.*—No constitutional provision; but this right has been conferred by statute (Pen. Code, § 1102); *People v. Bird*, 132 Cal. 261, 64 Pac. 259; *People v. Plyler*, 126 Cal. 379, 58 Pac. 904; *People v. Gordon*, 99 Cal. 227, 33 Pac. 901.

*Georgia.*—*Ralph v. State*, 124 Ga. 81, 52 S. E. 298, 2 L. R. A. (N. S.) 509 (Const., art. 1, § 5; Civ. Code 1895, § 5702). (This provision guarantees that witnesses for the state shall be examined in the presence of accused, and be subject to cross-examination).

*Illinois.*—*Gillespie v. People*, 176 Ill. 238, 52 N. E. 250 (Const., art. 2, § 9).

*Indiana.*—*Butler v. State*, 97 Ind. 378 (Const., art. 1, § 13).

*Iowa.*—*State v. Collins*, 32 Iowa 36 (New Const., art. 1, § 10).

*Kentucky.*—Bill of Rights, § 11, affirms the right of a person accused of crime to meet the witnesses face to face. "Of course this means the witness that may be called by the state against him." *Adkins v. Com.*, 97 Ky. 539, 33 S. W. 948.

*Louisiana.*—*State v. Kline*, 109 La. 603, 33 So. 618; *State v. Lee*,

50 La. Ann. 9, 22 So. 954 (art. 8 of the Const.).

*Maine.*—*State v. Frederic*, 69 Me. 400 (Const., art. 1, § 6, cl. 13).

*Michigan.*—*People v. Goodrode*, 132 Mich. 542, 94 N. W. 14 (§ 28, art. 6, Const. provides the accused is entitled to be confronted by witnesses against him. Supplemented by statute (Comp. Laws, § 11, 796, providing that he shall have the right to meet the witnesses face to face).

*Missouri.*—*State v. Williford*, 111 Mo. App. 668, 86 S. W. 570 (Const., art. 2, § 22).

*Montana.*—*State v. Lee*, 13 Mont. 248, 33 Pac. 690 (Const., art. 3, § 16, providing that accused shall have the right to meet the witnesses face to face, and Crim. Proc. Act, § 9, providing that accused shall be entitled to be confronted with the witnesses against him).

*New York.*—*People v. Welsh*, 84 N. Y. Supp. 703; *People v. Elliott*, 172 N. Y. 146, 64 N. E. 837, 60 L. R. A. 318, affirming 66 App. Div. 179, 73 N. Y. Supp. 279 (Code Crim. Proc. § 8, subd. 3, re-enacting Bill of Rights, § 14).

*North Carolina.*—*State v. Mitchell*, 119 N. C. 784, 25 S. E. 783, 1020 (Const., art. 1, § 11, provides that in all criminal prosecutions every man "has the right" to confront accusers and witnesses face to face).

*Oregon.*—*State v. Bowker*, 26 Or. 309, 38 Pac. 124; *State v. Hinkle*, 33 Or. 93, 54 Pac. 155 (Const., art. 1, § 11).

*Pennsylvania.*—*Com. v. Zorambo*, 205 Pa. St. 109, 54 Atl. 716 (Declaration of Rights, art. 1, § 9).

*Rhode Island.*—*State v. Sheehan*, 28 R. I. 160, 66 Atl. 66; *State v. Waldron*, 16 R. I. 191, 14 Atl. 847 (Const., art. 1, § 10).

*Texas.*—*Cline v. State*, 36 Tex. Crim. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850; *Porch v. State*, 51 Tex. Crim. 7, 99 S. W. 1122 (Bill of Rights, § 10).

dictions it is held that an accused has no constitutional right to be

*Utah.*—*State v. King*, 24 Utah, 482, 68 Pac. 418, 91 Am. St. Rep. 808; *State v. Mortensen*, 26 Utah 312, 73 Pac. 562, rehearing denied, 26 Utah 312, 73 Pac. 633 (Const., art. 1, § 12).

*Washington.*—*State v. Cushing*, 17 Wash. 544, 50 Pac. 512 (Const., art. 1, § 22).

*Wisconsin.*—*Spencer v. State*, 132 Wis. 509, 112 N. W. 462 (Const., art. 1, § 7).

An accused has a right to be confronted with the witness against him in all stages of the accusation. The privilege is inherent, and the right to demand the enjoyment of proving his innocence is simultaneous with the first step of the prosecution. *United States v. Almeida*, 2 Wheeler Cr. Cas. (N. Y.) 576.

Under the constitution (art. 1, § 12) and the statutes of Utah, a person accused of crime has a right to be confronted by his accusers and witnesses against him face to face; and he cannot be denied this constitutional right because of the youth, incapacity, or unwillingness of his accusers to meet him face to face in the presence of the court and jury; and an order of the trial court to permit a witness to turn her back to the accused, and directing the removal of the defendant from his counsel, twenty-four feet away from the prosecuting witness testifying against him, so far that the defendant could neither see nor hear the witness, nor see the jury on account of the distance and intervening obstacles, denied the defendant a constitutional right and prevented him from having a fair trial. *State v. Mannion*, 19 Utah 505, 57 Pac. 542, 75 Am. St. Rep. 753.

**Refusal of Inspection of Refreshing Memorandum.**—The accused in a criminal case in the courts of the United States has a right to be confronted by the witnesses against him. To permit the district attorney to furnish a paper to a witness and allow the witness to testify from and by that, without

having previously exhibited it to the defendant on his demand, is practically to deny him the right of being confronted by the witnesses against him, and tends to deprive him of full opportunities to defend himself. *Morris v. United States*, 149 Fed. 123, 80 C. C. A. 112.

**Admissions of Conspirator.**—On a trial for conspiracy where the object of the alleged conspiracy had been accomplished, it was held that the admissions of a co-conspirator, by way of recital to past facts, were not admissible against his confederate, under Const., art. 1, § 11, providing that an accused shall have the right to meet witnesses against him face to face. *State v. Hinkle*, 33 Or. 93, 54 Pac. 155.

**Contempt Proceedings** under the Code of Ohio are not provisional remedies, but special proceedings. § 5644 Rev. Stat. contemplates a trial on such evidence as is competent in ordinary trials before the court. The party accused has the right to meet the witnesses for the prosecution face to face, and the opportunity to cross-examine; and affidavits can therefore not be used. *Effinger v. Ohio*, 11 Ohio C. C. 389.

**Examination on Preliminary Hearing.**—Constitutional provisions not applicable on preliminary examination. See article "EXAMINATION BEFORE COMMITTING MAGISTRATE," Vol. V, pp. 310, 311, notes 18-21.

**Grand Jury.**—No right to confront witnesses before. See article "GRAND JURY," Vol. VI, p. 249, note 22.

**Coroner's Inquest** as to right of accused to be present before. See article "CORONER'S INQUEST," Vol. III, p. 57, notes 21-22.

**Dying Declarations** are not admitted under any exception to the rule, but are held admissible because they were so at common law, and the constitutional declarations do not shut them out. *State v. Waldron*, 16 R. I. 191, 14 Atl. 847. And see article "DYING DECLARATIONS," Vol. IV, pp. 919-921, notes 8-10.



confronted with his own witnesses,<sup>69</sup> although in others it is held expressly to the contrary.<sup>70</sup>

**This Is But Declaratory of the Ancient Common Law** as it was before certain statutory exceptions were created.<sup>71</sup>

**A Deaf Defendant** should be allowed such opportunity for communication to him of the testimony of adverse witnesses by the sign language employed by deaf mutes, or by writing, or in some other manner which would be reasonable and proper, under the circumstances, to insure him a full and fair exercise of his legal rights.<sup>72</sup>

**A Dumb Witness** may be allowed to answer questions capable of being answered by yes or no by a nod or shake of the head and other questions by means of writing without violating a defendant's constitutional rights.<sup>73</sup>

69. *Petty v. State*, 4 Lea (Tenn.) 326; *State v. Lee*, 50 La. Ann. 9, 22 So. 954.

70. *Davis v. Com.*, 25 Ky. L. Rep. 1426, 77 S. W. 1101; *Taylor v. Com.*, 9 Ky. L. Rep. 316; *Adkins v. Com.*, 97 Ky. 539, 33 S. W. 948.

In *Virginia* the provisions of the Bill of Rights secure to one accused of crime a fair and impartial trial, and to that end safeguard his right "to call for evidence in his favor." (Const. Va., art. I, § 8, p. CCX). Under this requirement an accused in a "capital or criminal prosecution" cannot be forced into a trial in the absence of his witnesses, upon the theory that they will be summoned and examined if they should arrive before verdict, and, if not, that their testimony may be made the basis of a motion for a new trial, such practice violating both the letter and spirit of the constitution. *Cremeans v. Com.*, 104 Va. 860, 52 S. E. 362.

71. 2 Hawk. P. C. 46, § 23; 1 Bishop Cr. Proc. § 520; 1 Chitty Crim. Law, § 585.

72. In *Ralph v. State*, 124 Ga. 81, 52 S. E. 298, 2 L. R. A. (N. S.) 509, the court said: "The exact manner in which this result should be arrived at must depend upon the circumstances of the case, and to a considerable extent be left to the sound discretion of the court. If there is no official stenographer, the court cannot be required to stop the trial, and incur the expense of employing one. To have the testimony of each witness taken down stenographically, and then arrest the

progress of the trial until the stenographer can transcribe his notes, and the defendant can read what had thus been written, would be cumbersome. Nor will the court be compelled to employ a typewriter for that purpose. The defendant knowing of his infirmity, should make provision for his own assistance, and not require the court to practically destroy an orderly trial. Whether an expert operator on a typewriter and a machine were accessible, or whether the use of such a machine in the court house during the trial would interfere with the proper conduct of the business, were matters addressed to the sound discretion of the presiding judge. He allowed the counsel for the accused to write out and exhibit to him the testimony. It does not appear how many witnesses testified, or whether this was a matter of slight or great inconvenience; nor does it appear that the accused was not fully apprised of the evidence introduced against him. It may be inferred from the judge's note that he allowed time and opportunity for the taking down and exhibition to the accused of the testimony, and it is not shown that any harm resulted from the method adopted by the court."

73. *Roberson v. State* (Tex. Crim.), 49 S. W. 398, which was a case where the witness' affliction was due to injuries received at defendant's hands.

**Interpreter.**—Not a violation of accused's constitutional rights to receive evidence through an interpreter.

**2. Construction of Constitutional Provisions. — A. IN GENERAL.** The requirement that an accused shall be confronted on his trial by the witnesses against him has reference to the personal presence of the witnesses;<sup>74</sup> so that accused may be enabled to cross-examine them.<sup>75</sup> The words "to be confronted" do not necessarily mean a sitting face to face in the literal sense.<sup>76</sup>

**B. RULE AS TO TESTIMONY CONCERNING REPUTATION. —** Where testimony as to reputation is adduced, it is sufficient that the accused be confronted with those who testify as to the existence of

ter. See article "INTERPRETER," Vol. VII, p. 659, note 29.

74. *Loan v. Etzel*, 62 Iowa 429, 17 N. W. 611; *State v. Mannion*, 19 Utah 505, 57 Pac. 542, 75 Am. St. Rep. 753 (*per* Bartch, C. J.); *Summons v. State*, 5 Ohio St. 325; *Ralph v. State*, 124 Ga. 81, 52 S. E. 298, 2 L. R. A. (N. S.) 509 (guaranteed under Const., art. 1, par. 5, Civ. Code 1895, § 5702, that witnesses should be examined in presence of accused).

In *Brown v. State*, 38 Tex. 483, the court said: "The accused should not only be within the walls of the court house, but he should be present when the trial is conducted, that he may see and be seen, hear and be heard, under such regulations as the law established."

**Representation by Counsel Not Necessary. —** In *Butler v. State*, 83 Ark. 272, 103 S. W. 382, it was contended that the testimony of certain absent witnesses was not competent because the defendant was not represented by counsel at the examination before the justice of the peace when the testimony was given. *Held*, that it was not necessary, in order to render the testimony competent, that the defendant should have been represented by counsel. The law does not provide that an accused person must have counsel in a preliminary examination before a justice of the peace or other committing court. That is a privilege which he may or may not take advantage of as he chooses. The constitutional guaranty that he shall have an opportunity to be confronted with the witnesses against him is fulfilled by his presence when the testimony is given.

75. *Wray v. State*, 154 Ala. 36, 45 So. 697 (defendant's rights in-

fringed where, although permission was granted to cross-examine a state's witness dangerously ill, he was denied a motion to strike out the witness' testimony in chief, since he could not be required to cross-examine in view of witness' critical condition); *Howser v. Com.*, 51 Pa. St. 332; *Summons v. State*, 5 Ohio St. 325; *Ralph v. State*, 124 Ga. 81, 52 S. E. 298, 2 L. R. A. (N. S.) 509.

In *Mattox v. United States*, 156 U. S. 237, Justice Brown, referring to the provision in the constitution of the United States, said: "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury, in order that they may look at him, and judge by his demeanor upon the stand and manner in which he gives his testimony whether he is worthy of belief."

**Cross-Examination — Not Impeaching Character. —** In *Howser v. Com.*, 51 Pa. St. 332, it was contended that the constitutional right to confront witnesses would be abridged in the instance of witnesses taken from the jury box, because their truth and veracity could not be attacked without damage to the attacking party. *Held*, that confronting witnesses does not mean impeaching their character, but means cross-examination in the presence of the accused.

76. *State v. Mannion*, 19 Utah

the reputation, the latter being "the witnesses against" an accused and not those whose utterances create the reputation.<sup>77</sup>

C. APPLICATION FOR CONTINUANCE. — The right of an accused to be confronted with the witnesses against him does not apply to an application for a continuance. The constitutional sections merely relate to the trial of the guilt or innocence of the accused.<sup>78</sup>

D. FEDERAL CONSTITUTION NOT APPLICABLE IN STATE COURTS. U. S. Const., Amend. 6, which provides that the accused in all criminal prosecutions shall enjoy the right to be confronted by the witnesses against him is not applicable to prosecutions in state courts.<sup>79</sup>

E. MUTUALITY OF RIGHT. — In the federal courts it is held that not only has an accused the right to be confronted by witnesses appearing against him, but the state is also entitled to be confronted by the defendant's witnesses.<sup>80</sup>

3. Statements as to What Absent Witnesses Would Testify. — It is a deprivation of an accused's constitutional right to be confronted by the witnesses against him for the court to permit to be read in evidence, at the instance of the state and against the defendant's objection, a written showing of what an absent witness would prove, if present, which the defendant refuses to admit for the purpose of obtaining a trial.<sup>81</sup>

And in Kentucky and Louisiana statutes have been enacted and have been held to be valid, providing that the state may coerce a trial by making an admission that, if the witnesses named in an affidavit for a continuance were present they would testify to the truth of the statement contained therein.<sup>82</sup>

505, 57 Pac. 542, 75 Am. St. Rep. 753 (per Bartch, C. J.)

But see *State v. Thomas*, 64 N. C. 74, where it is said: "In all criminal prosecutions every man has a right to be informed of the accusation against him, and to confront the accusers and witnesses with other witnesses. We take it that the word 'confront' does not simply secure to the accused the privilege of examining witnesses in his behalf, but is in affirmance of the rule of the common law that in trial by jury the witnesses must be present before the jury and accused, so that they may be confronted; that is, put face to face."

77. *State v. Waldron*, 16 R. I. 191, 14 Atl. 847.

78. *Lipscomb v. State*, 76 Miss. 223, 25 So. 158.

79. *People v. Welsh*, 88 App. Div. 65, 84 N. Y. Supp. 703; *State v. Jones*, 7 Nev. 408; *Ryan v. People*, 21 Colo. 119, 40 Pac. 775; *But-*

*ler v. State*, 97 Ind. 378; *People v. Penhollow*, 42 Hun (N. Y.) 103. See also *Barker v. People*, 3 Cow. (N. Y.) 686, 701. But see *Com. v. Cleary*, 148 Pa. St. 26, 23 Atl. 1110; *People v. Williams*, 35 Hun (N. Y.) 516.

80. *United States v. Angell*, 11 Fed. 34.

81. *Wills v. State*, 73 Ala. 362. See also *Dominges v. State*, 15 Miss. 475, 45 Am. Dec. 315, holding such action not allowed except in extreme instances.

82. *State v. Lee*, 50 La. Ann. 9, 22 So. 954; *Davis v. Com.*, 25 Ky. L. Rep. 1426, 77 S. W. 1101.

In Kentucky, Bill of Rights, § 11, confirmed the right of a person accused of crime to meet the witnesses face to face. By the code of 1854 the State was allowed a trial upon admitting as true the facts stated by accused that he could prove by absent witnesses. This provision having, on a fair trial,

In Other Jurisdictions such statements may be admitted for the purpose of coercing a trial, but it is not sufficient that the state agree that the absent witness would testify to certain facts if present;<sup>83</sup> such an agreement must also constitute an admission that the facts alleged are absolutely true.<sup>84</sup>

**4. Introduction of Depositions and Ex Parte Affidavits.**—In civil cases there is no constitutional rule requiring witnesses to be produced in open court; in equity the rule was that all testimony must be by deposition; but in criminal cases, on the other hand, neither depositions<sup>85</sup> or *ex parte* affidavits<sup>86</sup> of state's witnesses taken in the presence<sup>87</sup> or absence<sup>88</sup> of the accused can be introduced in evidence against him. But when a defendant having been convicted of a crime is called for sentence and the state's attorney reads affidavits in aggravation of the crime for which defendant has been convicted, defendant is not thereby denied his constitutional right to confrontation of witnesses, since such evidence does not affect

been found highly detrimental, if not subversive of the whole Criminal Code, was by the amendment of 1886 abandoned and a different mode adopted by the legislative will. This consists in only requiring the state to admit that the absent witnesses, if present, would testify as claimed in the affidavit. *Held*, that on the face of the acts in question, neither of them, either in letter or spirit, violates the provisions of the constitution. *Adkins v. Com.*, 97 Ky. 539, 33 S. W. 948.

83. "It was not sufficient that the district attorney agreed that the witness would have deposed to certain facts, if present; he should have admitted the truth of these facts, absolutely. It was the right of the accused to have his witness orally examined in court; and this right could not be frittered away by compelling him to go to trial in their absence, without the benefit of their testimony upon a statement of what that evidence could be, subject to impeachment." *People v. Diaz*, 6 Cal. 248.

84. *Dominges v. State*, 15 Miss. 475, 45 Am. Dec. 315; *People v. Diaz*, 6 Cal. 248. But see note 82, next preceding.

85. *People v. Sligh*, 48 Mich. 54, 11 N. W. 782; *Garza v. State*, 43 Tex. Crim. 499, 66 S. W. 1008; *Com. v. Zorambo*, 205 Pa. St. 109, 54 Atl. 716; *People v. Restell*, 3 Hill

(N. Y.) 289; *Anderson v. State*, 89 Ala. 12, 7 So. 429.

But see *State v. Harvey*, 28 La. Ann. 105, holding that where an accused had a witness "face to face" on the preliminary trial and had the opportunity to cross-examine him, his constitutional right invoked by him was not violated by the introduction, on the final trial, of the deposition of such witness, where it was shown that the witness could not be produced.

**Forfeitures.**—As to whether actions for, are criminal in character such as to preclude use of depositions, see article "FORFEITURES," Vol. V, p. 836, note 4.

**Depositions Taken in Preliminary Proceeding.**—See *infra*, "Testimony in Prior Judicial Investigations."

86. *Com. v. Zorambo*, 205 Pa. St. 109, 54 Atl. 716.

In *Wilburn v. State* (Tex. Crim.), 77 S. W. 3, which was a trial for murder, a controversy arose over occurrences which had taken place in the state attorney's office between his witnesses and himself. It was held that the facts could not be shown by *ex parte* affidavits; the witnesses themselves should have been put on the stand, subject to cross-examination.

87. *State v. Chambers*, 44 La. Ann. 603, 10 So. 886. But see *State v. Webb*, 2 N. C. (1 Hayn.) 103.

88. *State v. Webb*, 2 N. C. (1 Hayn.) 103.

the verdict already rendered within the meaning of the constitution.<sup>89</sup>

In Nevada there appears to be no constitutional provision whereby an accused may demand confrontation of witnesses, and therefore it is of course entirely competent for the state to make provision, as it has done, that in certain cases and under certain circumstances, depositions may be introduced against an accused.<sup>90</sup>

In Colorado the constitutional section granting to an accused the right to meet the witnesses against him face to face is immediately followed by a provision permitting the taking of depositions to be used upon the trial, under certain definite limitations.<sup>91</sup>

By Accused's Consent in some jurisdictions, depositions of state's witnesses may be introduced by statutory authority without violating constitutional provisions guaranteeing right to confrontation of witnesses.<sup>92</sup>

**5. Introduction of Documentary Evidence.**—The constitutional provision that an accused shall have a right to be confronted with the witnesses against him does not preclude proof of facts in their nature essentially and purely documentary;<sup>93</sup> nor does such provision preclude the introduction of documentary evidence, to establish collateral facts, as would be admissible under the rules of the

89. *State v. Reeder*, 79 S. C. 139, 60 S. E. 434.

90. *State v. Jones*, 7 Nev. 408.

91. "These provisions, being a part of the same instrument, must be construed *in pari materia*, and when so construed no doubt can be entertained that in this state, at least, there is constitutional sanction for the taking of a deposition on the part of the prosecution and the introduction of the same against the accused upon final trial, under some circumstances." *Ryan v. People*, 21 Colo. 119, 40 Pac. 775.

92. *Anderson v. State*, 89 Ala. 12, 7 So. 429.

Depositions taken *de bene esse*, under a stipulation between the district attorney and the attorney for defendant, which recited that the depositions should be read on the trial with the same force and effect as if they had been given in court on the trial by the witnesses, are not open to the objection that their admission would deprive defendant of his constitutional right to be confronted by his accusers. *People v. Molins*, 10 N. Y. Supp. 130.

"The statute under examination confers upon an accused person a right he did not have at common law, namely, the right to take dep-

ositions in a foreign jurisdiction, and confers it upon condition that he shall concede a like privilege to the state. No right is taken from him, but an additional one is granted him. It seems clear to our minds that a statute conferring a new and beneficial privilege upon a defendant cannot be deemed unconstitutional because it annexes to the grant a condition favorable to the state, but just in itself and not oppressive to the accused." *Butler v. State*, 97 Ind. 378.

93. *Illinois*.—*Tucker v. People*, 122 Ill. 583, 13 N. E. 809; *Sokel v. People*, 212 Ill. 238, 72 N. E. 382.

*Iowa*.—*State v. Matlock*, 70 Iowa 229, 30 N. W. 495.

*Michigan*.—*People v. Jones*, 24 Mich. 215; *People v. Dow*, 64 Mich. 717, 31 N. W. 597, 8 Am. St. Rep. 873; *People v. Goodrode*, 132 Mich. 542, 94 N. W. 14.

*North Carolina*.—*State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002; *State v. Toler*, 145 N. C. 440, 58 S. E. 1005.

*Tennessee*.—*Reeves v. State*, 7 Coldw. 96.

*Texas*.—*Patterson v. State*, 17 Tex. App. 102; *Rogers v. State*, 11 Tex. App. 608.

common law.<sup>94</sup> Thus, record proof of a marriage is generally held to be competent and admissible in a prosecution for bigamy.<sup>95</sup> And in various other criminal proceedings it has been held that a school census containing a record of ages of children,<sup>96</sup> a notary's certificate showing that a draft was protested,<sup>97</sup> a comptroller's certificate showing a tax collector's defalcations,<sup>98</sup> and a transcript from an auditor's money order account books, were admissible in evidence.<sup>99</sup> But it has been said that the general rule allowing introduction of record evidence applies only to facts which can be proved in no other way than by an original, or properly certified copy, and especially when the fact to be proved comes up collaterally.<sup>1</sup>

**Contempt Proceedings** although criminal or *quasi* criminal in their character are not generally held to be of themselves criminal actions

94. *Rogers v. State*, 11 Tex. App. 608. See also *United States v. Liddle*, 2 Wash. C. C. 205, 26 Fed. Cas. No. 15,598; *United States v. Ortega*, 4 Wash. C. C. 531, 27 Fed. Cas. No. 15,971.

95. *Tucker v. People*, 122 Ill. 583, 13 N. E. 809.

In *Sokol v. People*, 212 Ill. 238, 72 N. E. 382, which was an indictment for bigamy, the question arose as to the admission in evidence of an instrument in the Hebrew language, prepared and signed by two witnesses as a part of a marriage ceremony in Sabed, Turkey. The evidence tended to show that the making of the paper was a part of a ceremonial marriage under the law where the marriage took place. Its execution as a part of the ceremony was duly proved. *Held*, that it was was admissible, in connection with the testimony, as a part of the ceremonial marriage, and this not in violation of constitutional provision providing for meeting of witnesses face to face.

**Certified Transcripts of Marriage Records** are "receivable in all courts and places as evidence of the marriage, and the date thereof." Code § 2197. The law makes marriages a matter of public record, and the record is made evidence of the fact of the marriage. There is no reason why this provision should not apply to criminal as well as to civil cases. The constitutional provision in relation to confrontation of witnesses has no reference to record evidence. *State v. Matlock*, 70 Iowa 229, 30 N. W. 495.

But see *People v. Lambert*, 5 Mich. 349, 72 Am. Dec. 49, *holding* that a certificate of marriage from a foreign state merely signed by a minister, while it may avail in civil proceedings, if properly supported, cannot avail in criminal trials, where defendant is entitled to confront the witnesses.

96. *McAnally v. State* (Tex. Crim.), 73 S. W. 404.

97. *May v. State*, 15 Tex. App. 430.

98. *Johns v. State*, 55 Md. 350.

99. *United States v. Swan*, 7 N. M. 306, 34 Pac. 533.

1. *People v. Jones*, 24 Mich. 215; *State v. Reidel*, 26 Iowa 430.

And so it was held in *People v. Dow*, 64 Mich. 717, 31 N. W. 597, 8 Am. St. Rep. 873, a criminal case, that an official record of the weather as kept in the office of a signal officer was not admissible in evidence without the presence of the man who made the observations and the record, on the stand, so that the accuracy of such record could have been inquired into.

And in *People v. Goodrode*, 132 Mich. 542, 94 N. W. 14, which was a prosecution for polygamy, defendant's alleged first wife testified that at the time of the performance of the ceremony she was a married woman, having been married to another, whereupon the state introduced a certificate from the clerk of the county court to the effect that after a diligent search he had been unable to find any record of such marriage. *Held*, inadmissible as

or prosecutions, and so in such proceedings documentary evidence is generally admissible since constitutional provisions in relation to confrontation of witnesses do not apply.<sup>2</sup>

**6. Testimony in Prior Judicial Investigations.** — **A. TESTIMONY OF ABSENT WITNESSES.** — In many cases it has been held that the constitutional right of an accused to be confronted with witnesses against him is violated by permitting a deposition or statement of an absent witness taken at a former trial or preliminary hearing to be read at the final trial,<sup>3</sup> especially so where it appears that the witness' absence was due to the negligence of the prosecution.<sup>4</sup> The rule is otherwise, however, where it appears that the witness was absent by the suggestion, connivance or procurement of the accused.<sup>5</sup> In these decisions there appears to have been no distinction made between those cases in which the accused was given an opportunity on a preliminary hearing or former trial of confronting and cross-examining the witness and those in which no such occasion was furnished. In a few of them it distinctly appeared that

violating defendant's constitutional rights.

2. *O'Neil v. People*, 113 Ill. App. 195; *State v. Mitchell*, 3 S. D. 223, 52 N. W. 1052. But see *Effinger v. Ohio*, 11 Ohio C. C. 389.

3. *United States*. — *Motes v. United States*, 178 U. S. 458; *United States v. Angell*, 11 Fed. 34.

*Iowa*. — *State v. Collins*, 32 Iowa 36.

*Kansas*. — *State v. Woods*, 71 Kan. 658, 81 Pac. 184 (transcript of testimony in civil action inadmissible).

*Missouri*. — *State v. Houser*, 26 Mo. 431.

*Montana*. — *State v. Lee*, 13 Mont. 248, 33 Pac. 690 (in absence of prosecuting witness, committing magistrate not allowed to testify as to former's evidence on preliminary hearing in view of Const., art. 3, § 16, and Crim. Proc. Act, § 9, providing for confrontation of witnesses).

In *Kirby v. United States*, 174 U. S. 47, which was a prosecution for receiving stolen postage stamps from three persons named, it appeared that in the district court, the judgment convicting the said three persons of stealing the said stamps had been received in evidence against the accused, under the provision in the Act of March 3, 1875, c. 144, § 2, that such judgment "shall be conclusive evidence against said re-

ceiver, that the property of the United States therein described has been embezzled, stolen or purloined." Held, that such provision was in violation of the Sixth Amendment of the constitution of the United States, which provides that "in all criminal prosecutions the accused shall . . . be confronted with the witnesses against him."

4. *Motes v. United States*, 178 U. S. 458.

5. *Motes v. United States*, 178 U. S. 458; *State v. Houser*, 26 Mo. 431; *Pittman v. State*, 92 Ga. 480, 17 S. E. 856. See also *Reg. v. Scaibe*, 2 Den. C. C. 281, 17 Q. B. 238, 5 Cox C. C. 243.

"The constitution gives the accused the right to a trial at which he should be confronted with the witnesses against; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his

the accused had had no opportunity of confrontation at the prior investigation.<sup>6</sup>

But the Great Weight of Authority establishes the rule that the testimony of a witness who was examined on the former trial of a criminal charge, or on the preliminary examination thereof, an opportunity to cross-examine being afforded to the accused, is admissible on the subsequent trial, on proof that the witness is absent from the state, either permanently, or for such an indefinite time that his return is merely contingent or conjectural, or on proof that the witness cannot with due diligence be found within the state; and this is not in violation of the constitutional right of an accused to be confronted by the witnesses against him.<sup>7</sup> It is generally

constitutional rights have been violated." *Reynolds v. United States*, 98 U. S. 145.

6. *Motes v. United States*, 178 U. S. 458; *United States v. Angell*, 11 Fed. 34; *Kirby v. United States*, 174 U. S. 47; *State v. Woods*, 71 Kan. 658, 81 Pac. 184.

7. *Arkansas*.—*Hurlèy v. State*, 26 Ark. 17; *Sneed v. State*, 47 Ark. 180, 1 S. W. 68; *Vaughan v. State*, 58 Ark. 353, 24 S. W. 885.

*California*.—Under Pen. Code, § 686, it is provided that in criminal actions defendant is entitled "to be confronted with the witnesses against him in the presence of the court" except in specified instances when the testimony of a witness taken at a preliminary examination, or the deposition of one unable to give security for his appearance, may, under certain circumstances, be read. Under this statute, which has been held to be constitutional (*People v. Oiler*, 66 Cal. 101, 4 Pac. 1066; *People v. Plyler*, 126 Cal. 379, 58 Pac. 904), the testimony of a stenographer who was present at a preliminary examination and heard the testimony of a witness absent from the state at the time of trial is not admissible in proof thereof. *People v. Gardner*, 98 Cal. 127, 32 Pac. 880. Nor is the transcript of testimony on a former trial admissible where the same does not conform to the requirement of a "deposition" as stated above. *People v. Gordon*, 99 Cal. 227, 33 Pac. 901. In *People v. Chung Ah Chue*, 57 Cal. 567, it is held that the word "court" as used in the statute referred to above, refers to the court

in which the action is being tried, so that the reporter's notes of testimony given on a former trial under an indictment for the same offense, by a witness out of the state, are not admissible. In *People v. Lee Fat*, 54 Cal. 527, it was held that receiving in evidence a stenographic report of evidence given at a prior trial through an interpreter was a violation of defendant's guaranteed right to confront witnesses; the interpreter himself should have been called.

*Kansas*.—*State v. Nelson*, 68 Kan. 566, 75 Pac. 505; *State v. Harmon*, 70 Kan. 476, 78 Pac. 805 (one having heard testimony of absent witness at preliminary hearing allowed to testify as to substance of same).

*Louisiana*.—*State v. Banks*, 111 La. 22, 35 So. 370 (under the present, as under former constitutions, the right guaranteed to the accused in a criminal prosecution, to be confronted with the witnesses against him, is accorded if he is so confronted upon his preliminary examination or at any one of several trials, and is then afforded an opportunity for cross-examination, and he is not entitled to such confronting upon a multiplicity of hearings).

*Maine*.—*State v. Frederic*, 69 Me. 400 (certified copy of witnesses' testimony as taken by official court reporter admissible to prove such testimony, this not being in contravention of const., art. 1, § 6, cl. 3, relating to confrontation of witnesses).

*Michigan*.—*People v. Case*, 105 Mich. 92, 62 N. W. 1017 (people



held that the testimony of a witness on a preliminary hearing cannot be given on the trial, because the witness is too ill to attend at that time, this being held to be a violation of defendant's constitutional rights.<sup>8</sup>

**B. TESTIMONY OF DECEASED WITNESSES.**—On the trial of a criminal case, the testimony of a witness who has since died, given in a preliminary hearing or in a former trial may generally be given in evidence without contravening the constitutional provisions requiring that one accused shall be confronted by the witnesses against him; such requirement being satisfied by his having once been so confronted.<sup>9</sup>

permitted on trial to interrogate witness as to his testimony on preliminary hearing, accused having then been confronted by such witness).

*New York.*—*People v. Fish*, 125 N. Y. 136, 26 N. E. 319; *People v. Williams*, 35 Hun 516.

*Pennsylvania.*—*Com. v. Cleary*, 148 Pa. St. 26, 23 Atl. 1110.

*Texas.*—*Porch v. State*, 51 Tex. Crim. 7, 99 S. W. 1122; *Johnson v. State*, 1 Tex. App. 333; *Black v. State*, 1 Tex. App. 368; *Steagald v. State*, 22 Tex. App. 464, 3 S. W. 771; *Sullivan v. State*, 6 Tex. App. 319; *Cooper v. State*, 7 Tex. App. 194; *Post v. State*, 10 Tex. App. 579; *Garcia v. State*, 12 Tex. App. 335; *Evans v. State*, 12 Tex. App. 370; *Crowell v. State*, 16 Tex. App. 57; *Kerry v. State*, 17 Tex. App. 178; *Parker v. State*, 18 Tex. Crim. 72; *Conner v. State*, 23 Tex. App. 378, 5 S. W. 189; *Parker v. State*, 24 Tex. App. 61; *McCollum v. State*, 29 Tex. App. 162, 14 S. W. 1020. *Contra*, *Cline v. State*, 36 Tex. Crim. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850 (*Henderson, J. dissenting*).

*Utah.*—*State v. King*, 24 Utah 482, 68 Pac. 418, 91 Am. St. Rep. 808.

8. *State v. Staples*, 47 N. H. 113; *People v. Bojorquez*, 55 Cal. 463; *Com. v. McKenna*, 158 Mass. 207, 33 N. E. 389. But see *Spencer v. State*, 132 Wis. 509, 112 N. W. 462.

9. *United States.*—*Mattox v. United States*, 156 U. S. 237.

*Idaho.*—*Territory v. Evans*, 2 Idaho 627, 23 Pac. 232.

*Iowa.*—*State v. Fitzgerald*, 63 Iowa 268, 19 N. W. 202.

*Massachusetts.*—*Com. v. Rich-*

*ards*, 18 Pick. 434, 29 Am. Dec. 608.

*Michigan.*—*People v. Dowdigan*, 67 Mich. 95, 38 N. W. 920.

*Missouri.*—*State v. Mc O'Brien*, 24 Mo. 402, 69 Am. Dec. 435; *State v. Baker*, 24 Mo. 437; *State v. Houser*, 26 Mo. 431 (deposition admissible taken before examining court on proof of witness' death); *State v. Harman*, 27 Mo. 120.

*Nebraska.*—*Hair v. State*, 16 Neb. 601, 21 N. W. 464.

*New York.*—*People v. Penhol-*  
*low*, 42 Hun 103; *People v. Elliott*, 172 N. Y. 146, 64 N. E. 837, 60 L. R. A. 318, *affirming*, 16 App. Div. 179, 73 N. Y. Supp. 279.

*Ohio.*—*Deveaux v. Clemens*, 17 Ohio C. C. 33; *State v. Summons*, 1 Ohio Dec. 381 (constitutional right has reference to personal presence of accused and does not apply to subject-matter of evidence), *affirmed* in *Summons v. State*, 5 Ohio St. 325.

*Pennsylvania.*—*Com. v. Cleary*, 148 Pa. St. 26, 23 Atl. 1110.

*Tennessee.*—*Bostick v. State*, 3 Humph. 344; *Kendrick v. State*, 10 Humph. 479, *overruling State v. Atkins*, 1 Overt. 229.

*Texas.*—*Porch v. State*, 51 Tex. Crim. 7, 99 S. W. 1122; *Potts v. State*, 26 Tex. App. 663, 14 S. W. 456; *Childers v. State*, 30 Tex. App. 160, 16 S. W. 903; (in this case the rule stated in the text was recognized, but it was held that testimony taken in a *habeas corpus* proceeding was not examining trial evidence); *McGee v. State*, 31 Tex. Crim. 71, 19 S. W. 764; *Bennett v. State*, 32 Tex. Crim. 216, 22 S. W. 684; *Ex parte Meyers*, 33 Tex. Crim. 204, 26 S. W. 196. *Contra*, *Cline v.*

**7. Waiver.** — **A. IN GENERAL.** — A defendant in a criminal case may waive his constitutional right to confront the witnesses against him,<sup>10</sup> or those who are called by him and give testimony in his

State, 36 Tex. Crim. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850. (Henderson, J., dissenting).

*Utah.* — State v. King, 24 Utah 482, 68 Pac. 418, 91 Am. St. Rep. 808.

*Washington.* — State v. Cushing, 17 Wash. 544, 50 Pac. 512.

*Wisconsin.* — Jackson v. State, 81 Wis. 127, 51 N. W. 89.

In California before the adoption of the codes the rule above stated was sanctioned and employed. People v. Murphy, 45 Cal. 137; People v. Devine, 46 Cal. 46. Upon the adoption of the codes, it was provided by § 1870 of the Code of Civil Procedure (subd. 8) that the testimony of a deceased witness given in a former action between the same parties relating to the same matter might be introduced; and, as the rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in the Code (§ 1102 Pen. Code), the same rule obtains unless changed by positive enactments. Although in this state there is no constitutional provision in relation to confrontation of witnesses, by § 686 of the Penal Code a restriction is placed upon, and a narrowing of, this common law rule of evidence. Under the title of the "Rights of Defendant in a Criminal Action," it is provided that a defendant shall have the right of confrontation of witnesses against him, saving in those cases where the charge has been preliminarily examined by a committing magistrate, the testimony taken down by question and answer in the presence of the defendant, who either in person or by counsel has cross-examined, or had an opportunity to cross-examine, the witness; or when the testimony of a witness, who is unable to give security for his appearance, has been taken conditionally in like manner in the presence of the defendant. This provision deprived the prosecution of the right which it had theretofore enjoyed of introducing against a defendant the evidence of a deceased witness,

unless taken before a committing magistrate, or by deposition in the mode described. It forbade the introduction of the testimony of a deceased witness, which may have been given upon a former trial of the cause. People v. Oiler, 66 Cal. 101, 4 Pac. 1066; People v. Chin Hane, 108 Cal. 597, 41 Pac. 697; People v. Sierp, 116 Cal. 249, 48 Pac. 88; People v. Cady, 117 Cal. 10, 48 Pac. 908; People v. Plyler, 126 Cal. 379, 58 Pac. 904; People v. Bird, 132 Cal. 261, 64 Pac. 259. *Contra*, Kean v. Com., 73 Ky. 190, 19 Am. Rep. 63.

**10. Alabama.** — Rosenbaum v. State, 33 Ala. 354 (deposition of witness taken in a civil suit between defendant and prosecutor may be admitted).

*Arkansas.* — Wells v. State, 16 S. W. 577 (a state's witness being too ill to testify, prosecutor offered testimony taken on former trial. Defendant insisted that statement made before committing magistrate be read, whereupon this was done, and during reading defendant objected but stated no ground therefor. Held, constitutional right to confrontation waived).

*California.* — People v. Bird, 132 Cal. 261, 64 Pac. 259.

*Illinois.* — Gillespie v. People, 176 Ill. 238, 52 N. E. 250.

*Iowa.* — State v. Olds, 106 Iowa 110, 76 N. W. 644; State v. Polson, 29 Iowa 133; State v. Fooks, 65 Iowa 196, 452, 21 N. W. 561, 773.

*Louisiana.* — State v. Hornsby, 8 Rob. 554, 41 Am. Dec. 305.

*Michigan.* — People v. Murray, 52 Mich. 288, 17 N. W. 843 (waiver by admission of depositions in accordance with voluntary stipulations of parties).

*Missouri.* — State v. Walliford, 111 Mo. App. 668, 86 S. W. 570; State v. Wagner, 78 Mo. 644, 47 Am. Rep. 131.

*Montana.* — United States v. Sacramento, 2 Mont. 239, 25 Am. Rep. 742.

*New Mexico.* — Ruiz v. Territory, 10 N. M. 120, 61 Pac. 126,

favor,<sup>11</sup> and he is bound by the express terms of such agreement.<sup>12</sup>

**B. WAIVER BY ABSENTING ONE'S SELF OR BY FAILURE TO APPEAR.** — Where accused in a criminal case voluntarily absents himself after the beginning of the trial, he thereby waives his right to confrontation of witnesses.<sup>13</sup> And in misdemeanor cases he may waive his rights by failure to appear.<sup>14</sup>

## V. SEPARATION AND EXCLUSION OF WITNESSES.

**1. In General.** — In the trial of both civil and criminal cases it is a rule of practice for the presiding judge, of his own motion,<sup>15</sup>

*North Carolina.* — *State v. Mitchell*, 119 N. C. 784, 25 S. E. 783, 1020.

*Oregon.* — *State v. Bowker*, 26 Or. 309, 38 Pac. 124 (waiver by consent to admission of deposition of state's witness taken in defendant's presence to which he expressly consented for purpose of obtaining a continuance).

*Texas.* — *Odell v. State*, 44 Tex. Crim. 307, 70 S. W. 964; *Allen v. State*, 16 Tex. App. 237.

*Utah.* — *State v. Mortensen*, 26 Utah 312, 73 Pac. 562, 633, rehearing denied, 26 Utah 312, 73 Pac. 633.

*Wisconsin.* — *Williams v. State*, 61 Wis. 281, 21 N. W. 56.

11. *Taylor v. Com.*, 9 Ky. L. Rep. 316.

12. *Gillespie v. People*, 176 Ill. 238, 52 N. E. 250; *Weightman v. People*, 67 Barb. (N. Y.) 44; *State v. Polson*, 29 Iowa 133 (consent to substitution of testimony taken down in former trial based on same facts, binding); *State v. Fooks*, 65 Iowa 196, 452, 21 N. W. 561, 773; *State v. Minard*, 96 Iowa 267, 65 N. W. 147.

In *State v. Mortensen*, 26 Utah 312, 73 Pac. 562, 633, which was a prosecution for homicide, it appeared that defendant had entered into a stipulation in open court, admitting that if a certain witness were present he would testify to certain facts, and agreeing that it should be received in evidence. Held, that subsequently he could not contend that the admission of such stipulation was erroneous, on the ground that it was a violation of defendant's constitutional right to be confronted with adverse witnesses, since such right can be waived and the terms

of such waiver are binding on defendant.

13. *Collier v. Com.*, 22 Ky. L. Rep. 1929, 62 S. W. 4.

In *Arkansas* § 2213 *Marshall's Digest*, which provides "that if a defendant on trial for a felony escapes from custody after his trial has commenced, or, if on trial, shall absent himself during the trial, the trial . . . may progress to a verdict," is not unconstitutional. The guaranty of the constitution (art. 2, § 10) that the defendant shall have the right to be confronted by witnesses against him does not give him the right to abscond as the defendant did in this case, and then complain of his own absence. *Gore v. State*, 52 Ark. 285, 12 S. W. 564, 5 L. R. A. 832.

14. In *Shiflett v. Com.*, 90 Va. 386, 18 S. E. 838, it was held that where defendants, indicted jointly for a misdemeanor, had been duly summoned, but failed to appear, a trial and sentence of such defendants in their absence was not a violation of the constitutional guaranty that "the accused in all criminal prosecutions hath a right to be confronted with the witnesses against him."

In *New York*, defendant appearing by counsel may be tried for a misdemeanor in his absence, under direct provisions of Code Crim. Proc. § 356, notwithstanding it is provided by § 8, that defendant in criminal cases is entitled to be confronted with witnesses against him since this provision may be waived. *People v. Welsh*, 88 App. Div. 65, 84 N. Y. Supp. 703.

15. *Wilson v. State*, 52 Ala. 299; *Ryan v. Couch*, 66 Ala. 244; *Hey v.*

or on the motion or suggestion of either party,<sup>16</sup> to direct that witnesses shall be examined out of the hearing of each other, or be "put under the rule" as such an order is frequently termed.<sup>17</sup>

**To Effect This Object**, the respective parties are generally required to disclose the names of the witnesses intended, and then the witnesses are simply ordered to withdraw from the court room and warned not to return until called, or, as is sometimes the case, they are placed under the charge of an officer of the court to be kept out of hearing in the jury room or some other convenient place, and brought into court when and as they may be severally needed for examination.<sup>18</sup>

Com., 32 Gratt. (Va.) 946, 34 Am. Rep. 799. See also *Hoover v. State*, 48 Neb. 184, 66 N. W. 1117.

**16. *United States*.** — *United States v. White*, 5 Cranch C. C. 38, 28 Fed. Cas. No. 16,675.

**Alabama.** — *McLean v. State*, 16 Ala. 672; *Wilson v. State*, 52 Ala. 299; *Ryan v. Couch*, 66 Ala. 244.

**Georgia.** — *Johnson v. State*, 14 Ga. 55; *Bird v. State*, 50 Ga. 585.

**Kentucky.** — *Baker v. Com.*, 106 Ky. 212, 50 S. W. 54.

**Massachusetts.** — *Com. v. Knapp*, 9 Pick. 496.

**Nebraska.** — *Maynard v. State*, 81 Neb. 301, 116 N. W. 53.

**New York.** — *People v. Duffy*, 1 Wheeler Cr. Cas. 123.

**North Carolina.** — *State v. Sparrow*, 7 N. C. 487.

**Texas.** — *Welhausen v. State*, 30 Tex. App. 623, 18 S. W. 300; *McMillan v. State*, 7 Tex. App. 142.

**Virginia.** — *Hey v. Com.*, 32 Gratt. 946, 34 Am. Rep. 799.

**Time for Motion.** — A motion to exclude witnesses must be made at the commencement of the trial. If made after some of an opponent's witnesses have testified, it is too late. *Pritchard v. Henderson*, 3 Penne. (Del.) 128, 50 Atl. 217. See also *People v. Hall*, 48 Mich. 482, 12 N. W. 665.

**17. *Joice v. Alexander***, 1 Cranch C. C. 528, 13 Fed. Cas. No. 7,435; *Patton v. Janney*, 2 Cranch C. C. 71, 18 Fed. Cas. No. 10,836; *Com. v. Hersey*, 2 Allen (Mass.) 173; *Rooks v. State*, 65 Ga. 330; *Hey v. Com.*, 32 Gratt. (Va.) 946, 34 Am. Rep. 799; *Johnson v. State*, 2 Ind. 652, citing *Southey v. Nash*, 7 Car. & P. (Eng.) 632.

**Rule Ancient as Trial of Susanna by Daniel.** — *Thomas v. State*, 27 Ga. 287, citing *Apocrypha*, History of Susanna, 51st verse.

**Practice Coeval With Judicature**, having long been administered in the British Parliament, and the courts of both England and Scotland. *Ryan v. Couch*, 66 Ala. 744, citing 2 Best on Ev., § 636; 1 Greenl. on Ev., § 432.

**Exclusion Ordered but Not Separation.** — In *United States v. White*, 5 Cranch C. C. 38, 28 Fed. Cas. No. 16,675, it was held that the court, at the suggestion of either party, will order some of the witnesses to be taken out of court and kept by the marshal while other witnesses are under examination, but will not order them to be kept apart from each other.

**Prosecution's Witnesses Separated From Those of Defense.** — Witnesses summoned for the prosecution may be separated from those summoned by the defense. *McMillan v. State*, 7 Tex. App. 142.

**Witnesses Not Excluded After Examination.** — *United States v. Woods*, 4 Cranch C. C. 484, 28 Fed. Cas. No. 16,760.

**It Is a Sufficient Separation** if the first witness sworn is separated from the others after his examination, though allowed to hear the opening of the case. *State v. McElmurray*, 3 Strobb. (S. C.) 33. See also *Hughes v. State*, 128 Ga. 19, 57 S. E. 236; *Wilson v. State*, 52 Ala. 299; *Lyman v. State*, 69 Ga. 404.

**18. *Crenshaw v. Gardner***, 25 Ky. L. Rep. 506, 76 S. W. 26; *Anonymous*, 1 Hill (S. C.) 251; *Welhausen v. State*, 30 Tex. App. 623,

**Instructions to Witness Under the Rule.**—What instructions should be given to witnesses under the rule is a matter within the discretion of the trial court, and an appellate court will not control his discretion unless plainly and palpably abused.<sup>19</sup>

**The Manifest Purpose of the Rule** is to prevent a witness who has not testified from hearing the testimony of other witnesses and possibly shaping his evidence to harmonize with theirs.<sup>20</sup>

**Purpose Not To Deprive Counsel of Access.**—The purpose is not to deprive counsel of access to witnesses under the rule,<sup>21</sup> although it has been held that an attorney should not be allowed a conference with witnesses under the rule, unless in the presence of an officer.<sup>22</sup>

**2. Discretion of the Court.**—The exclusion of witnesses is a matter which rests in the sound discretion of the trial court, and is involved in the power to control the course of the trial in such a

18 S. W. 300; *Jones v. State*, 3 Tex. App. 150; *McMillan v. State*, 7 Tex. App. 142 (within discretion of court to place witnesses under rule in the custody of an officer, or allow them to go at large); *Hey v. Com.*, 32 Gratt. (Va.) 946, 34 Am. Rep. 799.

**Witnesses Not Prohibited From Reading Newspaper Accounts.** The court will not order an officer to prohibit witnesses in his charge under the rule from reading newspaper accounts of the evidence in the case. *Com. v. Hersey*, 2 Allen (Mass.) 173.

**Removing Witnesses From Immediate Vicinity of Accused.** There is no presumption that the court without sufficient justification required witnesses, through relations of the prisoner, to leave the immediate vicinity of the accused during the progress of the trial; neither does the mere fact that this was done in an unusual manner justify the assumption that prejudice thereby resulted. *Hoover v. State*, 48 Neb. 184, 66 N. W. 1117.

19. *Broyles v. Prisock*, 97 Ga. 643, 25 S. E. 398. See *Loose v. State*, 120 Wis. 115, 97 N. W. 526.

Whether excluded witnesses should be instructed not to converse with other persons or with each other are questions within the sound discretion of the trial judge, to be determined in the light of his knowledge of the witnesses and of the case. His discretion will not be controlled unless manifestly abused. *Kelly v. State*, 118 Ga. 329, 45 S. E. 413.

Where but one witness had testified and the court had instructed other witnesses upon an adjournment not to allow any witness who had testified to communicate anything to them that had been testified to, and had specially instructed the witness who had testified not to say anything to the witnesses in reference to what he had testified, it was not error to restrict the instructions within these limits and to refuse a requested instruction that all the witnesses should not talk among themselves or to any one in reference to the case during adjournment. *Broyles v. Prisock*, 97 Ga. 643, 25 S. E. 389.

20. *Alabama*.—*Roberts v. State*, 122 Ala. 47, 25 So. 238; *State v. Brookshire*, 2 Ala. 303; *Ryan v. Couch*, 66 Ala. 244.

*Kentucky*.—*Joseph v. Com.*, 30 Ky. L. Rep. 638, 99 S. W. 311.

*Missouri*.—*State v. Hopper*, 71 Mo. 425.

*South Carolina*.—Anonymous, 1 Hill 251; *State v. McGraw*, 35 S. C. 283, 14 S. E. 630.

*Texas*.—*McMillan v. State*, 7 Tex. App. 142; *Jones v. State*, 3 Tex. App. 150.

*Virginia*.—*Hey v. Com.*, 32 Gratt. 946, 34 Am. Rep. 799.

21. *Jones v. State*, 3 Tex. App. 150; *State v. McGraw*, 35 S. C. 283, 14 S. E. 630; *Bryan v. Com.*, 17 Ky. L. Rep. 965, 33 S. W. 95; *Allen v. State*, 61 Miss. 627; *Williams v. State*, 35 Tex. 355.

22. *Brown v. State*, 3 Tex. App. 294.

manner as to disclose the truth and promote justice.<sup>23</sup> In the absence of a showing of an abuse of discretion or prejudice to an

**23. United States.**—United States *v.* White, 5 Cranch C. C. 38, 28 Fed. Cas. No. 16,675; Bromberger *v.* United States, 128 Fed. 346, 63 C. C. A. 76.

*Arizona.*—Territory *v.* Dooley, 3 Ariz. 60, 78 Pac. 138.

*Alabama.*—McClellan *v.* State, 117 Ala. 140, 23 So. 653; Wilson *v.* State, 52 Ala. 299; State *v.* Brookshire, 2 Ala. 303; McLean *v.* State, 16 Ala. 672; McGuff *v.* State, 88 Ala. 147, 7 So. 35, 16 Am. St. Rep. 25; Barnes *v.* State, 88 Ala. 204, 7 So. 38, 16 Am. St. Rep. 48.

*California.*—People *v.* Oliver, 7 Cal. App. 601, 95 Pac. 172; People *v.* McCarty, 117 Cal. 65, 48 Pac. 984; People *v.* Sam Lung, 70 Cal. 515, 11 Pac. 673; People *v.* Sprague, 53 Cal. 491; People *v.* Hong Ah Duck, 61 Cal. 378; People *v.* Garnett, 29 Cal. 622.

*Colorado.*—Kelly *v.* People, 17 Colo. 130, 29 Pac. 805.

*Georgia.*—Talley *v.* State, 58 S. E. 667; Turbaville *v.* State, 58 Ga. 545; Bird *v.* State, 50 Ga. 585; Kelly *v.* State, 118 Ga. 329, 45 S. E. 413; Thomas *v.* State, 27 Ga. 287; May *v.* State, 94 Ga. 76, 20 S. E. 251.

*Illinois.*—Errissman *v.* Errissman, 25 Ill. 119; Staver & Abbott Mfg. Co. *v.* Coe, 49 Ill. App. 426.

*Indiana.*—Coolman *v.* State, 163 Ind. 503, 72 N. E. 568; Johnson *v.* State, 2 Ind. 652; Sanders *v.* Johnson, 6 Blackf. 50, 56 Am. Dec. 564; Porter *v.* State, 2 Ind. 435; Detrick *v.* McGlone, 46 Ind. 291.

*Iowa.*—State *v.* Worthen, 124 Iowa 408, 100 N. W. 330; Jemison *v.* Gray, 29 Iowa 537; Hubbel *v.* Ream, 31 Iowa 289.

*Kansas.*—State *v.* Davis, 48 Kan. 1, 28 Pac. 1092; First Nat. Bank *v.* Knoll, 7 Kan. App. 352, 52 Pac. 619.

*Kentucky.*—Roberts *v.* Com., 94 Ky. 499, 22 S. W. 845; Com. *v.* Phillips, 12 Ky. L. Rep. 410, 14 S. W. 378; Johnson *v.* Clem, 82 Ky. 84; Salisbury *v.* Com., 79 Ky. 425; Baker *v.* Com., 106 Ky. 212, 50 S. W. 54; Gilbert *v.* Com., 111 Ky. 793, 64 S. W. 846; Greer *v.* Com., 27 Ky. L. Rep. 333, 85 S. W. 166. See also

Underwood *v.* Com., 119 Ky. 384, 84 S. W. 310.

*Louisiana.*—State *v.* Daniels, 122 La. 261, 47 So. 599; State *v.* High, 122 La. 521, 47 So. 878; State *v.* Giroux, 26 La. Ann. 582; State *v.* Forbes, 111 La. 473, 35 So. 710; State *v.* Hogan, 117 La. 863, 42 So. 352.

*Maryland.*—Parker *v.* State, 67 Md. 329, 10 Atl. 219, 1 Am. St. Rep. 387.

*Massachusetts.*—Com. *v.* Thompson, 159 Mass. 56, 33 N. E. 1111; Com. *v.* Follansbee, 155 Mass. 274, 29 N. E. 471; Com. *v.* Knapp, 9 Pick. 496, 20 Am. Dec. 491.

*Michigan.*—People *v.* Burns, 67 Mich. 537, 35 N. W. 154; People *v.* Hall, 48 Mich. 482, 12 N. W. 665; Johnston *v.* Farmers' F. Ins. Co., 106 Mich. 96, 64 N. W. 5; People *v.* Considine, 105 Mich. 149, 63 N. W. 196; People *v.* Machen, 101 Mich. 400, 59 N. W. 664.

*Minnesota.*—State *v.* Quirk, 101 Minn. 334, 112 N. W. 409.

*Missouri.*—State *v.* Fitzsimmons, 30 Mo. 236; State *v.* Duffey, 128 Mo. 549, 31 S. W. 98; King *v.* State, 1 Mo. 717; Jaeschke *v.* Reinders, 2 Mo. App. 212; State *v.* Hughes, 71 Mo. 633.

*Nebraska.*—Maynard *v.* State, 81 Neb. 301, 116 N. W. 53; Binfield *v.* State, 15 Neb. 484, 19 N. W. 607; Murphey *v.* State, 43 Neb. 34, 61 N. W. 491; Chicago, etc. R. Co. *v.* Kellogg, 54 Neb. 138, 74 N. W. 403; Halbert *v.* Rosenbalm, 49 Neb. 498, 68 N. W. 622.

*New York.*—People *v.* Green, 1 Park. Crim. 11; People *v.* Duffy, 1 Wheeler Crim. Cas. 123.

*North Carolina.*—State *v.* Silver, 14 N. C. (3 Dev. L.) 332; State *v.* Sparrow, 7 N. C. (3 Murph. L.) 487; Purnell *v.* Purnell, 80 N. C. 42; State *v.* Morris, 84 N. C. 756; State *v.* Manuel, 64 N. C. 601; State *v.* Laxton, 78 N. C. 564.

*North Dakota.*—King *v.* Hanson, 13 N. D. 85, 99 N. W. 1085.

*Texas.*—Baldwin *v.* State, 39 Tex. Crim. 245, 45 S. W. 714; DeLuce-nay *v.* State (Tex. Crim.), 68 S. W. 796; Rambo *v.* State (Tex.

accused on trial, the exercise of this discretion is not reviewable on appeal.<sup>24</sup>

Crim.), 69 S. W. 163; McCullough v. State, 50 Tex. Crim. 132, 94 S. W. 1056; Johnson v. State, 10 Tex. App. 571; Watts v. Holland, 56 Tex. 54; Cavazos v. Gonzales, 33 Tex. 133; Willis v. Nichols, 5 Tex. Civ. App. 154, 23 S. W. 1025; McMillan v. State, 7 Tex. App. 142; Gulf, etc. R. Co. v. West (Tex. Civ. App.), 36 S. W. 101; Texas & P. R. Co. v. Pearl, 3 Wills. Civ. Cas. § 4; Kennon v. State, 46 Tex. Crim. 359, 82 S. W. 518; Watters v. State (Tex. Crim.), 94 S. W. 1038; Green v. State, 49 Tex. Crim. 645, 98 S. W. 1059. See also Powell v. State, 50 Tex. Crim. 592, 99 S. W. 1005.

*Vermont.*—Streeter v. Evans, 44 Vt. 27.

*Virginia.*—Hey v. Com., 32 Gratt. 946, 34 Am. Rep. 799.

*Washington.*—State v. Dalton, 43 Wash. 278, 86 Pac. 590.

*Wisconsin.*—Benaway v. Conym, 3 Chand. 167; Zoldoske v. State, 82 Wis. 586, 52 N. W. 778; Loose v. State, 120 Wis. 115, 97 N. W. 526.

*Wyoming.*—Haines v. Territory, 3 Wyo. 167, 13 Pac. 8.

#### Separation During Adjournment.

The separation of witnesses during an adjournment over night is within the discretion of the court. State v. Manuel, 64 N. C. 601.

In *Nebraska* it is expressly provided by statute that a magistrate, if requested, shall keep witnesses separate during their examination in a criminal case. He apparently has no discretion in the matter. Binfield v. State, 15 Neb. 484, 19 N. W. 607.

In *Tennessee* it is the legal right of either party litigant, upon good cause shown by affidavit, to have all the witnesses in the cause against him put under the rule. Rainwater v. Elmore, 1 Heisk. (Tenn.) 363. See also Nelson v. State, 2 Swan (Tenn.) 237. In this case it was held to be discretionary with the court to permit witnesses who had been placed under the rule, to disperse at a recess of court and to be again put under the rule when the court resumed its sitting. But the rule above stated does not apply to

parties to a suit or their officers, agents or representatives. Adolff v. Irby & Gilleland, 110 Tenn. 222, 75 S. W. 710; Lenoir Car Co. v. Smith, 100 Tenn. 127, 42 S. W. 879. These cases were decided in view of a statutory enactment passed subsequent to the trial of another case which held expressly to the contrary. See Wisener v. Maupin, 2 Baxt. (Tenn.) 342.

24. *United States.*—Bromberger v. United States, 128 Fed. 346, 63 C. C. A. 76.

*Alabama.*—Barnes v. State, 88 Ala. 204, 7 So. 38, 16 Am. St. Rep. 48; McGuff v. State, 88 Ala. 147, 7 So. 35, 16 Am. St. Rep. 25.

*Georgia.*—Hughes v. State, 128 Ga. 19, 57 S. E. 236; Talley v. State, 2 Ga. App. 395, 58 S. E. 667 (where witness is allowed to remain and assist in trial after first having been examined, there is no abuse of discretion).

*Iowa.*—State v. Worthen, 124 Iowa 408, 100 N. W. 330.

*Kansas.*—State v. Davis, 48 Kan. 1, 28 Pac. 1092 (where no special reasons are given for a request, court does not abuse its discretion by a refusal to grant the same).

*Kentucky.*—Greer v. Com., 27 Ky. L. Rep. 333, 85 S. W. 166; Com. v. Phillips, 12 Ky. L. Rep. 410, 14 S. W. 378 (not an abuse of discretion to exclude a witness from the court room after he has testified, under a rule theretofore).

*Missouri.*—Schlingmann v. Fiedler, 3 Mo. App. 577.

*Montana.*—Finlen v. Heinze, 32 Mont. 354, 80 Pac. 918.

*Nebraska.*—Maynard v. State, 81 Neb. 301, 116 N. W. 53; Halbert v. Rosenbalm, 49 Neb. 498, 68 N. W. 622; Chicago, etc. R. Co. v. Kellogg, 54 Neb. 138, 74 N. W. 403.

*North Carolina.*—State v. Silver, 14 N. C. (3 Dev. L.) 332 (though witnesses were removed before their first examination and have since been together, it is not an abuse of discretion to allow their reexamination at any time before verdict).

*Tennessee.*—Nelson v. State, 2 Swan. 237.

**Order Seldom Withheld.**—An order for the exclusion or separation of witnesses should seldom if ever be withheld when asked for by either party.<sup>25</sup>

**3. Excusing Witnesses From Rule.**—A. IN GENERAL.—As to whether a particular witness should be excepted from the rule excluding witnesses from the courtroom, this is a matter generally within the sound discretion of the trial court, and usually to sustain alleged error it must be shown that this discretion has been abused.<sup>26</sup> In criminal cases it is usually held not to be an abuse of discretion

*Texas.*—*Coombs v. State* (Tex. Crim.), 49 S. W. 585.

*Washington.*—*Griffith v. Ridpath*, 38 Wash. 540, 80 Pac. 820.

*West Virginia.*—*State v. Morgan*, 35 W. Va. 260, 13 S. E. 385.

**What Bill of Exceptions Must Show.**—A bill of exceptions complaining of the court's refusal to put certain witnesses under the rule in a criminal case must show that an exception was taken to the introduction of these witnesses when they came to testify, and that they testified on material matters, and that as to such matters other witnesses testified in such measure, and as to some questions which might have influenced the testimony of the witnesses exempted from the rule. *Powell v. State*, 50 Tex. Crim. 592, 99 S. W. 1005.

**Error To Refuse Exclusion of Prosecuting Officer.**—In *Salisbury v. Com.*, 79 Ky. 425, which was a murder case, it was held that the court ought, on defendant's motion, to have excluded the father-in-law of deceased while the other witnesses were testifying, because he was an important witness, and afterwards testified and agreed in several material points with his son's testimony, who was not fifteen years old and the only eye-witness to the homicide. The court said: "The policy of the law in requiring the separation of the witnesses on the motion of either party is based upon sound reason and justice. And we know of no exception to the rule of excluding witnesses which allows a prosecutor and a witness in the same person to sit by and listen to the details of a trial, and then testify himself about the same or connected matters. He, of all others, except the wilfully corrupt, is most

obnoxious to the rule, for he may have his feelings enlisted or his revenge rankling in his bosom." *Compare People v. Burns*, 67 Mich. 537, 35 N. W. 154.

**25.** *Wilson v. State*, 52 Ala. 299; *Jemmison v. Gray*, 29 Iowa 537; *Binfield v. State*, 15 Neb. 484, 19 N. W. 607; *Hey v. Com.*, 32 Gratt. (Va.) 946, 34 Am. Rep. 799.

**26.** *Alabama.*—*Brooks v. State*, 146 Ala. 153, 41 So. 156; *Riley v. State*, 88 Ala. 193, 7 So. 149; *Webb v. State*, 100 Ala. 47, 14 So. 865.

*California.*—*People v. Oliver*, 7 Cal. App. 601, 95 Pac. 172.

*Georgia.*—*Hinkle v. State*, 94 Ga. 595, 21 S. E. 595; *Carson v. State*, 80 Ga. 170, 5 S. E. 295; *Central R. Co. v. Phillips*, 91 Ga. 526, 17 S. E. 952; *City Elec. R. Co. v. Smith*, 121 Ga. 663, 49 S. E. 724.

*Iowa.*—*State v. Pray*, 99 N. W. 1065.

*Kansas.*—*First Nat. Bank v. Knoll*, 7 Kan. App. 352, 52 Pac. 619.

*Kentucky.*—*Joseph v. Com.*, 30 Ky. L. Rep. 638, 99 S. W. 311; *Baker v. Com.*, 106 Ky. 212, 50 S. W. 54; *Kentucky Union Lumb. Co. v. Abney*, 17 Ky. L. Rep. 401, 31 S. W. 279; *Galloway v. Com.*, 7 Ky. L. Rep. 162.

*Missouri.*—*State v. Whitworth*, 126 Mo. 573, 29 S. W. 595 (in a seduction case it is discretionary to except the father of prosecutrix).

*Texas.*—*Galveston, etc. R. Co. v. Burnett* (Tex. Civ. App.), 42 S. W. 314; *Smith v. State*, 52 Tex. Crim. 80, 105 S. W. 501; *DeLucenay v. State* (Tex. Crim.), 68 S. W. 796; *Green v. State*, 49 Tex. Crim. 645, 98 S. W. 1059.

*Washington.*—*State v. Mann*, 39 Wash. 144, 81 Pac. 561; *State v. McGilvery*, 20 Wash. 240, 55 Pac. 115.



to except from the rule the prosecuting witnesses,<sup>27</sup> and other witnesses who are necessary either in the prosecution<sup>28</sup> or defense<sup>29</sup> of the case.<sup>30</sup>

**B. PARTIES.**—As a rule parties who have a substantial interest in the case on trial, although witnesses, are held to be entitled to be present during the trial unless guilty of misconduct and are therefore excepted from the rule,<sup>31</sup> but the court may in its discretion

**Witnesses Properly Excused** where it appeared that the case turned mainly upon the testimony of the prosecutrix herself. *Keller v. State* (Ga.), 31 S. E. 92.

**27.** *Coolman v. State*, 163 Ind. 503, 72 N. E. 568; *People v. Burns*, 67 Mich. 537, 35 N. W. 154.

**Prosecutor Should Be Examined First** if expected to be used as a witness and retained in court to assist counsel after an order for exclusion of witnesses. *Smartt v. State*, 112 Tenn. 539, 80 S. W. 586.

**28.** *Shaw v. State*, 102 Ga. 660, 29 S. E. 477; *Thomas v. State*, 27 Ga. 287; *Baker v. Com.*, 106 Ky. 212, 50 S. W. 54; *Greer v. Com.*, 27 Ky. L. Rep. 333, 85 S. W. 166.

**29.** *Thomas v. State*, 27 Ga. 287. But see *Turbaville v. State*, 58 Ga. 545.

**30.** *Thomas v. State*, 27 Ga. 287.

**31.** *Alabama*.—*Smith v. Collins*, 94 Ala. 394, 10 So. 334; *Ryan v. Couch*, 66 Ala. 244.

*Florida*.—*Seaboard Air Line R. Co. v. Scarborough*, 52 Fla. 425, 42 So. 706.

*Georgia*.—*Georgia R. & Bkg. Co. v. Tice*, 124 Ga. 459, 52 S. E. 916; *St. Paul Fire, etc. Ins. Co. v. Grocery Co.*, 113 Ga. 786, 39 S. E. 483. See *Central R. Co. v. Phillips*, 91 Ga. 526, 17 S. E. 952; *City Elec. R. Co. v. Smith*, 121 Ga. 663, 49 S. E. 724.

*Indiana*.—*Xenia Real Estate Co. v. Macy*, 147 Ind. 568, 47 N. E. 147; *Shew v. Hews*, 126 Ind. 474, 26 N. E. 483; *Larue v. Russell*, 26 Ind. 386; *Cottrell v. Cottrell*, 81 Ind. 87.

*Iowa*.—*Jemmison v. Gray*, 29 Iowa 537.

*Kentucky*.—*Johnson v. Clem*, 82 Ky. 84; *Francis v. Com.*, 3 Bush. 4; *Kentucky Union Lumb. Co. v. Abney*, 17 Ky. L. Rep. 401, 31 S. W. 279 (chief officer of a corporation in the county in which an ac-

tion against it is tried is not a party within the statute exempting parties from the rule).

*Michigan*.—*McIntosh v. McIntosh*, 79 Mich. 198, 44 N. W. 592.

*Mississippi*.—*French v. Sale*, 63 Miss. 386; *Bernheim v. Dibrell*, 66 Miss. 199, 5 So. 693. See *Kline v. Hazzlerigg*, 21 So. 11.

*Missouri*.—*H. T. Simon-Gregory Dry Goods Co. v. McMahan*, 61 Mo. App. 499; *Jaeschke v. Reinders*, 2 Mo. App. 212.

*Oregon*.—*Schneider v. Haas*, 14 Or. 174, 12 Pac. 236, 58 Am. Rep. 296.

*Tennessee*.—*Heaton v. Dennis*, 103 Tenn. 155, 52 S. W. 175; *Lenoir Car Co. v. Smith*, 100 Tenn. 127, 42 S. W. 879; *Adloff v. Irby & Gilleland*, 110 Tenn. 222, 75 S. W. 710 (excepted from rule by statutory enactment).

*Texas*.—*Willis v. Nichols*, 5 Tex. Civ. App. 154, 23 S. W. 1025; *Colbert v. Garrett* (Tex. Civ. App.), 57 S. W. 853 (party cannot be prevented from taking the stand though he has heard the testimony of two of his own witnesses).

*Vermont*.—*Streeter v. Evans*, 44 Vt. 27.

**Party in Interest Though Not of Record** should not be excluded. *Chester v. Bower*, 55 Cal. 46.

**Numerous Parties and All Witnesses.**—Though parties to a suit are numerous and all are present in court to testify, the rule will not be enforced against them. *Rotan Groc. Co. v. Martin* (Tex. Civ. App.), 57 S. W. 706; *Georgia R. & Bkg. Co. v. Tice*, 124 Ga. 459, 52 S. E. 916.

**Examination of Party First.** A party intending to be a witness for himself should be called first, so as to permit him to be present during the trial. *Tift v. Jones*, 52 Ga. 538. But if such method of procedure is not requested by oppos-

exclude a party as other witnesses under similar circumstances.<sup>32</sup>

**An Agent or Representative** of either of the parties necessarily absent whose presence is required by counsel to assist him in conducting the trial, because of his knowledge of the facts in the case, may, in the discretion of the court, be exempted from the rule.<sup>33</sup>

**C. EXPERT WITNESSES.** — Whether experts should be put under the rule and excluded with other witnesses is addressed almost entirely to the discretion of the trial court, and unless the record discloses a clear abuse of this discretion an appellate court will not

ing party, there is no error in permitting him to testify though not called first. *Kline v. Hazzlerigg* (Miss.), 21 So. 11. The court may require party to testify first and upon refusal may exclude him while other witnesses are testifying. *French v. Sale*, 63 Miss. 386; *Smith v. Team* (Miss.), 16 So. 492.

**Manner of Saving Objection to Refusal of Exemption.** — Where the trial court erroneously refuses a party exemption from the rule, he may save his objection by protesting though he leaves the room in obedience to the court's order; he is not obliged to stay in court and offer himself as a witness, notwithstanding the fact that he has been present and then except to his rejection. Either method is correct practice. *Heaton v. Dennis*, 103 Tenn. 155, 52 S. W. 175.

**Party Excluded Alone Entitled to Complain of Erroneous Exclusion.** The only person who is in a position to complain of an erroneous exclusion is the party to the cause so excluded, and no error is committed by the trial court in refusing to order the party so excluded to come into the court room at the instance of the opposing party, for the purpose of identification by a witness. *Seaboard Air Line R. v. Scarborough*, 52 Fla. 425, 42 So. 706.

32. *Randolph v. McCain*, 34 Ark. 696.

33. *Alabama*. — *Ryan v. Couch*, 66 Ala. 244.

*Georgia*. — *Central R. & Bkg. Co. v. Phillips*, 91 Ga. 526, 17 S. E. 952.

*Indiana*. — *Indianapolis Cabinet Co. v. Herrman*, 7 Ind. App. 462, 34 N. E. 579.

*Kentucky*. — *Warden v. Madisonville, etc. R. Co.*, 125 Ky. 644, 101 S. W. 914.

*Tennessee*. — *Lenoir Car Co. v. Smith*, 100 Tenn. 127, 42 S. W. 879; *Adloff v. Irby*, 110 Tenn. 222, 75 S. W. 710 (excepted by statutory enactment).

*Texas*. — *Cooper & Co. v. Sawyer*, 31 Tex. Civ. App. 620, 73 S. W. 992; *Voorheis v. Waller* (Tex. Civ. App.), 35 S. W. 807. But see *Gulf, etc. R. Co. v. Bruce* (Tex. Civ. App.), 24 S. W. 927, holding no error in excluding a railroad conductor and depriving counsel of his assistance, it not appearing that he had been placed in control of the suit).

**City Recorder** excepted from rule where he was a witness for the city in an action against it. *Trotter v. Stayton*, 45 Or. 301, 77 Pac. 395.

**Cashier of a Bank** excepted. *Voorheis v. Waller* (Tex. Civ. App.), 35 S. W. 807.

**A Railroad Conductor** as an agent or representative of the railroad in an action brought against it for the death of an employe may, in the discretion of the court, be allowed on request of counsel to remain in the court room after an order granting separation of witnesses. *Matthews' Admr. v. Louisville & N. R. Co.* (Ky.), 113 S. W. 459.

**Four Directors of a Corporation** will not be allowed exemption from the rule. No error in excluding all but one. *Xenia Real Estate Co. v. Macy*, 147 Ind. 568, 47 N. E. 147.

**No Error** in excluding a railroad company's division superintendent when there was nothing in the record to show that the company on whose behalf he was called as a witness would have been benefited by his aiding counsel in the development of the case. *Galveston, etc.*

interfere.<sup>34</sup> In some cases it is held that the rule should be relaxed in favor of experts,<sup>35</sup> and in others that it should be as rigidly enforced as in other cases.<sup>36</sup>

D. COURT OFFICIALS. — a. *Sheriff, Deputies, Etc.* — The court, in the exercise of his discretion, may exempt from the rule, the sheriff, his deputies or other officers of the court whose services are necessary about the court room.<sup>37</sup>

b. *Attorneys.* — An exception to the rule is usually made in favor of attorneys at law,<sup>38</sup> particularly those who are engaged in the particular case on trial.<sup>39</sup>

E. POLICE OFFICERS, DETECTIVES, ETC. — In criminal cases, a policeman, detective, or other peace officer may, in the court's discre-

R. Co. v. Burnett (Tex. Civ. App.), 42 S. W. 314.

34. Vance v. State, 56 Ark. 402, 19 S. W. 1066; Roberts v. State, 122 Ala. 47, 25 So. 238; State v. Baptiste, 26 La. Ann. 134; Paul v. Omaha, etc. R. Co., 82 Mo. App. 500; McCullough v. State, 50 Tex. Crim. 132, 94 S. W. 1056.

35. Johnson v. State, 10 Tex. App. 571; State v. Baptiste, 26 La. Ann. 134.

**Medical Witnesses** summoned to give scientific opinions upon circumstances of case excepted from rule. Com. v. Hersey, 2 Allen (Mass.) 173; State v. Baptiste, 26 La. Ann. 134.

36. Missouri, etc. R. Co. v. Smith, 31 Tex. Civ. App. 332, 72 S. W. 418; Leache v. State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638.

In Atlantic & B. R. Co. v. Johnson, 127 Ga. 392, 56 S. E. 482, it was held that there was no error in not allowing a practicing physician, who had been summoned as a witness for defendant, to hear plaintiff's testimony, so that he might be used as an expert witness in regard thereto. The proper mode of examination was by hypothetical questions, so that the jury might know what facts are assumed to be true as a basis of the opinion. But see *contra*, Johnson v. State, 10 Tex. App. 571.

**Experts Separated From Experts.** Expert witnesses should be separated from other expert witnesses who are called to testify to the same matters. Robert v. State, 122 Ala. 47, 25 So. 238.

37. California. — People v. Nunley, 142 Cal. 441, 76 Pac. 45.

Georgia. — Askew v. State, 3 Ga. App. 79, 59 S. E. 311; Turbaville v. State, 58 Ga. 545; Hoxie v. State, 114 Ga. 19, 39 S. E. 944.

Texas. — Smith v. State, 52 Tex. Crim. 80, 105 S. W. 501; Powell v. State, 50 Tex. Crim. 592, 99 S. W. 1005; Brite v. State (Tex. Crim.), 43 S. W. 342; Bonners v. State (Tex. Crim.), 35 S. W. 669.

Vermont. — State v. Lockwood 58 Vt. 378, 3 Atl. 539.

**Clerk of Court** properly excepted from rule where it appeared that his presence was necessary in court for want of a deputy. Johnican v. State (Tex. Crim.), 48 S. W. 181.

38. Allen v. Com., 10 Ky. L. Rep. 582, 9 S. W. 703; Mitchell v. State (Tex. Crim.), 114 S. W. 830; Jemison v. Gray, 29 Iowa 537; Powell v. State, 13 Tex. App. 244; Brown v. State, 3 Tex. App. 294. But see State v. Brookshire, 2 Ala. 303. Compare State v. Ward, 61 Vt. 153, 17 Atl. 483, holding that an attorney might testify concerning a matter in reference to which no other witness had testified.

39. England. — Everett v. Lowdham, 5 Car. & P. 91, 24 E. C. L. 228; Pomeroy v. Baddeley, Ryan & M. 430, 21 E. C. L. 482.

Kentucky. — Allen v. Com., 10 Ky. L. Rep. 582, 9 S. W. 703.

Texas. — Powell v. State, 13 Tex. App. 244; Boatmeyer v. State, 31 Tex. Crim. 473, 20 S. W. 1102; Johnson v. State, 10 Tex. App. 571; Roach v. State, 41 Tex. 261; Sherwood v. State, 42 Tex. 498.

tion, be exempted from the rule,<sup>40</sup> especially where it appears that his presence is required in the court room either to guard the prisoner on trial,<sup>41</sup> or in assisting in the prosecution of the case.<sup>42</sup>

**F. CHARACTER WITNESSES.**—Ordinarily, witnesses called to testify to another witness' character for truth and veracity are exempted from the rule.<sup>43</sup>

**4. Effect of Violation of the Rule.**—**A. IN GENERAL.**—It is generally said to be discretionary with the trial court to allow a witness who has violated the rule to testify.<sup>44</sup> And, as a rule, the

*West Virginia.*—Gregg v. State, 3 W. Va. 705.

**40.** People v. Machen, 101 Mich. 400, 59 N. W. 664; Sylvester v. State, 46 Fla. 166, 35 So. 142.

**41.** Powell v. State, 50 Tex. Crim. 592, 99 S. W. 1005; State v. High, 122 La. 521, 47 So. 878.

**42.** People v. Burns, 67 Mich. 537, 35 N. W. 154. See also Smith v. State, 52 Tex. Crim. 80, 105 S. W. 501.

**Mere Fact That Witness Is a Peace Officer** is not sufficient to excuse him from the rule. Smith v. State, 52 Tex. Crim. 80, 105 S. W. 501.

**Charge of Abuse of Privilege—When To Be Raised.**—Charges that such an officer has abused the privilege of exemption should be brought to the knowledge of the trial court. Suggestion of such abuse made for the first time in an appellate court cannot be considered. People v. Oliver, 7 Cal. App. 601, 95 Pac. 172.

**43.** Johnson v. State, 10 Tex. App. 571; Roach v. State, 41 Tex. 261; Brown v. State, 3 Tex. App. 294; Anonymous, 1 Hill (S. C.) 251.

**44. England.**—Beamon v. Ellice, 4 Car. & P. 585, 19 E. C. L. 537; Rex v. Boucher, 4 Car. & P. 527, 19 E. C. L. 562; Rex v. Wylde, 6 Car. & P. 380, 25 E. C. L. 447; Rex v. Colley, 1 M. & M. 239, 22 E. C. L. 325; Parker v. M'Williams, 6 Bing. 683, 19 E. C. L. 204.

*Alabama.*—Degg v. State, 150 Ala. 3, 43 So. 484; Ryan v. Couch, 66 Ala. 244; Bell v. State, 44 Ala. 393; Montgomery v. State, 40 Ala. 684; Hall v. State, 137 Ala. 44, 34 So. 680; Strickland v. State, 151 Ala. 31, 44 So. 90; Boyd v. State, 153 Ala. 41, 45 So. 591; Benjamin v. State, 148 Ala. 671, 41 So. 739; Wilson v. State, 52 Ala. 299; Burks

v. State, 120 Ala. 386, 24 So. 931; State v. Brookshire, 2 Ala. 303; Sanders v. State, 105 Ala. 4, 16 So. 935; Sidgreaves v. Myatt, 22 Ala. 617; Thorn v. Kemp, 98 Ala. 417, 13 So. 749; Braham v. State, 143 Ala. 28, 38 So. 919.

*Arkansas.*—Pleasant v. State, 15 Ark. 624.

*Colorado.*—Kelley v. People, 17 Colo. 130, 29 Pac. 805.

*Georgia.*—Davis v. State, 120 Ga. 843, 48 S. E. 305; Lassiter v. State, 67 Ga. 739; Grant v. State, 89 Ga. 393, 15 S. E. 488; Rooks v. State, 65 Ga. 330; Cunningham v. State, 97 Ga. 214, 22 S. E. 954; Hanvey v. State, 68 Ga. 612; Etheridge v. Hobbs, 77 Ga. 531, 3 S. E. 251; Bone v. State, 86 Ga. 108, 12 S. E. 205; Metropolitan St. R. Co. v. Johnson, 90 Ga. 500, 16 S. E. 49; Pergason v. Etcherson, 91 Ga. 785, 18 S. E. 29.

*Illinois.*—Palmer v. People, 112 Ill. App. 527; Bow v. People, 160 Ill. 438, 43 N. E. 593; Bulliner v. People, 95 Ill. 394.

*Indiana.*—Porter v. State, 2 Ind. 435; Taylor v. State, 130 Ind. 66, 29 N. E. 415.

*Iowa.*—State v. Pray, 99 N. W. 1065.

*Kentucky.*—Martin v. Com., 30 Ky. L. Rep. 1196, 100 S. W. 872; Carlton v. Com., 13 Ky. L. Rep. 946, 18 S. W. 535. See Illinois Cent. R. Co. v. Taylor, 24 Ky. L. Rep. 1169, 70 S. W. 825; Roberts v. Com., 15 Ky. L. Rep. 341, 22 S. W. 845.

*Louisiana.*—State v. Cole, 38 La. Ann. 843; State v. Watson, 36 La. Ann. 148; State v. Ducote, 47 La. Ann. 46, 16 So. 562.

*Maryland.*—Parker v. State, 67 Md. 329, 10 Atl. 219, 1 Am. St. Rep. 387.

*Massachusetts.*—Com. v. Hall, 4

action of the trial court in the exercise of this discretion will not be reviewed on appeal, unless there is a manifest abuse of discretion.<sup>46</sup>

Allen 305; *Com. v. Crowley*, 168 Mass. 121, 46 N. E. 415.

*Michigan*.—*People v. Piper*, 112 Mich. 644, 71 N. W. 174.

*Mississippi*.—*Sartorius v. State*, 24 Miss. 602; *Smith v. State*, 61 Miss. 754; *Taylor v. State*, 30 So. 657.

*Missouri*.—*State v. Welch*, 191 Mo. 179, 89 S. W. 945; *State v. Fitzsimmons*, 30 Mo. 236; *State v. Moore*, 156 Mo. 204, 56 S. W. 883; *Freleigh v. State*, 8 Mo. 606.

*New York*.—*Friedman v. Myers*, 14 N. Y. Supp. 142, 39 N. Y. St. 192.

*North Carolina*.—*State v. Silver*, 14 N. C. (3 Dev. L.) 332.

*Ohio*.—*Laughlin v. State*, 18 Ohio 99, 51 Am. Dec. 444.

*South Carolina*.—Anonymous, 1 Hill 252; *State v. Vari*, 35 S. C. 175, 14 S. E. 392; *Sharpton v. Augusta & A. R. Co.*, 72 S. C. 162, 51 S. E. 553.

*Tennessee*.—*Smartt v. State*, 112 Tenn. 539, 80 S. W. 586. See *Record v. Chickasaw Co.*, 108 Tenn. 657, 69 S. W. 334; *Adolff v. Irby*, 110 Tenn. 222, 75 S. W. 710.

*Texas*.—*Green v. State*, 49 Tex. Crim. 645, 98 S. W. 1059; *Rambo v. State* (Tex. Crim.), 69 S. W. 163; *Crawleigh v. Galveston, etc. R. Co.*, 28 Tex. Civ. App. 260, 67 S. W. 140; *Johnson v. Cooley*, 30 Tex. Civ. App. 576, 71 S. W. 34; *Fay v. State* (Tex. Crim.), 70 S. W. 744; *Jones v. State*, 3 Tex. App. 150; *Bonnors v. State* (Tex. Crim.), 35 S. W. 669; *Blackwell v. State*, 29 Tex. App. 194, 15 S. W. 597; *Garlington v. McIntosh* (Tex. Civ. App.), 33 S. W. 389; *Welhousen v. State*, 30 Tex. App. 623, 18 S. W. 300; *King v. State*, 34 Tex. Crim. 228, 29 S. W. 1086; *Hedrick v. State*, 40 Tex. Crim. 532, 51 S. W. 252; *Bishop v. State* (Tex. Crim.), 35 S. W. 170; *Cauthern v. State* (Tex. Crim.), 65 S. W. 96; *Williams v. State*, 37 Tex. Crim. 147, 38 S. W. 999; *Cook v. State*, 30 Tex. App. 607; *Turner v. State* (Tex. Crim.), 32 S. W. 700; *Sherwood v. State*, 42 Tex. 498; *Leache v. State*, 22 Tex. App. 279,

3 S. W. 539, 58 Am. St. Rep. 638; *Goins v. State*, 41 Tex. 334; *Miller v. State*, 36 Tex. Crim. 47, 35 S. W. 391.

*Utah*.—*People v. O'Loughlin*, 3 Utah 133, 1 Pac. 653.

*Virginia*.—*Hey v. Com.*, 32 Gratt. 946, 34 Am. Rep. 799.

*Washington*.—*Hendelmann v. Kahan*, 50 Wash. 247, 97 Pac. 109; *State v. Lee Loon*, 7 Wash. 308, 34 Pac. 1103.

In *Exchequer Cases* in the English courts a disobedient witness is peremptorily excluded. *Thomas v. David*, 7 Car. & P., 32 E. C. L. 537; *Parker v. M'Williams*, 6 Bing. 683, 19 E. C. L. 204.

45. *Alabama*.—*Degg v. State*, 150 Ala. 3, 43 So. 484; *Sloss-Sheffield S. & I. Co. v. Smith*, 40 So. 91; *Wilson v. State*, 52 Ala. 299.

*Colorado*.—*Hennessey v. Barnett*, 12 Colo. App. 254, 55 Pac. 197.

*Kentucky*.—*Martin v. Com.* 30 Ky. L. Rep. 1196, 10 S. W. 872; *Crenshaw v. Gardner*, 25 Ky. L. Rep. 506, 76 S. W. 26; *Carlton v. Com.*, 13 Ky. L. Rep. 946, 18 S. W. 535.

*Louisiana*.—*State v. Harrison*, 38 La. Ann. 501; *State v. Cole*, 38 La. Ann. 843.

*Tennessee*.—*Record v. Chickasaw Co.*, 108 Tenn. 657, 69 S. W. 334.

*Texas*.—*Bond v. State*, 20 Tex. App. 421; *Turner v. State* (Tex. Crim.), 32 S. W. 700; *Green v. State*, 49 Tex. Crim. 645, 98 S. W. 1059; *Rambo v. State* (Tex. Crim.), 69 S. W. 163; *Fay v. State* (Tex. Crim.), 70 S. W. 744; *Crawleigh v. Galveston, etc. R. Co.*, 28 Tex. Civ. App. 260, 67 S. W. 140; *Shields v. State*, 8 Tex. App. 427; *Walker v. State*, 17 Tex. App. 16; *George v. State*, 17 Tex. App. 513.

*Washington*.—*Hendelman v. Kahan*, 50 Wash. 247, 97 Pac. 109.

The trial court is in a much better position to pass on the question as to how far a party has been at fault when an order of exclusion is violated than is an appellate court,

The **Better Rule** seems to be that a witness is not disqualified from testifying by reason only of his having disobeyed an order of exclusion,<sup>46</sup> that his testimony ought not to be rejected and the party

and hence the latter will not interfere with the former's determination, if such determination may be sustained by any inference reasonably deducible from the evidence. *Murray v. Allerton* (Neb.), 91 N. W. 518.

**Upon a Violation of the Rule** the court should withdraw the case from the jury and allow a postponement. *St. Louis, etc. R. Co. v. Akers* (Tex. Civ. App.), 73 S. W. 848.

**Excuse for Disobedience May Be Heard.**—There is no error in hearing in the presence of the jury a witness' excuse for an alleged disobedience of an order of exclusion. *Pergason v. Etcherson*, 91 Ga. 785, 18 S. E. 29.

**Examination as to Matters Not Heard.**—There is no error in refusing to allow an examination of a disobedient witness although counsel agrees not to examine on any point on which other witnesses were examined in the presence of the witness offered. *Dyer v. Morris*, 4 Mo. 214. Likewise there is no error in allowing such an examination. *Sharpton v. Augusta & A. R. Co.*, 72 S. C. 162, 51 S. E. 553.

**Testimony Received on Matters Not Included in Previous Testimony.** No error in allowing a disobedient witness to testify as to matters not covered by the testimony of previous witnesses. *Gran v. Houston*, 45 Neb. 813, 64 N. W. 245.

**It Is an Abuse of Discretion** to refuse to permit a witness to testify, who, though not present in court when the rule was invoked, yet before testifying was informed by the party calling him of what previous witnesses had testified, it appearing that such information could have affected his testimony on but one of the points in issue, while the testimony itself was vitally material on all the issues. *Johnson v. Cooley*, 30 Tex. Civ. App. 576, 71 S. W. 34.

**Conference With Excluded Witnesses.**—Allowing a conference between counsel and an excluded wit-

ness is within the court's discretion and the exercise of such discretion by allowing a conference is not reviewable on appeal, unless such discretion has been clearly abused. *Kennedy v. State*, 19 Tex. App. 618.

**Waiver of Right To Object to Witness Because of Disobedience.** Where objection is made to a witness upon the ground of disobedience of an order of exclusion, such objection should be supported by proof, and the party urging an objection loses his right to do so where he knows that such an order has been violated and fails to call the attention of the court thereto. *Palmer v. People*, 112 Ill. App. 527.

**46. United States.**—Holder v. United States, 130 U. S. 91. But see *United States v. Woods*, 4 Cranch C. C. 484, 28 Fed. Cas. No. 16,760.

*Alabama.*—Degg v. State, 150 Ala. 3, 43 So. 484; *Montgomery v. State*, 40 Ala. 684; *Bell v. State*, 44 Ala. 393.

*Arkansas.*—Pleasant v. State, 15 Ark. 624.

*Colorado.*—Behrman v. Terry, 31 Colo. 155, 71 Pac. 1118.

*Florida.*—Sylvester v. State, 46 Fla. 166, 35 So. 142.

*Georgia.*—Phillips v. State, 121 Ga. 358, 49 S. E. 290; *McWhorter v. State*, 118 Ga. 55, 44 S. E. 873; *Davis v. State*, 120 Ga. 843, 48 S. E. 305; *Green v. State*, 125 Ga. 742, 54 S. E. 724; *Cunningham v. State*, 97 Ga. 214, 22 S. E. 954; *Rooks v. State*, 65 Ga. 330; *Hoxie v. State*, 114 Ga. 19, 39 S. E. 944; *May v. State*, 90 Ga. 793, 17 S. E. 108; *Lassiter v. State*, 67 Ga. 739; *Metropolitan St. R. Co. v. Johnson*, 90 Ga. 500, 16 S. E. 49.

*Illinois.*—Palmer v. People, 112 Ill. App. 527; *Bulliner v. People*, 95 Ill. 394; *Kota v. People*, 136 Ill. 655, 27 N. E. 53.

*Iowa.*—State v. Kissock, 111 Iowa 690, 83 N. W. 724.

*Kansas.*—State v. Falk, 46 Kan. 498, 26 Pac. 1023.

who called him deprived of his testimony where such party is himself without fault;<sup>47</sup> but that such violation should only affect the

*Louisiana*.—State *v.* Ducote, 47 La. Ann. 46, 16 So. 562 (witness not rendered incompetent by reason of disobedience where he did not understand English).

*Massachusetts*.—Com. *v.* Hall, 4 Allen 305.

*Mississippi*.—Taylor *v.* State, 30 So. 657; Ferguson *v.* Brown, 75 Miss. 214, 21 So. 603. See *Timberlake v. Thayer*, 76 Miss. 76, 23 So. 767, holding that where it appears that a disobedient witness has not heard other testimony, he has not violated any rule of court excluding witnesses and should therefore be allowed to testify.

*Nevada*.—State *v.* Salge, 2 Nev. 321.

*North Carolina*.—State *v.* Sparrow, 7 N. C. (3 Murph. L.) 487.

*Oklahoma*.—Price *v.* United States, 97 Pac. 1056.

*South Carolina*.—State *v.* Vari, 35 S. C. 175, 14 S. E. 392.

*Texas*.—Blackwell *v.* State, 29 Tex. App. 194, 15 S. W. 597. See *Johnson v. Cooley*, 30 Tex. Civ. App. 576, 71 S. W. 34 (*dictum*).

*West Virginia*.—State *v.* Stewart, 63 W. Va. 597, 60 S. E. 591.

*Wisconsin*.—Loose *v.* State, 120 Wis. 115, 97 N. W. 526.

<sup>47</sup> *England*.—Cobbett *v.* Hudson, 1 El. & Bl. 11, 72 E. C. L. 11.

*Alabama*.—Degg *v.* State, 150 Ala. 3, 43 So. 484 (no right to deprive a defendant in a criminal case of the testimony of a disobedient witness, since he has a constitutional right to the advantage of such witness' testimony).

*California*.—People *v.* Boscovitch, 20 Cal. 436.

*Colorado*.—Vickers *v.* People, 31 Colo. 491, 73 Pac. 845; Kelly *v.* Atkins, 14 Colo. App. 208, 59 Pac. 841; Behrman *v.* Terry, 31 Colo. 155, 71 Pac. 1118.

*Georgia*.—Lassiter *v.* State, 67 Ga. 739.

*Illinois*.—Palmer *v.* People, 112 Ill. App. 527; Bulliner *v.* People, 95 Ill. 394.

*Indiana*.—Burk *v.* Andis, 98 Ind. 59; State *v.* Thomas, 111 Ind. 575, 13 N. E. 35; Taylor *v.* State, 130

Ind. 66, 29 N. E. 415; State *ex rel.* Closson *v.* David, 25 Ind. App. 297, 58 N. E. 83; Brow *v.* Levy, 3 Ind. App. 464, 29 N. E. 417; Stewart *v.* Stewart, 28 Ind. App. 378, 62 N. E. 1023; Davis *v.* Byrd, 94 Ind. 525, overruling Jackson *v.* State, 14 Ind. 327.

*Iowa*.—Grimes *v.* Martin, 10 Iowa 347.

*Kansas*.—Davenport *v.* Ogg, 15 Kan. 363; State *v.* Falk, 46 Kan. 498, 26 Pac. 1023.

*Kentucky*.—Parker *v.* Com., 21 Ky. L. Rep. 406, 51 S. W. 573.

*Maryland*.—Parker *v.* State, 67 Md. 329, 10 Atl. 219, 1 Am. St. Rep. 389.

*Mississippi*.—Ferguson *v.* Brown, 75 Miss. 214, 21 So. 603; *Timberlake v. Thayer*, 76 Miss. 76, 23 So. 767. But see *Sartorius v. State*, 24 Miss. 602.

*Missouri*.—State *v.* Fannon, 158 Mo. 149, 59 S. W. 75; Keith *v.* Wilson, 6 Mo. 435, 35 Am. Dec. 443; O'Bryan *v.* Allen, 95 Mo. 68, 8 S. W. 225; State *v.* Sumpter, 153 Mo. 436, 55 S. W. 76; State *v.* Gesell, 124 Mo. 531, 27 S. W. 1101, overruling State *v.* Fitzsimmons, 30 Mo. 236.

*Nebraska*.—Clemmons *v.* Clemmons, 96 N. W. 404; Gran *v.* Houston, 45 Neb. 813, 64 N. W. 245; Murray *v.* Allerton, 91 N. W. 518.

*Nevada*.—State *v.* Salge, 2 Nev. 321.

*New Mexico*.—Trujillo *v.* Territory, 6 N. M. 589, 30 Pac. 870.

*New York*.—Friedman *v.* Myers, 14 N. Y. Supp. 142, 39 N. Y. St. 192.

*North Carolina*.—State *v.* Sparrow, 7 N. C. (3 Murph. L.) 487. See State *v.* Hare, 74 N. C. 591.

*Ohio*.—Dickson *v.* State, 39 Ohio St. 73.

*Oregon*.—Hubbard *v.* Hubbard, 7 Or. 42.

*South Dakota*.—State *v.* King, 9 S. D. 628, 70 N. W. 1046.

*Virginia*.—Hey *v.* Com., 32 Gratt. 946, 34 Am. Rep. 799.

*Washington*.—Hendelman *v.* Kahan, 50 Wash. 247, 97 Pac. 109; State *v.* Ilomaki, 40 Wash. 629, 82 Pac. 873; State *v.* Lee Doon, 7 Wash. 308, 34 Pac. 1103.

witness' credibility,<sup>48</sup> or subject him to punishment for contempt.<sup>49</sup>

**B. BY WITNESS IGNORANT OF RULE.**—It has been held that the testimony of a witness ought not to be excluded,<sup>50</sup> where it appears

*West Virginia*.—Gregg v. State, 3 W. Va. 705.

*Wisconsin*.—Loose v. State, 120 Wis. 115, 97 N. W. 526.

A party to a suit on trial, especially a defendant charged with felony, may not have time to carefully watch each witness to see that he obeys the orders of the court. Such a defendant must be in the court room during the trial, and is not likely to know what his witnesses are doing outside the court room door while the trial proceeds. To deprive a party of his witness because of misconduct which the party has not caused, procured or permitted, would be to punish the innocent. Palmer v. People, 112 Ill. App. 527.

**To Entitle a Party to the Testimony of a Disobedient Witness** he must apprise the court of the facts he expects to prove by such witness, and it must appear that such facts are material and that such violation of the order of the court was without the knowledge, consent or connivance of himself or his attorneys. Mangold v. Oft, 63 Neb. 397, 88 N. W. 507; Trujillo v. Territory, 6 N. M. 589, 30 Pac. 870. See also Hennessey v. Barnett, 12 Colo. App. 254, 55 Pac. 197, holding that where there is a close relationship existing between the witness and the party calling him, it is incumbent upon such party to show that he is without fault.

**Witness Should Be Rejected** where order of exclusion has been disobeyed with the knowledge, consent, connivance, or by the procurement of the party seeking to use the witness. Murray v. Allerton (Neb.), 91 N. W. 518; Mangold v. Oft, 63 Neb. 397, 88 N. W. 507; Kelly v. Atkins, 14 Colo. App. 208, 59 Pac. 841; Behrman v. Terry, 31 Colo. 155, 71 Pac. 1118; O'Bryan v. Allen, 95 Mo. 68, 8 S. W. 225; State v. Gesell, 124 Mo. 531, 27 S. W. 1101; Trujillo v. Territory, 6 N. M. 589, 30 Pac. 870; Dyer v. Morris, 4 Mo. 214; Bird v. State, 50 Ga. 585; Jack-

son v. State, 14 Ind. 327. See also Com. v. Crowley, 168 Mass. 121, 46 N. E. 415.

**48. United States.**—Holder v. United States, 150 U. S. 91.

*Arkansas*.—Pleasant v. State, 15 Ark. 624.

*Georgia*.—Phillips v. State, 121 Ga. 358, 49 S. E. 290; Metropolitan St. R. Co. v. Johnson, 90 Ga. 500, 16 S. E. 49.

*Indiana*.—Taylor v. State, 130 Ind. 66, 29 N. E. 415.

*Mississippi*.—Timberlake v. Thayer, 76 Miss. 76, 23 So. 767; Ferguson v. Brown, 75 Miss. 214, 21 So. 603.

*Oklahoma*.—Price v. United States, 97 Pac. 1056.

*Virginia*.—Hey v. Com., 32 Gratt. 946, 34 Am. Rep. 799.

*West Virginia*.—Gregg v. State, 3 W. Va. 705.

**49. United States.**—Holder v. United States, 150 U. S. 91.

*Alabama*.—Degg v. State, 150 Ala. 3, 43 So. 484; Bell v. State, 44 Ala. 393.

*Georgia*.—Green v. State, 125 Ga. 742, 54 S. E. 724; Rooks v. State, 65 Ga. 330; Lassiter v. State, 67 Ga. 739.

*Illinois*.—Bulliner v. People, 95 Ill. 394.

*Indiana*.—State ex rel. Closson v. David, 25 Ind. App. 297, 58 N. E. 83.

*Kansas*.—State v. Falk, 46 Kan. 498, 26 Pac. 1023.

*Mississippi*.—Timberlake v. Thayer, 76 Miss. 76, 23 So. 767.

*New York*.—Friedman v. Myers 14 N. Y. Supp. 142, 39 N. Y. St. 192.

*Oklahoma*.—Price v. United States, 97 Pac. 1056.

*Texas*.—Johnson v. Cooley, 30 Tex. Civ. App. 576, 71 S. W. 34.

*Wisconsin*.—Loose v. State, 120 Wis. 115, 97 N. W. 526.

**50. Pile v. State**, 107 Tenn. 532, 64 S. W. 477; State v. Hare, 74 N. C. 591; State v. Burton, 27 Wash. 528, 67 Pac. 1097; State v. Welch, 191 Mo. 179, 89 S. W. 945; Lowrie



that he was not present in court when the rule was made and was in ignorance thereof, although the trial court has a large discretion in the matter.<sup>51</sup>

C. BY REBUTTAL WITNESSES. — Rebuttal witnesses are usually allowed to testify although it appears that they have violated the rule, since the party calling them may not have foreseen the necessity for their use as witnesses.<sup>52</sup>

5. **Examination of Witnesses Attending Not Under Rule.** — A. IN GENERAL. — It is generally held to be discretionary with the trial court to permit a witness to testify who has been present in court, but who has not been placed under the rule, either by an unintentional omission<sup>53</sup> or because expressly exempted,<sup>54</sup> and the exercise of such discretion will not be reviewed on appeal in the absence of evidence showing an abuse thereof.<sup>55</sup>

B. WITNESSES WHOSE TESTIMONY IS NOT ANTICIPATED. — In the course of a trial it often becomes desirable to call upon one or more of those attending, though not subpoenaed, to take the stand. If it appears that the necessity for such a witness's testimony could not have been anticipated by the party calling him, the fact that he was present does not render him incompetent, though the court had made an order of exclusion,<sup>56</sup> and it is generally held to be within

*v. State* (Tex. Crim.), 98 S. W. 838; *State v. Watson*, 36 La. Ann. 148.

51. *State v. Watson*, 36 La. Ann. 148; *Cook v. State*, 30 Tex. App. 607, 18 S. W. 412. See also *State v. Welch*, 191 Mo. 179, 89 S. W. 945.

52. *United States v. Woods*, 4 Cranch C. C. 484, 28 Fed. Cas. No. 16,760.

*Georgia*. — *Thomas v. State*, 27 Ga. 287; *Bone v. State*, 86 Ga. 108, 12 S. E. 205; *Metropolitan St. R. Co. v. Johnson*, 90 Ga. 500, 16 S. E. 49; *Hanvey v. State*, 68 Ga. 612. See *Lyman v. State*, 69 Ga. 404.

*Michigan*. — *People v. Piper*, 112 Mich. 644, 71 N. W. 174 (state's witnesses allowed to testify in rebuttal where their names did not appear endorsed on indictment).

*Mississippi*. — *Ferguson v. Brown*, 75 Miss. 214, 21 So. 603.

*Tennessee*. — *Heaton v. Dennis*, 103 Tenn. 155, 52 S. W. 175.

*Texas*. — *Green v. State*, 49 Tex. Crim. 645, 98 S. W. 1059.

*Washington*. — *State v. Burton*, 27 Wash. 528, 67 Pac. 1097.

53. *Baldwin v. State*, 39 Tex. Crim. 245, 45 S. W. 714; *Hey v.*

*Com.*, 32 Gratt. (Va.) 946, 34 Am. Rep. 799; *Anonymous*, 1 Hill (S. C.) 251; *Cook v. State*, 30 Tex. App. 607, 18 S. W. 412. See *McCullough v. State*, 50 Tex. Crim. 132, 94 S. W. 1056.

54. *Roberson v. State* (Tex. Crim.), 49 S. W. 398; *Hedrick v. State*, 40 Tex. Crim. 532, 51 S. W. 252; *Buchanan v. State*, 41 Tex. Crim. 127, 52 S. W. 769; *Watters v. State* (Tex. Crim.), 94 S. W. 1038; *Braham v. State*, 143 Ala. 28, 38 So. 919.

55. *Watters v. State* (Tex. Crim.), 94 S. W. 1038; *Hey v. Com.*, 32 Gratt. (Va.) 946, 34 Am. Rep. 799.

It is error to refuse to permit a joint defendant to testify for an accused on trial where it appears that the former was exempted from a rule of exclusion by reason of a misunderstanding between court and counsel, the court supposing that he was not to be used as a witness. *Parker v. Com.*, 21 Ky. L. Rep. 406, 51 S. W. 573.

56. *Grundy v. Com.*, 8 Ky. L. Rep. 876; *State v. Jones*, 47 La. Ann. 1524, 18 So. 515; *Smith v. State*, 4 Lea (Tenn.) 428; *Price v. United*

the court's discretion to admit the same, which discretion will not be reviewed on appeal in the absence of an abuse thereof.<sup>57</sup>

In Alabama it is held that the party calling such witness is entitled to his testimony as a matter of right.<sup>58</sup>

6. Limiting Number of Witnesses. — A discussion of this subject will be found in other parts of this work.<sup>59</sup>

## VI. COMPETENCY OF WITNESSES.

The competency of witnesses to testify is discussed elsewhere in this work<sup>60</sup> in numerous articles dealing with the particular class of witnesses in question.<sup>61</sup>

## VII. OATH AND SWEARING.

1. Necessity for Swearing. — A. IN GENERAL. — As a general rule it is necessary that a witness shall affirm<sup>62</sup> or be sworn<sup>63</sup> before

States (Okla.), 97 Pac. 1056; Hey v. Com., 32 Gratt (Va.) 946, 34 Am. Rep. 799; State v. Vari, 35 S. C. 175, 14 S. E. 392. See also Kota v. People, 136 Ill. 655, 27 N. E. 53. But see Rummel v. State, 22 Tex. App. 558, 3 S. W. 763.

57. State v. Benjamin (R. I.), 71 Atl. 65; State v. Goodson, 116 La. 388, 40 So. 771; Taylor v. State, 130 Ind. 66, 29 N. E. 415; Com. v. Brown, 90 Va. 671, 19 S. E. 447; Gilbert v. Com., 111 Ky. 793, 64 S. W. 846; Sessions v. State (Tex. Crim.), 98 S. W. 243; Thomas v. State, 33 Tex. Crim. 607, 28 S. W. 534. See also Buchanan v. State, 41 Tex. Crim. 127, 52 S. W. 769.

58. Degg v. State, 150 Ala. 3, 43 So. 484.

59. See articles "CUMULATIVE EVIDENCE," Vol. III, pp. 930-934; "DIRECT EXAMINATION," Vol. IV, pp. 680-681.

60. For a General Discussion of the competency of witnesses and of certain miscellaneous classes of witnesses, see article "COMPETENCY," Vol. III, p. 161.

61. See the Index (*infra*) of this work, title "Witnesses" for a complete reference to the various articles dealing with this question.

62. Williamson v. Carroll, 16 N. J. L. 217.

In Louisiana the Code of Practice (Code Prac. arts. 478, 479) after providing that "witnesses must be

sworn on the Bible, in open court," further declares that "if the religious opinions of a witness are opposed to his taking an oath, his affirmation of the truth of his testimony shall suffice." Curtis v. Lehmann & Co., 115 La. 40, 38 So. 887. And see the codes and statutes of the various states.

63. State v. Williams, 49 W. Va. 220, 38 S. E. 495; Coleman v. State, 43 Tex. Crim. 15, 63 S. W. 322; State v. Smith, 78 N. C. 462; Vandervoort v. Smith, 2 Caines (N. Y.) 155 (translations from a foreign language must be on oath).

In all civilized communities, some ceremony or solemn act is prescribed as a condition precedent to giving testimony. In nations or states professing the Christian religion, there is an appeal to almighty God, or an adjuration on the Holy Evangelists, that the testimony to be given shall be the truth. This is a most solemn recognition of an all-seeing, omnipotent ruler, who will reward or punish in this world or the next, according to the deeds done in the body. This is the sanction which the law exacts and imposes upon the conscience, before it permits a witness to testify. Chappell v. State, 71 Ala. 322, citing 1 Greenl. Ev. § 328.

**Witness Must Be Sworn Generally.** — Where a witness is competent in chief, he must be sworn generally

testifying; but a witness, who has no objection to being sworn, cannot be allowed to testify under affirmation.<sup>64</sup> It is the duty of the counsel offering a witness to move that he may be sworn, and thus be qualified to testify.<sup>65</sup> It is then the duty of the court to cause the oath to be administered to him, if no legal objection appears to his competency.<sup>66</sup>

**B. JURORS AS WITNESSES.**—A juror cannot be allowed to give evidence to his fellow jurors without being sworn as a witness.<sup>67</sup>

**C. PROSECUTING ATTORNEYS.**—The general rule applies to prosecuting attorneys as well; statements made by the latter are not

in the cause, though his examination may be confined to a particular or incidental fact; and although the evidence may be addressed to the court instead of the jury; and the rule that when the loss or destruction of an instrument is sought to be proved by a party to the record, he may be sworn specially, has no application, because in the latter instance he is an incompetent witness, and his testimony is admitted only from the necessity of the case, and is admitted no further than such necessity demands. *Jackson v. Parkhurst*, 4 Wend. (N. Y.) 369.

**Effect of Refusal to Swear or Affirm.**—See article "CONTEMPT," Vol. III, p. 481, notes 97-1.

**Infancy as Affecting Necessity for Swearing.**—See article "INFANTS," Vol. VII.

**Dying Declarations Need Not Be Sworn to.**—See article "DYING DECLARATIONS," Vol. IV, p. 991, notes 65-66.

**Affidavits.**—As to necessity of an oath in connection with an affidavit and as to how an oath is administered to an affiant, etc., see article "AFFIDAVITS," Vol. I.

**Competency of Witnesses in General.**—See article "COMPETENCY," Vol. III.

64. *Williamson v. Carroll*, 16 N. J. L. 217; *Maden v. Catanach*, 7 H. & N. 360, 31 L. J. Ex. 118, 7 Jur. (N. S.) 1107, 5 L. T. 288, 10 W. R. 112; *Reg. v. Moore*, 61 L. J. M. C. 80, 66 L. T. 125, 40 W. R. 304, 17 Cox C. C. 458, 56 J. P. 345, C. C. R.

**In Maryland** witnesses can only be allowed to testify upon affirmation when they are members of some religious society which professes to be conscientiously scrupulous of tak-

ing an oath. *Bank of Columbia v. Wright*, 3 Cranch C. C. 216, 2 Fed. Cas. No. 883; *King v. Fearson*, 3 Cranch 435, 14 Fed. Cas. No. 7,790.

In *King v. Fearson*, 3 Cranch C. C. 435, 14 Fed. Cas. No. 7,790, it was held that where a witness was considered by the society of Quakers as a member of that society in principle and religious profession and usually met with them for religious worship, and had applied to be admitted to a full participation of all the civil privileges and the moral discipline of the society, he might be permitted to testify upon affirmation instead of on oath.

**Duty of Court To Inquire Into Ground of Objection** to being sworn before permitting witness to affirm under § 1 of the Oaths Act, 1888, and to ascertain whether the witness objects because of want of religious belief or because the taking of an oath is contrary to his religious belief. *Reg. v. Moore*, 61 L. J. M. C. 80, 66 L. T. 125, 40 W. R. 304, 17 Cox C. C. 458, 56 J. P. 345, C. C. R.

**Time To Object for Failure To Inquire.**—An objection to the admissibility of a witness' evidence permitted to affirm without being so questioned is not too late when taken after verdict. *Reg. v. Moore*, 61 L. J. M. C. 80, 66 L. T. 125, 40 W. R. 304, 17 Cox C. C. 458, 56 J. P. 345, C. C. R.

65. *Hawks v. Baker*, 6 Me. 72, 19 Am. Dec. 191.

66. *State v. Smith*, 124 Iowa 334, 100 N. W. 40; *Barr v. State* (Miss.), 23 So. 628; *Hawks v. Baker*, 6 Me. 72, 19 Am. Dec. 191.

67. *Manley v. Shaw*, Car. & M. (Eng.) 361; *Anderson v. Barnes*, 1

evidence against an accused unless they were duly sworn as other witnesses.<sup>68</sup>

**D. CHILDREN OF TENDER YEARS.** — The unsworn testimony of a child in a civil action is generally inadmissible.<sup>69</sup> The rule seems to be the same in the United States with respect to criminal cases,<sup>70</sup> and in England formerly;<sup>71</sup> in the latter country it is now held that where the exigency of the case requires it, as in cases of rape, buggery, etc., an infant may be examined without oath.<sup>72</sup>

**E. DEFENDANTS IN CRIMINAL CASES.** — Formerly in some states, by statute, it was permitted a defendant in a criminal case to make an unsworn<sup>73</sup> statement to the court or jury in his own behalf. Upon the question as to whether in such cases the people had the same right of cross-examination, as though the defendant had been sworn, the authorities were in conflict.<sup>74</sup> But it is now the law that the accused may be a witness in his own behalf if he choose

N. J. L. 203; *Underhill v. Waite*, 9 Daly (N. Y.) 83.

68. *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561.

69. The unsworn testimony of a seven and a half year old child in a civil action is inadmissible. *Neustadt v. New York City R. Co.*, 104 N. Y. Supp. 735.

In *Washington* the statute provides (§ 5993 Ballinger's Ann. Codes & Stats.) that children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly, shall not be competent to testify. Assuming that a child is competent under the statute, then he must be sworn. On the other hand, if he is not competent, then he should not be permitted to testify at all. *Hodd v. Tacoma*, 45 Wash. 436, 88 Pac. 842. See also *Rex v. Williams*, 7 Car. & P. (Eng.) 338; *Smith v. French*, 2 Atk. (Eng.) 245.

70. *State v. Tom*, 8 Or. 177.

71. *Rex v. Brasier*, 1 Leach C. C. 199, 1 East P. C. 443; *Rex v. Williams*, 7 Car. & P. (Eng.) 338.

72. 2 Hale P. C. 278.

In *England* it is provided by statute (48 and 49 Vict., c. 69, § 4) that in prosecutions for criminal assaults on girls of tender years, they may be examined without oath, if of sufficient intelligence to speak the truth, though too young to appreciate the nature of an oath. *Reg. v. Prunty*, 16 Cox C. C. 344; *Reg. v. Wealand*,

20 Q. B. Div. (Eng.) 827. And see article "INFANTS," Vol. VII.

73. *Alabama*. — Code (1896), c. 180, art. 12; *Blackburn v. State*, 71 Ala. 319; *Chappell v. State*, 71 Ala. 322.

*Georgia*. — *Brown v. State*, 60 Ga. 210; *Ross v. State*, 59 Ga. 248.

*Michigan*. — Code 1871, Vol. 2, § 5967. Prior to the amendment of 1881 (act No. 245), under that of 1861 (act No. 125) a person accused of crime could make an unsworn statement in his own behalf. See *People v. Thomas*, 9 Mich. 314; *Maher v. People*, 10 Mich. 212; *Morrissey v. People*, 11 Mich. 327, 331; *People v. Annis*, 13 Mich. 511; *Durant v. People*, 13 Mich. 351; *Grimm v. People*, 14 Mich. 300; *DeFoe v. People*, 22 Mich. 224; *People v. Jones*, 24 Mich. 215; *People v. Morrigan*, 29 Mich. 4; *Gale v. People*, 26 Mich. 157; *Burden v. People*, 26 Mich. 162. See also *Carne v. Litchfield*, 2 Mich. 340. And even after the passage of the Act of 1881 it seemed that an unsworn statement could be made. *People v. Robinson*, 86 Mich. 415, 49 N. W. 260; *People v. Reilly*, 53 Mich. 260, 18 N. W. 849.

74. In *Alabama* it was held that such statements, although in the nature of evidence and to be considered by the jury in connection with the evidence, were not evidence in the strict legal sense. *Chappell v. State*, 71 Ala. 322; *Whizenant v. State*, 71 Ala. 383.

to testify, but he must be sworn as other witnesses and submit to cross-examination.<sup>75</sup>

**2. Presumption as to Administration of Oath.**—In accordance with the general presumption that public officials have faithfully performed their duty, it is presumed that an oath was administered to a witness before testifying;<sup>76</sup> and the mere fact that a witness states to a party out of court that he had not been sworn is not sufficient to overcome the presumption.<sup>77</sup>

**3. Form of Oath.**—A. AT COMMON LAW.—No particular form of oath was required at common law. Any form was sufficient

In Michigan prior to the act of 1881 under that of 1861 the accused could be cross-examined only as to the statement made. *People v. Robinson*, 86 Mich. 415, 49 N. W. 260.

75. Code of Alabama (1896) c. 180, art. 13; Com. Laws Michigan 1897, § 10211.

76. *State v. Smith*, 124 Iowa 334, 100 N. W. 40; *Hawks v. Baker*, 6 Greenl. (Me.) 72, 19 Am. Dec. 191.

The legal presumption is that witnesses were properly sworn where there is no evidence showing or tending to show they considered any other code of swearing as more obligatory than the one prescribed by the Code. *Curtis v. Lehmann & Co.*, 115 La. 40, 38 So. 887.

The defendant in a criminal action has a right to presume that a witness taking the stand against him has been sworn. *Hawks v. Baker*, 6 Greenl. (Me.) 72, 19 Am. Dec. 191. See also *Barr v. State* (Miss.), 23 So. 628.

77. In *State v. Smith*, 124 Iowa 334, 100 N. W. 40, which was a prosecution for seduction, the court said: "In argument, counsel for appellant insists that there should be a reversal of the judgment of the trial court because it appeared from the record that the prosecuting witness, Nellie Curry, was allowed to give her testimony without being sworn as required by law. The record does not disclose in terms that any of the witnesses, either for the state or for defendant, were sworn before testifying. It appears that Nellie Curry, among others, was called as a witness for the state, and, in answer to questions on direct and cross-examination, she detailed the story of her alleged seduc-

tion. After she had left the witness stand she was recalled, and there was propounded to her by the court the following question: 'Was the testimony heretofore given by you true and correct?' and this she answered in the affirmative. Being cross-examined by counsel for defendant, she said that she did not know when giving her testimony, that she had not been sworn; that she was not present when the other witnesses were sworn; that Mr. Emery had asked her if she had been sworn, and she told him she had not. It is a plain requirement of law that witnesses shall affirm or be sworn before being allowed to testify. It is the duty of the court to see that this is done, and we will assume that the requirement was observed, unless the contrary is made to appear. Can it be said that the record before us makes it clear that there was a failure to comply with the legal requirement? We have recited above all there is in the record relating to the subject. There is then, no direct showing to the effect that the oath was not administered. The question propounded by the court, and the answer thereto, cannot be accepted as showing failure, and, in our view, the cross-examination disclosed no more than that the witness had said to Emery, out of court, that she had not been sworn. She does not testify that she was not sworn, and there was no attempt to otherwise make the fact appear. The mere circumstance that one who had been a witness in a case is shown to have subsequently made the statement out of court, that she had not been sworn before testifying, cannot be accepted as suf-

which was considered by the witness as most binding on his conscience, or which was in accordance with his religious belief.<sup>78</sup>

**B. UNDER MODERN STATUTES.**—The form of oath for a witness is often provided for by statute.<sup>79</sup> In California and North

Carolina, it is sufficient to overcome the presumption of correct proceeding in which we are required to indulge, and so authorize a reversal of the judgment entered."

78. *Gill v. Caldwell*, 1 Ill. 53; *Reg. v. Serva*, 2 Car. & K. (Eng.) 53, 1 Den. C. C. 104, 1 Cox C. C. 292; *Omichund v. Barker*, Willes 538, 1 Atk. 21; *Atcheson v. Everitt*, Cowp. (Eng.) 389.

In the *Merrimac*, 1 Ben. 490, 17 Fed. Cas. No. 9,474, a Chinaman was offered as a witness in his own behalf, and was sworn in the usual way. Objection was made that the oath taken was not binding upon him. He stated that he did not know the name of the book that he was sworn on, but that if he should say anything that was not true, the court would punish him, and after he was dead he would go "down there," making an emphatic gesture with his hand downward. It was held that he was sworn in such a way as was binding on his conscience and that he was therefore competent to testify.

Where a witness accepted the form of oath as usually administered without objection, except kissing the Bible, it was held that the court was justified without further inquiry in presuming that the witness intended that her conscience should be bound. *Pullen v. Pullen* (N. J.), 4 Atl. 82.

In Louisiana the Code does not provide for the special case of a witness who has no religious scruples against taking an oath, but does not consider an oath taken "on the Bible" as binding on his conscience. In such cases the common law permitted the oath to be so administered as to suit the conscience of the witness, not regarding the mode of swearing as the material part of the oath. But where witness has been sworn "on the Bible" as provided by the code, the presumption is that he was properly sworn in the absence of evidence that the witness considered any other

method as more obligatory. *Curtis v. Lehmann & Co.*, 115 La. 40, 38 So. 887; citing 3 Jones, Law of Evidence, 730.

In Tennessee the practice has been to administer the oath with an uplifted hand, and the solemn appeal to God, without inquiry of the witness whether he is conscientiously scrupulous of swearing on the Gospels, and such oath has uniformly been regarded as legal and binding. *Doss v. Birks*, 11 Humph. (Tenn.) 431.

**Mode of Swearing Chinaman.** *Reg. v. Entrehman*, Car. & M. (Eng.) 248.

**Scotch Covenant.**—*Rex v. Mil-drone*, 1 Leach C. C. 412, 3 R. R. 708.

**Proper Time To Inquire as to Binding Effect of Oath.**—The proper time to ask a witness whether the form of administering the oath is such as will be binding upon his conscience is previous to the administration of the oath. No error is committed in overruling such a question when it is not asked until after the witness has been sworn. *State v. Davis*, 186 Mo. 533, 85 S. W. 354. See also *Gonzales v. State*, 31 Tex. 495.

79. *People v. Swist*, 136 Cal. 520, 69 Pac. 223; *In re Franklin County Comrs.*, 7 Ohio N. P. 450, 5 Ohio Dec. 691.

In *Salomons v. Miller*, 8 Ex. 778, 22 L. J. Ex. 169, 17 Jur. 463, 1 W. R. 360, Ex. Ch., it was held that the concluding paragraph in the form of oath of abjuration imposed by 6 Geo. 3, c. 53, "And I do make this recognition, acknowledgment, abjuration, renunciation and promise heartily, willingly, and truly upon the true faith of a Christian," was an essential portion of the substance of the oath, and no part of it could be omitted or altered.

In California, §§ 2095 and 2096 Code Civil Proc. are as follows: "Whenever the court before which a person is offered as a witness is satisfied that he has a peculiar mode

Carolina it is held that the invocation of God's help, although included in the statutory form, is not an essential element of the oath.<sup>80</sup>

**4. Time of Taking Oath.**—A witness must be sworn in the presence of the defendant in a criminal proceeding,<sup>81</sup> and before examination in all cases,<sup>82</sup> although a witness need not be sworn

of swearing, connected with, or in addition to the usual form of administration, which, in his opinion, is more solemn or obligatory, the court may in its discretion adopt that mode. When a person is sworn who believes in any other than the Christian religion, he may be sworn according to the peculiar ceremonies of his religion, if there be any such." In *People v. Green*, 99 Cal. 564, 34 Pac. 231, it was contended that the court erred in refusing to administer to a Chinese witness a form of oath other than the usual form, as authorized by the above quoted sections. The court said: "In answer to this, it is enough to say that it does not appear that the court was informed that those witnesses had 'a peculiar mode of swearing' . . . more solemn or obligatory than the usual form, nor that they believed 'in any other than the Christian religion.' And it may be added that those sections of the code are not mandatory, but merely permissive, at the discretion of the court, under the circumstances therein stated. To show an abuse of the discretionary power conferred, it should be made to appear, at least, that the witness regarded some other form of oath more obligatory than the form usually adopted in this state, and perhaps that he did not consider the latter at all obligatory."

In Illinois where it is provided by statute (Act of 1807) that an oath by uplifted hand shall be legal, and further that persons who conscientiously refuse to take an oath upon the testament may be sworn in the manner provided above, it is held that to cause the latter method to be binding upon the witness, it is not necessary that he should literally refuse to take the oath in the former manner, since he is presumed to have elected in the first instance. *Gill v. Caldwell*, 1 Ill. 53. See also

*McKinney v. People*, 7 Ill. 540, 43 Am. Dec. 65.

**Estoppel To Raise Objection.**—In a criminal case a defendant cannot complain that, in addition to the oath prescribed by the laws, Chinese witnesses were also sworn according to a Chinese practice, such proceeding having been had at his own instance. *Bow v. People*, 160 Ill. 438, 43 N. E. 593.

**California Code Civ. Proc. § 2094**, before the amendment of March 8, 1901, provided that a witness' oath should be, "You do solemnly swear . . . that the evidence you shall give in this issue. . . . pending between ——— and ——— shall be the truth, the whole truth, and nothing but the truth, so help you God." This section as amended was the same as before except that the invocation of God's help was omitted. *Held*, that an oath administered to a witness in accordance with the provision of the amendment was in substantial compliance with the section before amended and sufficient, although the amendment was thereafter declared unconstitutional, on grounds in no way connected with the subject now in hand. *People v. Swist*, 136 Cal. 520, 69 Pac. 223.

**80. North Carolina.**—*State v. Mazon*, 90 N. C. 676. See also *Lancaster & C. R. Co. v. Heaton*, 8 El. & Bl. 952, 27 L. J. Q. B. 195, 4 Jur. (N. S.) 707.

**81. Bearden v. State**, 44 Ark. 331. See also *Reg. v. Tew, Dears. C. C.* 429, 24 L. J. M. C. 62, 3 W. R. 178; *State v. Weber*, 22 Mo. 321, (holding that a witness was reasonably sworn, though before prisoner's arraignment, if after the latter had signified that he was ready for trial).

**82.** But the fact that a witness was not sworn before the examination began does not affect that part of his testimony taken after the administration of the oath. *Com. v. Keck*, 148 Pa. St. 639, 24 Atl. 161.

but once on the trial of the same cause,<sup>83</sup> though he may be examined on different days, and the matter in issue may be varied during the trial.<sup>84</sup>

**5. Who May Administer Oaths.**—A witness must be sworn by the court or an officer thereof.<sup>85</sup> It has been held that the solicitor general may lawfully administer an oath to a witness in a criminal case,<sup>86</sup> and that an attorney representing one of the parties in a civil case may lawfully administer such oath.<sup>87</sup>

**An Interpreter**, acting in the presence and under the immediate direction of the court may administer an oath to a witness, and it is not necessary that the clerk should repeat the oath to the interpreter every time he is called upon to administer it to the witness, it being sufficient if this is done at the beginning of the examination.<sup>88</sup>

**6. Manner of Swearing.**—The general practice is to read to the witness the form of oath, the witness assenting thereto, but where one has been consciously sworn as a witness it is sufficient, whether he actually heard the officer who administered the oath or not.<sup>89</sup> It is sufficient if a deaf witness reads an oath which appears to be substantially correct and manifests an understanding of its meaning.<sup>90</sup> A witness is not objectionable on the ground that he was not sworn with other witnesses, it appearing that he was sworn when he went upon the stand and was under the rule with such other witnesses.<sup>91</sup> The court may permit witnesses to be sworn in a body.<sup>92</sup>

<sup>83.</sup> *Redd v. State*, 65 Ark. 475, 47 S. W. 119; *Bullock v. Koon*, 9 Cow. (N. Y.) 30.

<sup>84.</sup> *Bullock v. Koon*, 9 Cow. (N. Y.) 30.

<sup>85.</sup> *Reg. v. Tew*, Dears. C. C. 429, 24 L. J. M. C. 62, 3 W. R. 178.

**As to Duty of Committing Magistrate to swear witnesses and power to delegate such duty**, see article "EXAMINATION BEFORE MAGISTRATE," Vol. IV, p. 309, notes 13 and 14.

<sup>86.</sup> *Thomas v. State*, 67 Ga. 460; *Sikes v. State*, 105 Ga. 592, 31 S. E. 567.

<sup>87.</sup> *Baker v. State*, 97 Ga. 347, 23 S. E. 829.

In *Sikes v. State*, 105 Ga. 592, 31 S. E. 567, the court said: "The attorney, when he, in open court, administers oaths to witnesses, is a mere organ or mouthpiece of the court. In our opinion, it is the same as though the judge presiding administered the oath himself. The attorneys are officers of the court,

and, when they administer oaths to witnesses, they simply represent the court, and the oaths are as legal and binding as if the judge had himself repeated the words of the oaths."

<sup>88.</sup> *Com. v. Jongrass*, 181 Pa. St. 172, 37 Atl. 207.

The interpreter acts under the sanction of his oath as such, when he administers the oath to the witness, no less than when he interprets the testimony of the witness to the court and jury. *Com. v. Jongrass*, 181 Pa. St. 172, 37 Atl. 207.

<sup>89.</sup> *Texas, etc. R. Co. v. Reid* (Tex. Civ. App.), 79 S. W. 99. See also *Ritchey v. People*, 23 Colo. 314, 47 Pac. 272, 384, holding that the difficulty attending the examination of a deaf mute is no reason for excluding his testimony.

<sup>90.</sup> *Kirk v. State* (Tex. Crim.), 37 S. W. 440.

<sup>91.</sup> *Ripsey v. State*, 29 Tex. App. 37, 14 S. W. 448.

<sup>92.</sup> *State v. Crea*, 10 Idaho 88, 76



**7. Obligation of an Oath.** — A witness must have sufficient understanding of the obligation of an oath to be competent to testify.<sup>93</sup> A witness may be instructed before testifying as to the obligation of an oath,<sup>94</sup> and the trial may be postponed for this purpose.<sup>95</sup>

**8. Objections for Failure To Take Oath.** — Where a witness fails to take the oath before testifying, objection should be made immediately,<sup>96</sup> but if the witness is allowed to testify and the mistake is discovered before the jury retires, it may be corrected or its effect annulled either by swearing the witness and rehearing his testi-

Pac. 1013; *State v. Rooke*, 10 Idaho 388, 79 Pac. 82.

**93.** *Freasier v. State* (Tex. Crim.), 84 S. W. 360; *Kilburn v. Mullen*, 22 Iowa 498; *Taylor v. State* (Tex.), 3 S. W. 753; *State v. Langford*, 45 La. Ann. 1177, 14 So. 181, 40 Am. St. Rep. 277; *Lee v. Missouri Pac. R. Co.* 67 Kan. 402, 73 Pac. 110, 63 L. R. A. 271.

It is proper for the court to inquire as to a witness' competency in reference to his understanding of the nature of an oath, and his responsibility to the Supreme Being, for not testifying to the truth. It is the nature of the oath as a religious obligation and solemn appeal to God, that is the principal subject of inquiry when an examination of this character is made. To answer this inquiry properly will of course require that the witness have a sufficient degree of intelligence and understanding to be admitted to testify in the matter before the court. *Com. v. Mullins*, 2 Allen (Mass.) 295.

Where a witness knows the difference between telling the truth and lying and is conscious that an oath binds him to speak the truth, he is not disqualified because he cannot define the legal obligation of an oath. *Bright v. Com.*, 120 Ky. 298, 86 S. W. 527; *Priest v. State*, 10 Neb. 393, 6 N. W. 468 (Indian held incompetent by reason of incapacity to understand obligation of oath).

**Formerly Witness Must Have Had Religious Belief.** — *Maden v. Cattanach*, 7 H. & N. 360, 31 L. J. Ex. 118, 7 Jur. (N. S.) 1107, 5 L. T. 288, 10 W. R. 112.

**Conception of Religious Obligation Not Necessary.** — A person is a competent witness under the statute in Indiana, if he has sufficient discretion and understands that perjury

is punishable by law, though he has no conception of the religious obligation of an oath. *Snyder v. Nations*, 5 Blackf. (Ind.) 295.

A witness who understands that he is brought to court to tell the truth, that it is wrong to tell a lie, and that he will be punished either by human or divine law if he tells a lie, has, under the statute, sufficient understanding of the obligation of an oath to be competent. *State v. Levy*, 23 Minn. 104, 23 Am. Rep. 678. See also *Bright v. Com.*, 120 Ky. 298, 86 S. W. 527.

**Religious Belief as Affecting Sense of Obligation.** — As to the right to cross-examine a witness regarding his religious belief and as to previous declarations concerning the same for the purpose of showing his failure to appreciate the solemnity of an oath, see article "Atheist," Vol. II.

**Infancy as Affecting Obligation.** As to the degree in which an infant witness must understand the nature of an oath, see article "INFANTS," Vol. VII.

**Insanity as Affecting Ability To Appreciate Obligation of Oath.** — See article "INSANITY," Vol. VII.

**94.** *Fuller v. Fuller*, 17 Cal. 605.

**95. Trial May Be Postponed for** purpose of instructing infant witness as to obligation of oath. *Reg. v. Baylis*, 4 Cox C. C. 23. *Contra*, *Rex v. Williams*, 7 Car. & P. (Eng.) 338.

**But Not Where Child Is Too Immature,** as one but six years of age. *Reg. v. Nicholas*, 2 Car. & K. (Eng.) 246, 2 Cox C. C. 136.

**96.** *City of O'Neill v. Clark*, 57 Neb. 760, 78 N. W. 256; *Smith v. State*, 81 Ga. 479, 8 S. E. 187; *Texas, etc. R. Co. v. Reid* (Tex. Civ. App.), 74 S. W. 99 (witness so deaf that counsel must necessarily have

mony,<sup>97</sup> or by motion to strike out,<sup>98</sup> or by instructing the jury to disregard the same.<sup>99</sup>

**Waiver of Objections.**— In the event that no objection<sup>1</sup> or motion is made,<sup>2</sup> or instruction asked for,<sup>3</sup> the parties will be deemed to have acquiesced in the reception of the unsworn statements as evidence.<sup>4</sup> The objection is too late when raised for the first time in the trial court after verdict where the fact was known to counsel before the case was given to the jury;<sup>5</sup> after the trial, though before the finding had been announced,<sup>6</sup> after judgment on a motion for a new trial,<sup>7</sup> or on appeal where there is nothing in the record to show that the irregularity was not discovered in time to object

known that she did not hear the oath when read to her). See also *People v. Swist*, 136 Cal. 520, 69 Pac. 223.

97. *State v. Williams*, 49 W. Va. 220, 38 S. E. 495; *Slauter v. Whitelock*, 12 Ind. 338; *Southern R. Co. v. Ellis*, 123 Ga. 614, 51 S. E. 594.

98. *State v. Smith*, 124 Iowa 334, 100 N. W. 40; *Moore v. State*, 96 Tenn. 209, 33 S. W. 1046.

99. *State v. Williams*, 49 W. Va. 220, 38 S. E. 495; *Slauter v. Whitelock*, 12 Ind. 338; *Southern R. Co. v. Ellis*, 123 Ga. 614, 51 S. E. 594. See also *Reg. v. James*, 6 Cox C. C. 5.

1. In *Texas, etc. R. Co. v. Reid* (Tex. Civ. App.), 74 S. W. 99, defendant contended that since plaintiff who was sworn with other witnesses in the court below was so deaf that she could not hear the oath as it was administered, a new trial should be granted for this reason. *Held*, that since defendant necessarily knew of plaintiff's deafness before she had answered a single question as a witness, objection should have then been made. To allow the witness to testify under such circumstances was to waive the irregularity.

2. *Slauter v. Whitelock*, 12 Ind. 338.

Where it was discovered during the trial of a criminal prosecution that a state's witness had not been sworn before testifying, and defendant, although his attention was called to the fact, failed to move that the testimony be stricken out, held that the objection was waived. *State v. Smith*, 124 Iowa 334, 100 N. W. 40.

3. See *Slauter v. Whitelock*, 12 Ind. 338.

4. *Cady v. Norton*, 14 Pick. (Mass.) 236.

If there is an omission to swear a witness, and the court instructs the jury to disregard his evidence, and the prisoner then makes no exception to the action of the court, and does not then rely on such omission, he cannot, for that cause, sustain a motion to set aside the verdict. *State v. Williams*, 49 W. Va. 220, 38 S. E. 495.

5. *Cogswell v. Houget*, 40 Ill. App. 645; *Nesbitt v. Dallam*, 7 Gill & J. (Md.) 494, 28 Am. Dec. 236; *City of O'Neill v. Clark*, 57 Neb. 760, 78 N. W. 256. See also *Lawrence v. Houghton*, 5 Johns. (N. Y.) 129; *Cover v. Stockdale*, 16 Md. 1.

In *Cady v. Norton*, 14 Pick. (Mass.) 236, a motion was made by defendant to set aside a verdict on the ground that one of the witnesses who had testified to material facts on the part of the plaintiffs had not been sworn. It appeared that notice of this fact had been communicated to defendant before the cause went to the jury. Defendant stated that this circumstance had come to the knowledge of defendant and his counsel during the argument of the counsel, but that the witness had, at that time, gone to his home in a distant town. *Held*, that it was too late for defendant after verdict for plaintiff to object that the witness had not been sworn.

6. *Stroup v. State*, 70 Ind. 495.

7. *Goldsmith v. State*, 32 Tex. Crim. 112, 22 S. W. 405; *Hawks v. Baker*, 6 Me. 72, 19 Am. Dec. 191.

thereto and have it remedied.<sup>8</sup> But where in a criminal action it is shown that neither the defendant nor his attorney knew of the fact that a state's witness was not sworn until after verdict, it is held that a new trial should be granted on the ground that the defendant has a right to presume that such witness was sworn, and that a party convicted on unsworn evidence has not enjoyed the protection of the laws to which he is entitled.<sup>9</sup>

**9. Swearing Witnesses Before Arbitrators. — Presumption.** — It is not necessary that an award of arbitrators should show affirmatively that the witnesses produced before them were sworn. The presumption is that the arbitrators discharged their duty in this respect.<sup>10</sup> In another part of this work will be found a full discussion as to the power of arbitrators to swear witnesses, necessity therefor, and waiver of the requirement.<sup>11</sup>

### VIII. EXAMINATION.

**1. Generally.** — The matters falling under this general head are elsewhere discussed in this work, with the exceptions hereinafter shown.<sup>12</sup>

**2. Recalling and Re-examination. — A. DIRECT EXAMINATION.**  
**a. Generally.** — (1.) **Right To Recall.** — It is generally held that a party has no absolute right to recall and examine a witness previously examined, but that such practice rests within the sound discretion of the trial court,<sup>13</sup> which discretion will not be reviewed

That a witness has testified without being sworn is no cause for a new trial, unless it appears that the counsel of the party against whom the witness testified was not guilty of laches in permitting the witness to testify, and that the evidence of the witness was material and not true. *Sheeks v. Sheeks*, 98 Ind. 288.

One who, without objection, allows a witness to go on the stand and give evidence against him without being first sworn cannot, after conviction, urge the failure of the witness to take the oath, as a ground of a motion for a new trial. Knowledge of the failure to swear the witness is necessarily imputable to the accused; for the oath must have been administered, if at all, in open court and in the presence of the accused. *Rhodes v. State*, 122 Ga. 568, 50 S. E. 361.

**8. Cogswell v. Hoguet**, 40 Ill. App. 645; *Leach v. Ackerman*, 2 Ind. App. 91, 28 N. E. 216; *Redd v. State*, 65 Ark. 475, 47 S. W. 119.

While it is required by statute

that witnesses shall be sworn, a defendant in a criminal prosecution cannot complain that a state's witness was not sworn, raising the question for the first time on appeal. *Coleman v. State*, 43 Tex. Crim. 15, 63 S. W. 322.

**9. Barr v. State** (Miss.), 23 So. 628; *Hawks v. Baker*, 6 Greenl. (Me.) 72, 19 Am. Dec. 191.

**10. Tomlinson v. Hammond**, 8 Iowa 40; *Older v. Quinn*, 89 Iowa 445, 56 N. W. 660.

**11. See article "ARBITRATION AND AWARD," Vol. I.**

**12. See articles "CROSS-EXAMINATION," Vol. III; "DIRECT EXAMINATION," Vol. IV; "EXAMINATION OF WITNESSES," Vol. V; and the Index of this work, titles "Examination of Witnesses," "Witnesses."**

**13. Alabama.** — *Louisville, etc. R. Co. v. Barker*, 96 Ala. 435, 11 So. 453; *Riley v. State*, 88 Ala. 193, 7 So. 149; *Gayle v. Bishop*, 14 Ala. 552; *Newbrich v. Dugan*, 61 Ala. 251.

*Arkansas.* — *Wallace v. State*, 28

on appeal except in case of manifest abuse and misuse thereof.<sup>14</sup>

(2.) **Time When Witness May Be Recalled.**—The re-examination of a witness before he leaves the stand,<sup>15</sup> or before,<sup>16</sup> or after the evidence is closed,<sup>17</sup> or before the argument has been concluded,<sup>18</sup> or after a cause has been summed up and the jury charged,<sup>19</sup> has been held to rest within the sound discretion of the trial court, and the judgment will not be reversed unless there has been a clear abuse of this discretion.

(3.) **Scope and Extent of Examination.**—(A.) **EXPLANATION OF FORMER TESTIMONY.**—Where it becomes necessary in the interest of justice a party will usually be allowed, in the discretion of the court, to

Ark. 531; *Burr v. Daugherty*, 21 Ark. 559; *Smith v. Childress*, 27 Ark. 328.

*Colorado.*—*Schaefer v. Gidea*, 3 Colo. 15.

*Georgia.*—*Central, etc. R. Co. v. Duffey*, 116 Ga. 346, 42 S. E. 510.

*Illinois.*—*Anderson Transfer Co. v. Fuller*, 174 Ill. 221, 51 N. E. 251, *affirming* 73 Ill. App. 48; *United Breweries Co. v. O'Donnell*, 124 Ill. App. 24, judgment *affirmed*, 221 Ill. 334, 77 N. E. 547.

*Indiana.*—*Nixon v. Beard*, 111 Ind. 137, 12 N. E. 131; *Killian v. Eigemann*, 57 Ind. 480.

*Iowa.*—*Sweet v. Wright*, 57 Iowa 510, 10 N. W. 870.

*Kentucky.*—*McQueen v. Com.*, 28 Ky. L. Rep. 20, 88 S. W. 1047; *Rhodes v. Com.*, 10 Ky. L. Rep. 722; *Adams v. Louisville, etc. R. Co.*, 82 Ky. 603.

*Louisiana.*—*State v. Baker*, 30 La. Ann. 1134.

*Maryland.*—*Brown v. State*, 72 Md. 468, 20 Atl. 186.

*Minnesota.*—*Keating v. Brown*, 30 Minn. 9, 13 N. W. 909; *Lynd v. Pickett*, 7 Minn. 184, 82 Am. Dec. 79.

*Missouri.*—*State v. Hamilton*, 55 Mo. 520; *Bailey v. Chapman*, 41 Mo. 536; *State v. Fitzgerald*, 130 Mo. 407, 32 S. W. 1113; *Johnston v. Mason*, 27 Mo. 511.

*New York.*—*Treadwell v. Stebbins*, 6 Bosw. (19 N. Y. Super.) 538; *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122; *Doolittle v. Gambee*, 88 Hun 364, 34 N. Y. Supp. 861; *Breidert v. Vincent*, 1 E. D. Smith 542.

*North Carolina.*—*State v. Gooch*, 94 N. C. 987; *State v. Weaver*, 35 N. C. (13 Ired. L.) 491; *Barton v. Morphis*, 15 N. C. (4 Dev. L.) 240.

*Ohio.*—*The C. & M. V. R. Co. v. Thompson*, 21 Ohio C. C. 778, 12 Ohio C. Dec. 326.

*Texas.*—*Pierson v. State*, 18 Tex. App. 524; *Haney v. Clark*, 65 Tex. 93; *Darter v. State*, 39 Tex. Crim. 40, 44 S. W. 850.

*Virginia.*—*Burke v. Shaver*, 92 Va. 345, 23 S. E. 749.

**Court May Recall Witness on Its Own Motion.**—*Upton v. State*, 48 Tex. Crim. 289, 88 S. W. 212.

14. *Anderson Trans. Co. v. Fuller*, 174 Ill. 221, 51 N. E. 251, *affirming* judgment, 73 Ill. App. 48; *Smith v. Childress*, 27 Ark. 328; *Burr v. Daugherty*, 21 Ark. 559; *Schaefer v. Gildea*, 3 Colo. 15; *The C. & M. V. R. Co. v. Thompson*, 21 Ohio C. C. 778, 12 Ohio C. Dec. 326.

**No Abuse of Discretion** in allowing commonwealth attorney to recall an accused and prove by him that he had been in the penitentiary. *McQueen v. Com.*, 28 Ky. L. Rep. 20, 88 S. W. 1047.

15. *Sheldon v. Wood*, 2 Bosw. (15 N. Y. Super.) 267.

16. *Carroll v. State*, 3 Humph. (Tenn.) 315; *Chicago City R. Co. v. Carroll*, 206 Ill. 318, 68 N. E. 1087, *affirming* 102 Ill. App. 202.

17. *Sutton v. Walters*, 118 N. C. 495, 24 S. E. 357; *Neindorff v. Manhattan R. Co.*, 4 App. Div. 46, 38 N. Y. Supp. 690; *Upton v. State*, 48 Tex. Crim. 289, 88 S. W. 212.

18. *Reyes v. State* (Tex. Crim.), 102 S. W. 1156; *Norris v. State* (Tex. Crim.), 64 S. W. 1044; *Lister v. State*, 3 Tex. App. 17; *Keller v. Alexander*, 24 Tex. Civ. App. 186, 58 S. W. 637.

19. *Freleigh v. State*, 8 Mo. 606; *Witherspoon v. Cain*, Walk. (Miss.) 407; *People v. Reilly*, 49 App. Div.

recall a witness for the purpose of bringing out an explanation of his former testimony,<sup>20</sup> but this will not be permitted especially after a conference by the witness with the counsel of the party calling him where it appears that the witness sought to be recalled, testified to the same fact in the same way both on direct and cross-examination.<sup>21</sup>

(B.) CORRECTION OF FORMER TESTIMONY.—Although it is usually said to be discretionary with the trial court to allow a witness to be recalled to correct previous testimony,<sup>22</sup> the privilege is seldom denied where a witness through forgetfulness or inadvertence misstates a fact, and seeks to correct the same.<sup>23</sup> And even where a witness has wilfully testified falsely, he may be recalled, in the discretion of the court, upon signifying a desire to make reparation and allowed to correct his former testimony,<sup>24</sup> but not, it seems,

218, 63 N. Y. Supp. 18, *affirmed*, 164 N. Y. 600, 59 N. E. 1128.

20. *Robbins v. Springfield*, etc. R. Co., 165 Mass. 30, 42 N. E. 334; *State v. Rorabacher*, 19 Iowa 154; *Plumb v. Curtis*, 66 Conn. 154, 33 Atl. 998; *Dennehy v. O'Connell*, 66 Conn. 175, 33 Atl. 920; *Piehl v. Piehl*, 138 Mich. 515, 101 N. W. 623.

In *State v. Reed*, 89 Mo. 168, 1 S. W. 225, a state's witness was asked on cross-examination, if he had not on a former occasion made statements, giving them in full, contradictory of his evidence on the witness stand. Upon his replying in the negative, the defendant called witnesses who testified that he had made the alleged contradictory statements. The state was allowed to recall the witness, to give his version of what was said by him.

**Question Calling for Explanation Must Be Definite.**—In *Gibson v. Burlington*, etc. R. Co., 107 Iowa 596, 78 N. W. 190, a witness was recalled and a question asked of him by counsel as follows: "I asked you a question the other day, and it appears there is some misunderstanding about that?" This was objected to "as indefinite," the objection was sustained. This ruling was complained of. The court said "If the proposed explanation was material or relevant, the fact should have been indicated, at least by pointing out the testimony to which the question referred."

21. *Meakim v. Anderson*, 11 Barb. (N. Y.) 215.

22. *Faust v. United States*, 163 U. S. 452; *Rhodes v. Lowry*, 54 Ala. 4; *Miller v. Hartford F. Ins. Co.*, 70 Iowa 704, 29 N. W. 411; *Central*, etc. R. Co. v. *Duffey*, 116 Ga. 346, 42 S. E. 510; *Chicago*, etc. R. Co. v. *Walsh*, 136 Ill. App. 73.

**Discretion Not Controlled Unless Manifestly Abused.**—*Central*, etc. R. Co. v. *Duffey*, 116 Ga. 346, 42 S. E. 510; *Michigan*, etc. R. Co. v. *Anderson*, 20 Mich. 244.

**Discretion Abused** in refusing to allow correction of the testimony. See *State v. Coats*, 174 Mo. 396, 74 S. W. 864, 872; *State v. Mays*, 24 S. C. 190.

23. *Walker v. Walker*, 14 Ga. 242; *Jesse v. State*, 20 Ga. 156; *Dunn v. Pipes*, 20 La. Ann. 276; *Blake v. Stoddard*, 107 Mass. 111; *Erickson v. Milwaukee*, etc. R. Co., 93 Mich. 414, 53 N. W. 393; *Moses v. Ela*, 43 N. H. 557, 82 Am. Dec. 175.

24. Although a witness in her direct examination may deny all knowledge of any fact or circumstance which tends to prove the particular allegation on which the defense rests, yet, if she afterwards confesses that she testified falsely, or suppressed the truth, and signifies her willingness to make reparation, the party examining her will, upon motion, be permitted to recall her for the purpose of further testimony; and if it appear that the party had no knowledge of what the witness knew until she makes this confession, the order will be sus-

according to the general rule where no such desire is signified.<sup>25</sup>

(C.) **RESTATEMENT OF FORMER TESTIMONY.**—(a.) *In General.*—The allowance or disallowance of questions addressed to a witness on re-examination, for the purpose of obtaining a repetition of some part of his former testimony, is a matter within the sound discretion of the court,<sup>26</sup> and therefore not subject to review, unless a palpable abuse of the discretion appears.<sup>27</sup> It has been said that the court may well refuse to permit the re-examination of a witness where the sole purpose is to elicit a repetition of former testimony,<sup>28</sup> but if a witness is recalled to rebut an opponent's evidence the judgment will not be reversed, because the witness may have repeated substantially some of his testimony in chief.<sup>29</sup>

(b.) *To Settle Disagreement as to Former Testimony.*—A party may be allowed to recall and re-examine a witness to settle a contro-

tained upon the ground of newly discovered evidence. *Rice v. Rice* (N. J. Eq.), 23 Atl. 946.

25. In *State v. Nauert*, 6 Mo. App. 596, it was held that where a witness has just sworn that certain property was worth \$2,000, he cannot be again introduced for the purpose of proving that at the same time the property was worth but \$300. The court will not knowingly permit a witness to perjure himself.

26. *Stern v. Stanton*, 184 Pa. St. 468, 39 Atl. 404; *Green v. Ford*, 35 Md. 82.

27. *Stern v. Stanton*, 184 Pa. St. 468, 39 Atl. 404.

It is not an abuse of discretion to refuse to permit a witness to be recalled to make an additional statement in regard to a matter about which he had been interrogated, but could give no definite reply when he was first on the stand. *Bonnet v. Glatfeldt*, 24 Ill. App. 533, *affirmed*, 120 Ill. 166, 11 N. E. 250.

In California where testimony brought out on reexamination is an unnecessary repetition, and such re-examination indicated a disposition on the part of the examiner to emphasize the testimony of the witness upon a particular subject, error can not be predicated upon a refusal to sustain an objection to such testimony since under the code the matter is left to the discretion of the trial court. *People v. McNamara*, 94 Cal. 509, 29 Pac. 953.

28. *United States v. Hill v. Dunklee*, 1 Mac. A. Pat. Cas. 475,

12 Fed. Cas. No. 6,489; *Collins v. Johnson*, Hempst. 279, 6 Fed. Cas. No. 3,015a.

*Alabama.*—*Phoenix Ins. Co. v. Moog*, 73 Ala. 284, 56 Am. Rep. 31.

*Indiana.*—*Morehouse v. Heath*, 99 Ind. 509.

*Kansas.*—*St. Louis, etc. R. Co. v. Vance*, 9 Kan. App. 565, 58 Pac. 233.

*Missouri.*—*Atchison v. The Dr. Franklin*, 14 Mo. 63.

*New York.*—*Hughes v. Mulvey*, 1 Sandf. (3 N. Y. Super.) 92; *Ordronaux v. Helie*, 3 Sandf. Ch. 512.

**Examination for Purpose of Reducing Testimony to Writing.**—It is not error to refuse to allow a party to reexamine a witness for the purpose of taking down his testimony, when he had neglected to do so on his former examination. *Jesse v. State*, 20 Ga. 156.

**Reserving Right to Recall** a party cannot reserve the right to recall a witness without the consent of the opposite party, unless so ordered for cause shown. *Ordronaux v. Helie*, 3 Sandf. Ch. (N. Y.) 512.

**In the Court of Claims** where a party obtains leave to reexamine his witnesses on a specified point, he cannot reexamine them on a second point as to which they have been previously interrogated, even though the case has been remanded for further evidence on the second point. He must call new witnesses as to it. *Sevier v. United States*, 7 Ct. Cl. 387.

29. *State v. Johnson*, 116 La. 30, 40 So. 521.

versy between counsel or jurymen as to the witness' testimony,<sup>30</sup> but this is not a privilege to be claimed as a matter of right;<sup>31</sup> in fact it has been held to be a dangerous practice, and ought to be allowed with great caution, and not at all where is reasonable ground to suspect the fairness of the witness.<sup>32</sup>

(D.) EXAMINATION AS TO NEW MATTER. — It is generally held to be within the discretion of the court to allow a party introducing a witness to recall and re-examine him as to additional facts, which discretion will not be controlled when manifestly abused;<sup>33</sup> but the privilege is seldom denied, where a matter has been overlooked by counsel in the examination of the witness,<sup>34</sup> or where the occasion

30. *Snodgrass v. Com.*, 89 Va. 679, 17 S. E. 238; *Upton v. State*, 48 Tex. Crim. 289, 88 S. W. 212.

In Texas the statute leaves it with the jury to request the recalling and reexamination of a witness in case of disagreement between counsel, and in the absence of such request there is no error in refusing to recall a witness on request of counsel. *Wilson v. State*, 37 Tex. Crim. 373, 35 S. W. 390, 38 S. W. 624, 39 S. W. 373; *Scott v. State* (Tex. Crim.), 81 S. W. 47. Article 615 Code of Criminal Procedure reads as follows: "If the jury disagree as to the statement of any particular witness, they may, upon applying to the court, have such witness brought upon the stand, and he shall be directed by the judge to detail his testimony in respect to the particular points of disagreement, and no other, and he shall be further instructed to make his statement in the language used upon his examination as nearly as he can." *Campbell v. State*, 42 Tex. 591. It was held in this case that while every departure from the strict letter of this article may not require a reversal of the judgment, it will be required, when, as here, there was a very palpable failure to conform to the directions. It did not appear that the jury had indicated any particular statement of the witness about which they disagreed and the witness was reexamined, not with a view of his reiterating a previous statement, but, it would seem, in order to permit him to testify as to what he had previously attempted to convey to the minds of the jury.

31. *State v. Ruhl*, 8 Iowa 447.

32. *Bigelow v. Young*, 30 Ga. 121.

33. *United States*. — *United States v. Wilson*, Baldw. 78, 28 Fed. Cas. No. 16,730.

*California*. — *People v. Moan*, 65 Cal. 532, 4 Pac. 545.

*Georgia*. — *Dixon v. State*, 116 Ga. 186, 42 S. E. 357.

*Illinois*. — *Chicago City R. Co. v. Carroll*, 206 Ill. 318, 68 N. E. 1087, affirming 102 Ill. App. 202.

*Maryland*. — See *New York, etc. R. Co. v. Jones*, 94 Md. 24, 50 Atl. 423.

*Michigan*. — *White v. Bailey*, 10 Mich. 155.

*North Carolina*. — *In re Abbee's Will*, 146 N. C. 273, 59 S. E. 700; *Sutton v. Waters*, 118 N. C. 495, 24 S. E. 357; *Olive v. Olive*, 95 N. C. 485.

*Pennsylvania*. — *Curren v. Connerly*, 5 Binn. 488.

*Texas*. — *Jenn v. Spencer*, 32 Tex. 657.

It is not an abuse of discretion to refuse to allow a witness to be recalled where he had been fully examined and testified that he knew nothing further, no oversight of counsel, or misrecollection or forgetfulness of the witness being suggested as a reason for recalling him. *Merriman v. Ames*, 26 Minn. 384, 4 N. W. 620.

In *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711, which was a trial for murder, the court directed that each witness should be fully examined to the extent of his knowledge upon all points of inquiry, and not be examined in part only at one stage of the trial, with a view to being afterwards recalled on other points.

34. *Carter v. Edmonds*, 80 Va.

for additional testimony has arisen, since his former examination.<sup>35</sup>

(4.) **Recalling Witnesses in Rebuttal.**—It is generally said to be discretionary with the trial court to allow a witness to be recalled for the purpose of rebutting testimony brought out by the opposing party,<sup>36</sup> although a party is seldom denied the privilege of so doing.<sup>37</sup>

(5.) **Recalling Witness for Examination by Court.**—For a discussion of this subject reference is made to another part of this work.<sup>38</sup>

(6.) **Recalling Witness for Purpose of Impeachment.**—Whether a witness may be recalled and re-examined with a view to his contradiction is a matter within the discretion of the trial court.<sup>39</sup> As

58; *Eldridge v. Com.*, 21 Ky. L. Rep. 1087, 54 S. W. 10.

35. *Birmingham R. & E. Co. v. Ellard*, 135 Ala. 433, 33 So. 276; *Mississippi, etc. R. Co. v. Gill*, 66 Miss. 39, 5 So. 393; *Collins v. Johnson*, 1 Hempst. 279, 6 Fed. Cas. No. 3,015a; *Bone v. Ingram*, 27 Ga. 382; *Jaspers v. Lano*, 17 Minn. 296.

36. *State v. Murphy*, 118 Mo. 7, 25 S. W. 95; *Coppersmith v. Mound City R. Co.*, 51 Mo. App. 357; *Girault v. Adams*, 61 Md. 1; *Upton v. State*, 48 Tex. Crim. 289, 88 S. W. 212.

37. *Dunham v. Forbes*, 25 Tex. 23; *Rust v. Shackelford*, 47 Ga. 538; *Osborne v. O'Reilly*, 34 N. J. Eq. 60; *State v. Johnson*, 116 La. 30, 40 So. 521.

In *Brown v. Finney*, 67 Pa. St. 214, a witness for plaintiff testified that what he said was all that had occurred at the making of the alleged contract; but defendant testified that he had required security before he would close the contract. It was held proper to examine the witness in rebuttal to contradict the defendant as to the security; since if what was testified to by defendant did not take place, that it did not, could not have been given on the examination in chief. But see *Coppersmith v. Mound City R. Co.*, 51 Mo. App. 357.

38. See "EXAMINATION OF WITNESSES," Vol. V, p. 382, n. 16.

39. *Alabama.*—*Pitman v. State*, 148 Ala. 612, 42 So. 993; *Crawford v. State*, 112 Ala. 1, 12 So. 214; *Richmond, etc. R. Co. v. Vance*, 93 Ala. 144, 9 So. 574, 30 Am. St. Rep. 41; *Bell v. State*, 74 Ala. 420.

*Illinois.*—*Hauser v. People*, 210 Ill. 253, 71 N. E. 416.

*Iowa.*—*State v. Ruhl*, 8 Iowa 447; *Huff v. Aultman*, 69 Iowa 71, 28 N. W. 440, 58 Am. Rep. 213.

*South Dakota.*—*Ashton v. Ashton*, 11 S. D. 610, 79 N. W. 1001.

*Tennessee.*—*Lawless v. State*, 4 Lea 173.

*Texas.*—*Clay v. State*, 40 Tex. Crim. 593, 51 S. W. 370; *Garza v. State*, 3 Tex. App. 286.

Where counsel's attention has been called to the rule that a witness cannot be called to contradict or impeach a witness in respect to matters occurring out of court, unless the attention of the witness is first called to the time and place of the alleged statement or declaration, and he is afforded an opportunity for explanation, it is no abuse of discretion to refuse to allow counsel, an objection having been sustained to the impeaching evidence, to recall the witness for the purpose of laying the proper foundation for the impeaching testimony. *Aneals v. People*, 134 Ill. 401, 25 N. E. 1022.

**Not a Sufficient Ground for Reversal** that the trial court refused to permit a party to recall a witness for the purpose of laying a foundation for his impeachment, where it appears that all of the facts in the testimony sought to be impeached have been established by other witnesses or admitted by counsel (*People v. Shaw*, 111 Cal. 171, 43 Pac. 593), or where it appears that the witness sought to be impeached has testified fully and that several witnesses have sworn to statements made by him as being contradictory



a matter of practice the privilege is seldom denied.<sup>40</sup> But where in a criminal case a state's witness has not testified to any affirmative fact hurtful to the state, he cannot be recalled solely for the purpose of laying a foundation for his contradiction.<sup>41</sup>

b. *Redirect.* — (1.) *Scope and Extent.* — (A.) *IN GENERAL.* — The purpose of a redirect examination is usually to elicit fuller evidence in respect to matters which have been the subject of the cross-examination,<sup>42</sup> and it is generally said to be confined exclusively

to his testimony. *Hauser v. People*, 210 Ill. 253, 71 N. E. 416.

**Proper Time To Lay Foundation Is Upon Cross-Examination.** — Although the proper time to lay a foundation for impeachment is upon the cross-examination of the witness, if from any cause such foundation has not been laid upon cross-examination, the court may, in its discretion, allow the witness to be recalled for that purpose. *Ashton v. Ashton*, 11 S. D. 610, 79 N. W. 1001.

40. *Ross v. Hayne*, 3 G. Gr. (Iowa) 211; *Huff v. Aultman*, 69 Iowa 71, 28 N. W. 440, 58 Am. Rep. 213; *State v. Nixon*, 47 La. Ann. 836, 17 So. 303; *State v. Goodbier*, 48 La. Ann. 770, 19 So. 755; *Little v. Com.*, 25 Gratt. (Va.) 921.

**Error To Refuse To Allow an Accused To Recall a State's Witness** for the purpose of laying a predicate for the introduction of evidence to prove that he had made contradictory statements. *Harvey v. State*, 37 Tex. 365.

**Party Recalling Opposing Witness Does Not Make the Witness His Own.** — Although a party may, after cross-examining an opposing witness, by permission of the court, recall and reexamine him to lay a predicate for his impeachment, he does not by so doing make the witness his own. *State v. Jones*, 64 Mo. 391; *Bennett v. State*, 28 Tex. App. 539, 13 S. W. 1005.

41. *Williford v. State*, 36 Tex. Crim. 414, 37 S. W. 761.

42. *Alabama.* — *Kroell v. State*, 139 Ala. 1, 36 So. 1025.

*Arkansas.* — *Standard Life & Acc. Ins. Co. v. Schmaltz*, 66 Ark. 588, 53 S. W. 49, 74 Am. St. Rep. 112.

*California.* — *DeWitt v. Floriston Pulp & Paper Co.*, 7 Cal. App. 774,

96 Pac. 397; *People v. French*, 69 Cal. 169, 10 Pac. 378.

*Illinois.* — *Mayer v. Brensinger*, 180 Ill. 110, 54 N. E. 159, 73 Am. St. Rep. 196, *affirming* 74 Ill. App. 475.

*Indiana.* — *Walker v. State*, 136 Ind. 663, 36 N. E. 356.

*Iowa.* — *Leipird v. Stotler*, 97 Iowa 169, 66 N. W. 150; *Spaulding v. Chicago*, etc. R. Co., 98 Iowa 205, 67 N. W. 227; *Hofarce v. Monticello*, 128 Iowa 239, 103 N. W. 488; *Houseman v. Belle Plaine*, 124 Iowa 510, 100 N. W. 343; *State v. McIntosh*, 109 Iowa 209, 80 N. W. 349.

*Maine.* — *Pelky v. Hodgdon*, 102 Me. 426, 67 Atl. 218.

*Maryland.* — *Archer v. State*, 45 Md. 33.

*Massachusetts.* — *Com. v. Wilson*, 1 Gray 337; *Baxter v. Abbott*, 7 Gray 71; *Dole v. Wooldredge*, 142 Mass. 161, 7 N. E. 832; *Com. v. Bent*, 16 Gray 239; *Young v. Mason*, 8 Pick. 551.

*Michigan.* — *Daniels v. Dayton*, 49 Mich. 137, 13 N. W. 392; *Hall v. Moriarty*, 57 Mich. 345, 24 N. W. 96.

*Missouri.* — *State v. Kaiser*, 124 Mo. 651, 28 S. W. 182.

*Nebraska.* — *Bierbower v. Polk*, 17 Neb. 268, 22 N. W. 698.

*North Carolina.* — *State v. Banner*, 149 N. C. 519, 63 S. E. 84.

*New Hampshire.* — *McIlvaine v. Wilkins*, 12 N. H. 474.

*New York.* — *Fuller v. Jamestown*, etc. R. Co., 75 Hun 273, 26 N. Y. Supp. 1078 judgment *affirmed*, 148 N. Y. 741, 42 N. E. 1093; *People v. Noblett*, 96 App. Div. 293, 89 N. Y. Supp. 181, judgment *affirmed*, 184 N. Y. 612, 77 N. E. 1193; *Thiry v. Taylor Brew. & M. Co.*, 37 App. Div. 391, 56 N. Y. Supp. 85.

*Ohio.* — *Moran v. State*, 11 Ohio C. C. 464.

to such facts,<sup>43</sup> although there is authority holding that a witness may be examined on redirect examination as to material facts, not

*Rhode Island.*—*State v. Williams*, 6 R. I. 207.

*South Carolina.*—*State v. Hicks*, 20 S. C. 341.

*Texas.*—*Hoxie v. Sillman* (Tex. Civ. App.), 29 S. W. 913; *Mitchell v. State*, 36 Tex. Crim. 278, 33 S. W. 367, 36 S. W. 456; *Lahue v. State*, 51 Tex. Crim. 159, 101 S. W. 1008; *Drye v. State* (Tex. Crim.), 55 S. W. 65.

*Vermont.*—*Bellows v. Sowles*, 59 Vt. 63, 7 Atl. 542.

*Washington.*—*Dutcher v. Howard*, 15 Wash. 693, 47 Pac. 28 (redirect examination may embrace all matters gone into on cross-examination, though testimony as to a part of such matters on direct examination was stricken out at the instance of the cross-examiner).

**Examination as to Matters Volunteered on Cross-Examination.** The fact that a witness on cross-examination testifies as to a matter not called for by the cross-examiner's questions, and the party whose witness he is fails to move for the exclusion of such testimony, does not render permissible redirect examination as to such matter. *Miller v. Illinois*, etc. R. Co., 89 Iowa 567, 57 N. W. 418. See also *Levels v. St. Louis*, etc. R. Co., 196 Mo. 606, 94 S. W. 275.

43. *England.*—*Prince v. Samo*, 7 Ad. & El. 627, 34 E. C. L. 183; *The Queen's Case*, 2 Brod. & B. 297, 6 E. C. L. 120; *Rex v. Beezley*, 4 Car. & P. 220, 19 E. C. L. 353.

*Alabama.*—*Campbell v. State*, 23 Ala. 44.

*Connecticut.*—*Driscoll v. Ansonia*, 73 Conn. 743, 47 Atl. 718.

*Illinois.*—*Finley v. West Chicago St. R. Co.*, 90 Ill. App. 368.

*Indiana.*—*Griffith v. State*, 140 Ind. 163, 39 N. E. 440.

*Louisiana.*—*State v. Denis*, 19 La. Ann. 119.

*Massachusetts.*—*Dutton v. Woodman*, 9 Cush. 255, 57 Am. Dec. 46.

*Michigan.*—*People v. Pyckett*, 99 Mich. 613, 58 N. W. 621.

*Nebraska.*—*George v. State*, 61

Neb. 669, 85 N. W. 840; *Schlencker v. State*, 9 Neb. 241, 1 N. W. 857.

*New Jersey.*—*State v. Gedicke*, 43 N. J. L. 86.

*New York.*—*Brown v. Barse*, 3 App. Div. 257, 38 N. Y. Supp. 400  
*Oklahoma.*—*Robinson v. Peru Plow & W. Co.*, 1 Okla. 140, 31 Pac. 988.

*Pennsylvania.*—*Com. v. Campbell*, 31 Pa. Super. 9.

*Wisconsin.*—*Schaser v. State*, 36 Wis. 429.

Where it appears from the cross-examination of a character witness that he based the whole of his testimony in his direct examination upon his personal relations and private dealings with the man about whom he testified, he will not be permitted on redirect examination after application has been made to strike out the evidence, to amplify the testimony given on direct examination. *State v. Stewart* (Del.), 67 Atl. 786.

Where in a criminal case a state's witness has testified as to defendant's bad character and on cross-examination that he was reputed to be profane and a drinking man, on redirect examination it cannot be shown that he was reputed dishonest. *Robinson v. State*, 84 Ind. 452.

**Where a Question Has Been Answered Adversely to Examiner on Cross-Examination**, there was no error in refusing redirect examination of the witness, since the testimony sought to be introduced was not in explanation or avoidance of anything obtained by cross-examination, but was an attempt to take up again the line of direct examination and carry it to a further point. *Ranney v. St. Johnsbury R. Co.*, 67 Vt. 594, 32 Atl. 810.

**Compare** *State v. Robinson*, 47 Iowa 489, holding that on the redirect examination of a state's witness, the accused may properly object to testimony partially elicited by himself, if the same has a tendency to mislead the jury as to the time or place of the transactions under consideration.

before elicited on direct examination from inadvertence or ignorance of their being within the witness' knowledge.<sup>44</sup>

(B.) COURT'S DISCRETION. — It is sometimes held to rest within the discretion of the trial court to allow redirect examination as to matters not referred to in either the direct<sup>45</sup> or cross-examination.<sup>46</sup>

(2.) **Explanation of Testimony on Cross-Examination.** — (A.) IN GENERAL. — The cross-examination of a witness may open the door for the admission, on redirect examination, of testimony necessary to explain the evidence elicited upon cross-examination, and to correct or repel any wrong impressions or inferences which may arise from matter drawn out on such cross-examination,<sup>47</sup> although the

44. *State v. Duncan*, 8 Rob. (La.) 562; *State v. Scott*, 24 La. Ann. 161. See also *Finley v. West Chicago St. R. Co.*, 90 Ill. App. 368; *Com. v. Campbell*, 31 Pa. Super. 9.

On redirect examination of a state's witness it is competent to ask him if he had not talked with defendant in jail, to show relationship of the witness and defendant, no effort being apparently made to impeach the witness. *State v. Stukes*, 73 S. C. 386, 53 S. E. 643.

45. *England. — Compare* *Giles v. Powell*, 2 Car. & P. 259, 12 E. C. L. 120.

*California. — People v. Majoine*, 144 Cal. 303, 77 Pac. 952.

*Connecticut. — Hoadley v. Seward & Son Co.*, 71 Conn. 640, 42 Atl. 997.

*Georgia. — Augusta, etc. R. Co. v. Randall*, 85 Ga. 297, 11 S. E. 706.

*Illinois. — Concord Apart. House Co. v. O'Brien*, 228 Ill. 360, 81 N. E. 1038; *City of Springfield v. Dalby*, 139 Ill. 34, 29 N. E. 860; *Finley v. West Chicago St. R. Co.*, 90 Ill. App. 368.

*Kentucky. — Chesapeake, etc. R. Co. v. Lynch*, 28 Ky. L. Rep. 476, 89 S. W. 517.

*Louisiana. — State v. Lyons*, 113 La. 959, 37 So. 890.

*Maine. — Caven v. Bodwell Granite Co.*, 99 Me. 278, 59 Atl. 285.

*Maryland. — Blake v. Stump*, 73 Md. 160, 20 Atl. 788, 10 L. R. A. 103.

*Massachusetts. — Beal v. Nichols*, 2 Gray 262.

*Michigan. — Hemmens v. Bentley*, 32 Mich. 89.

*Minnesota. — See* *First Nat. Bank v. Strait*, 75 Minn. 396, 78 N. W. 101.

*Missouri. — Brown v. Burrus*, 8 Mo. 26.

*Nebraska. — Schlencker v. State*, 9 Neb. 241, 1 N. W. 857. *Compare*

*Collins v. State*, 46 Neb. 37, 64 N. W. 432.

*New York. — Manufacturers' & Traders' Bank v. Koch*, 105 N. Y. 630, 12 N. E. 9; *Gleason v. Metropolitan St. R. Co.*, 99 App. Div. 209, 90 N. Y. Supp. 1025; *Horowitz v. Hamburg-American Packet Co.*, 18 Misc. 24, 41 N. Y. Supp. 54. *Compare* *Clark v. Vorce*, 15 Wend. 193, 30 Am. Dec. 53.

*South Dakota. — Comeau v. Hurley*, 115 N. W. 521.

*Utah. — Shafer v. Russell*, 28 Utah 444, 79 Pac. 559.

*Vermont. — See* *Hyde v. Swanton*, 72 Vt. 242, 49 Atl. 790.

*Virginia. — Howell v. Com.*, 5 Gratt. 664.

**Exercise of Discretion Not Reviewable on Appeal** unless an abuse appears. *Shafer v. Russell*, 28 Utah 444, 79 Pac. 559; *Hoadley v. Seward & Son Co.*, 71 Conn. 640, 42 Atl. 997.

46. *Jacobs v. United States*, (C. C. A.) 161 Fed. 694; *Brown v. Burus*, 8 Mo. 26; *City of Springfield v. Dalby*, 139 Ill. 34, 29 N. E. 860; *Kidd v. State*, 101 Ga. 528, 28 S. E. 990; *Gleason v. Metropolitan St. R. Co.*, 99 App. Div. 209, 90 N. Y. Supp. 1025; *George v. State*, 61 Neb. 669, 85 N. W. 840; *Schlencker v. State*, 9 Neb. 241, 1 N. W. 857.

47. *England. — Rex v. Beezley*, 4 Car. & P. 220, 19 E. C. L. 353; *The Queen's Case*, 2 Brod. & B. 297, 6 E. C. L. 112, 120; *Reg. v. St. George*, 9 Car. & P. 483, 38 E. C. L. 193; *Rex v. Simmons*, 1 Car. & P. 84, 11 E. C. L. 322; *Rex v. Bodle*, 6 Car. & P. 186, 25 E. C. L. 347; *Greville v. Chapman*, 5 Q. B. 731, 48 E. C. L. 730.

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evidence thus brought out might not have been admissible in the

*Car Co. v. Harkins*, 55 Fed. 932, 5 C. C. A. 326, 17 U. S. App. 22; *United States v. 18 Barrels of High Wines*, 8 Blatchf. 478.

*Alabama*.—*Southern R. Co. v. Crowder*, 130 Ala. 256, 30 So. 529; *Wadsworth v. Dunnam*, 117 Ala. 661, 23 So. 699; *Jones v. State*, 104 Ala. 30, 16 So. 135; *Campbell v. State*, 23 Ala. 44; *Thomas v. State*, 103 Ala. 18, 16 So. 4.

*California*.—*People v. Corey* (Cal. App.), 97 Pac. 907; *Hewes v. Germain Fruit Co.*, 106 Cal. 441, 39 Pac. 853; *Robinson v. Dugan*, 35 Pac. 902.

*Connecticut*.—*Engel v. Conti*, 78 Conn. 351, 62 Atl. 210; *Nesbit v. Crosby*, 74 Conn. 554, 51 Atl. 550; *Lovejoy v. Isbell*, 73 Conn. 368, 47 Atl. 682; *Mechanics' Bank v. Woodward*, 73 Conn. 470, 47 Atl. 762; *Sayles v. Fitz Gerald*, 72 Conn. 391, 44 Atl. 733; *Chatfield v. Bunnell*, 69 Conn. 511, 37 Atl. 1074.

*Florida*.—*Marlow v. State*, 49 Fla. 7, 38 So. 653.

*Georgia*.—*Southern R. Co. v. Gentry*, 128 Ga. 429, 57 S. E. 703.

*Illinois*.—*Leek v. People*, 118 Ill. App. 514; *Morton v. Zwierzkowski*, 192 Ill. 328, 61 N. E. 413, *affirming* 91 Ill. App. 462; *Mayer v. Brensinger*, 180 Ill. 110, 54 N. E. 159, 72 Am. St. Rep. 196, *affirming* 74 Ill. App. 475; *Illinois, etc. R. Co. v. Berry*, 81 Ill. App. 17.

*Indiana*.—*Strebin v. Lavengood*, 163 Ind. 478, 71 N. E. 494; *Joy v. Petty*, 3 Ind. App. 241, 29 N. E. 788; *Walker v. State*, 136 Ind. 663, 36 N. E. 356; *Parker v. State*, 136 Ind. 284, 35 N. E. 1105.

*Iowa*.—*State v. Rohn*, 119 N. W. 88; *State v. Bone*, 114 Iowa 537, 87 N. W. 507; *Kendall v. Abia*, 73 Iowa 241, 34 N. W. 833; *Walkley v. Clarke*, 107 Iowa 451, 78 N. W. 70; *Farmers', etc. Bank v. Young*, 36 Iowa 44.

*Louisiana*.—*State v. Lyons*, 113 La. 959, 37 So. 890; *State v. Duplechain*, 52 La. 448, 26 So. 1000.

*Maine*.—*Pelkey v. Hogdon*, 102 Me. 426, 67 Atl. 218.

*Maryland*.—*Baltimore Belt R. Co. v. Sattler*, 100 Md. 306, 59 Atl. 654; *Finch v. Mishler*, 100 Md. 458, 59

Atl. 1009; *Stoner v. Devilbliss*, 70 Md. 144, 16 Atl. 440.

*Massachusetts*.—*Com. v. Armstrong*, 158 Mass. 78, 32 N. E. 1032; *Com. v. Burton*, 183 Mass. 461, 67 N. E. 419; *Com. v. Carter*, 183 Mass. 221, 66 N. E. 716; *Com. v. Kennedy*, 136 Mass. 152; *Rumrill v. Ash*, 169 Mass. 341, 47 N. E. 1017; *Com. v. Wilson*, 1 Gray 337; *Reeve v. Dennett*, 141 Mass. 207, 6 N. E. 378.

*Michigan*.—*Rogers v. Fowler*, 151 Mich. 485, 115 N. W. 469; *People v. Hanifan*, 98 Mich. 32, 56 N. W. 1048; *Van Dusen v. Letellier*, 78 Mich. 492, 44 N. W. 572; *People v. Mills*, 94 Mich. 630, 54 N. W. 488; *Fowles v. Joslin*, 135 Mich. 333, 97 N. W. 790; *Feige v. Burt*, 124 Mich. 565, 83 N. W. 367.

*Minnesota*.—*Lindstrom v. Fitzpatrick*, 105 Minn. 331, 117 N. W. 441; *Mix v. Ege*, 67 Minn. 116, 69 N. W. 703.

*Missouri*.—*State v. Cochran*, 147 Mo. 504, 49 S. W. 558.

*Montana*.—*State v. McClellan*, 23 Mont. 532, 59 Pac. 924.

*Nebraska*.—*Wheeler v. State*, 79 Neb. 491, 113 N. W. 253; *Norfolk Nat. Bank v. Job*, 48 Neb. 774, 67 N. W. 781.

*New Hampshire*.—*Smith v. Morrill*, 75 N. H. 409, 52 Atl. 928; *State v. Saidell*, 70 N. H. 174, 46 Atl. 1083, 85 Am. St. Rep. 627.

*New Jersey*.—*Pullen v. Pullen* (N. J. Eq.), 12 Atl. 138; *Somerville, etc. R. Co. v. Doughty*, 22 N. J. L. 495.

*New York*.—*Stape v. People*, 85 N. Y. 390; *In re Spratt's Will*, 4 App. Div. 1, 38 N. Y. Supp. 329; *Richardson v. Wilkins*, 19 Barb. 510; *Caffi v. New York Cent. R. Co.*, 49 Misc. 620, 96 N. Y. Supp. 835; *Hayes v. Metropolitan St. R. Co.*, 84 N. Y. Supp. 271; *People v. Buchanan*, 145 N. Y. 1, 39 N. E. 846; *King v. Second Ave. R. Co.*, 75 Hun 17, 26 N. Y. Supp. 973.

*North Carolina*.—*State v. Orrell*, 75 N. C. 317.

*North Dakota*.—*State v. McGahey*, 3 N. D. 293, 55 N. W. 753.

*Oklahoma*.—*Veseley v. Engelkemeier*, 10 Okla. 290, 61 Pac. 924.

*Oregon.*—*State v. Doris*, 94 Pac. 44.

*Rhode Island.*—*State v. Farr*, 69 Atl. 5; *State v. Babcock*, 25 R. I. 224, 55 Atl. 685; *State v. Williams*, 6 R. I. 207.

*South Carolina.*—*State v. Chiles*, 44 S. C. 338, 22 S. E. 339.

*South Dakota.*—*Smith v. Mut. Fire Ins. Co.*, 21 S. D. 433, 113 N. W. 94; *Hebert v. Hebert*, 20 S. D. 85, 104 N. W. 911.

*Texas.*—*Favors v. State*, 20 Tex. App. 155; *Smith v. State* (Tex. Crim.), 106 S. W. 1161; *Brundige v. State*, 49 Tex. Crim. 596, 95 S. W. 527; *Lax v. State*, 46 Tex. Crim. 628, 79 S. W. 578; *Smith v. State*, 52 Tex. Crim. 344, 74 S. W. 556; *Merrell v. State* (Tex. Crim.), 65 S. W. 534; *Mulliner v. Shumake* (Tex. Civ. App.), 55 S. W. 983; *Fossett v. State*, 41 Tex. Crim. 400, 55 S. W. 497; *Jackson v. Missouri*, etc. R. Co., 23 Tex. Civ. App. 319, 55 S. W. 376; *Fitzpatrick v. State*, 37 Tex. Crim. 20, 38 S. W. 806; *Darnell v. State* (Tex. Crim.), 39 S. W. 370; *Hicks v. Hicks*, (Tex. Civ. App.), 26 S. W. 227; *Hoxie v. Siliman* (Tex. Civ. App.), 29 S. W. 913.

*Utah.*—*Smith v. Mine & S. Supply Co.*, 32 Utah 21, 88 Pac. 683.

*Virginia.*—*Martin's Admr. v. Richmond*, etc. R. Co., 101 Va. 406, 44 S. E. 695.

*Washington.*—*State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382; *Latimer v. Baker*, 25 Wash. 192, 64 Pac. 899.

*Wisconsin.*—*Norwegian Plow Co. v. Hanthorn*, 71 Wis. 529, 37 N. W. 825.

Where, in a criminal prosecution, a state's witness was asked on cross-examination as to whether he had had any trouble with defendant and answered, "Yes, in this way," the state had the right on redirect to show whether the trouble was a fight, a personal difficulty, or other kind of trouble, without going into the details. *Glass v. State*, 147 Ala. 50, 41 So. 727.

Where, in a will contest, a witness for contestant testified on direct examination as to the unsoundness of mind of testator, and on cross-examination that a brother of testator manifested the same char-

acteristics, it was error to exclude on redirect examination a question calling for an opinion as to the mental condition of the brother when he manifested such peculiarities. *Nichols v. Wentz*, 78 Conn. 429, 62 Atl. 610.

Where in an action for breach of promise to marry, plaintiff having testified that she considered herself defendant's wife, it was not error to permit her on re-examination to testify that she did not claim to be defendant's legal wife, no ceremony other than a religious ceremony having been performed. *Massucco v. Tomassi*, 78 Vt. 188, 62 Atl. 57.

**Reason for the Rule.**—If the tendency of evidence adduced on cross-examination is to contradict the witness, thereby casting upon him more or less discredit, it has an equal tendency to show that he may have erred in judgment,—may have fallen into an innocent mistake, and therefore redirect examination is essential. *Wadsworth v. Dunman*, 117 Ala. 661, 23 So. 699.

**Counsel Cannot Recite Witness' Evidence on Cross-Examination.** In the redirect examination of his own witness, counsel has no right to recite his understanding of the evidence given by witness on cross-examination, preliminary to having the witness explain his testimony. *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18.

**Privileged Communications.** Where a defendant is examined in his own behalf and refuses to answer certain questions because privileged communications are involved, on redirect examination he may testify as to the same for the purpose of explaining circumstances disclosed on cross-examination. *Lally v. Emery*, 79 Hun 560, 29 N. Y. Supp. 888.

**Cross-Examination Limited to Particular Purpose.**—Where in an action against a town for an injury occasioned by the insufficiency of a highway, a witness introduced by defendant was asked, on cross-examination, without objection, whether his team had not run off at the same place the day before the injury complained of occurred, and he answered that they did, and the counsel for plaintiff disclaimed all intention of using the fact, except for

first instance,<sup>48</sup> and although it may prejudice the case for the opposing party.<sup>49</sup>

(B.) MOTIVES OR REASONS FOR ACTS OR STATEMENTS DETAILED ON CROSS-EXAMINATION. — (a.) *In General*. — It is generally held proper to allow a witness on redirect examination to explain his motives or reasons for acts or statements detailed on cross-examination;<sup>50</sup> thus in a prosecution for rape where it appears from the cross-examination of prosecutrix that she made no outcry at the time of the crime,

the purpose of calling the mind of the witness with more certainty to the time when the injury happened to the plaintiff, — and the court instructed the jury that they must disregard that fact, except for the purpose specified, it was held that the defendant was not entitled to re-examine the witness in relation to the circumstances under which his team ran off the road. *Allen v. Hancock*, 16 Vt. 230.

48. *State v. Orrell*, 75 N. C. 317; *Wheeler v. State*, 79 Neb. 491, 113 N. W. 253; *Mayer v. Brensinger*, 180 Ill. 110, 54 N. E. 159, 72 Am. St. Rep. 196, affirming 74 Ill. App. 475; *Veseley v. Engelkemeier*, 10 Okla. 290, 61 Pac. 924.

49. *People v. Corey* (Cal. App.), 97 Pac. 907; *State v. McGahey*, 3 N. D. 293, 55 N. W. 753; *Martin's Admr. v. Richmond*, etc. R. Co., 101 Va. 406, 44 S. E. 695.

**Discretionary With Court** to allow a witness having alluded in cross-examination to a remark made by the party calling him, to explain on re-direct examination what the remark was, though derogatory to defendant. *Graves v. Santway*, 52 Hun 613, 6 N. Y. Supp. 892, judgment affirmed, 127 N. Y. 677, 28 N. E. 256.

50. *Alabama*. — *Sanders v. State*, 131 Ala. 1, 31 So. 564; *Campbell v. State*, 23 Ala. 44.

*California*. — *Hale Bros. v. Milliken*, 5 Cal. App. 344, 90 Pac. 365; *Yordi v. Yordi*, 6 Cal. App. 20, 91 Pac. 348; *People v. Darr*, 3 Cal. App. 50, 84 Pac. 457.

*Colorado*. — *Boles v. People*, 37 Colo. 41, 86 Pac. 1030.

*Illinois*. — *Wilson v. People*, 94 Ill. 299.

*Indiana*. — *Westbrook v. Aultman, Miller & Co.*, 3 Ind. App. 83, 28 N. E. 1011.

*Iowa*. — *State v. Rohn*, 119 N. W.

88; *State v. Maher*, 74 Iowa 82, 37 N. W. 5.

*Massachusetts*. — *Mulrey v. McDonald*, 124 Mass. 345. Compare *McCooe v. Dighton*, etc. R. Co., 173 Mass. 117, 53 N. E. 133.

*Michigan*. — *Taylor v. Taylor's Estate*, 138 Mich. 658, 101 N. W. 832.

*Missouri*. — *State v. Vickers*, 209 Mo. 12, 106 S. W. 999.

*Nebraska*. — *Craig v. State*, 78 Neb. 466, 111 N. W. 143; *Kay v. Noll*, 20 Neb. 380, 30 N. W. 269; *Yeoman v. State*, 21 Neb. 171, 31 N. W. 669; *Collins v. State*, 46 Neb. 37, 64 N. W. 432.

*New Hampshire*. — *Smith v. Morrill*, 71 N. H. 409, 52 Atl. 928.

*New Jersey*. — *Pullen v. Pullen* (N. J. Eq.), 12 Atl. 138.

*New York*. — *Uransky v. Dry Dock*, etc. R. Co., 7 N. Y. St. 395; *James v. Ford*, 16 Daly 126, 9 N. Y. Supp. 504; *Chellie v. Chapman*, 52 Hun 613, 7 N. Y. Supp. 78, judgment affirmed, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784.

*Texas*. — *Weaver v. State*, 46 Tex. Crim. 607, 81 S. W. 39, 65 S. W. 534; *Hicks v. Hicks* (Tex. Civ. App.), 26 S. W. 227; *International, etc. R. Co. v. Locke* (Tex. Civ. App.), 67 S. W. 1082; *Drye v. State* (Tex. Crim.), 55 S. W. 65; *James v. State*, 40 Tex. Crim. 190, 49 S. W. 401; *Turner v. State* (Tex. Crim.), 51 S. W. 366.

*Vermont*. — *Hyde v. Swanton*, 72 Vt. 242, 47 Atl. 790.

*Wisconsin*. — *Grabowski v. State*, 126 Wis. 447, 105 N. W. 805.

In a prosecution for a violation of the local option law, it is proper to allow a witness to state when and how he came to tell about purchasing the liquor alleged to have been illegally sold, after defendant's attorney had attempted to show that

she may be allowed on redirect examination to explain her reasons for not having done so.<sup>51</sup>

(b.) *Reasons Involving Collateral Facts.* — But motives or reasons for acts or statements involving immaterial or collateral facts to those in issue are not admissible on redirect examination.<sup>52</sup>

(C.) *EXPLAINING INCONSISTENT STATEMENTS.* — Where a witness on cross-examination admits having made statements contradictory to his direct testimony, he may on redirect examination explain why, how, and under what circumstances they were made;<sup>53</sup> or to sustain and corroborate the witness' direct testimony, it may be shown by him that shortly after the event, or before any inducement was offered for him to state the matter falsely, he made a statement coinciding with his testimony on his examination in chief.<sup>54</sup> But evidence as to previous consistent, confirmatory statements is usually limited to those made prior to the impeaching statement.<sup>55</sup>

(3.) *New Matter on Cross-Examination.* — (A.) *IN GENERAL.* — Where a matter of evidence is brought out for the first time on cross-

the witness voluntarily informed on defendant and that he was being paid to testify. *Biddy v. State* (Tex. Crim.), 108 S. W. 689.

Where in a criminal prosecution defendant on the cross-examination of a state's witness, showed that he had on the night after the alleged offense left town and gone to another state, it was permissible for the state to show on redirect examination why the witness went away. *Sims v. State*, 146 Ala. 109, 41 So. 413.

*Compare Levels v. St. Louis, etc. R. Co.*, 196 Mo. 606, 94 S. W. 275, where a witness in reply to a question on cross-examination as to whether a decedent was intelligent enough not to give her age falsely, answered that she may have told an untruth, but had a purpose in doing so, and on cross-examination was asked to state the purpose, it was held error to allow the witness to do so, such testimony being founded upon hearsay.

51. *State v. Symens*, 133 Iowa 113, 115 N. W. 878; *Smith v. State*, 52 Tex. Crim. 344, 106 S. W. 1161.

52. *People v. Biddlecome*, 3 Utah 208, 2 Pac. 194; *Foster v. Tanenbaum*, 2 App. Div. 168, 37 N. Y. Supp. 722; *State v. Gregory*, 33 La. Ann. 737; *State v. Jackson*, 39 La. Ann. 910, 3 So. 59. But see *People v. Hanifan*, 98 Mich. 32, 56 N. W. 1048.

In *Atchison, etc. R. Co. v. Briggs*, 2 Kan. App. 154, 43 Pac. 289, which was an action to recover damages resulting from a fire set by a locomotive, defendant's counsel elicited from a witness on cross-examination the fact that he was hostile to the railroad company. Plaintiff was not allowed on redirect examination to explain the cause of such hostility on the ground that such facts were collateral to the matters in dispute.

53. *Campbell v. State*, 23 Ala. 44; *Bressler v. People*, 117 Ill. 422, 8 N. E. 62; *People v. Mills*, 94 Mich. 630, 54 N. W. 488; *Kennelly v. Savage*, 18 Mont. 119, 44 Pac. 400; *Graham v. McReynolds*, 90 Tenn. 673, 18 S. W. 272; *Smith v. Traders' Nat. Bank*, 82 Tex. 368, 17 S. W. 779.

54. *Indiana.* — *Hinshaw v. State*, 147 Ind. 334, 47 N. E. 157, 169. See also *Daily v. State*, 28 Ind. 285; *Brookbank v. State*, 55 Ind. 169; *Perkins v. State*, 4 Ind. 222.

*Tennessee.* — See also *Graham v. McReynolds*, 90 Tenn. 673, 18 S. W. 272; *Glass v. Bennett*, 89 Tenn. 478, 14 S. W. 1085; *Third Nat. Bank v. Robinson*, 1 Baxt. 479; *Dossett v. Miller*, 3 Sneed 72; *Hays v. Cheatham*, 6 Lea 10. *Compare Story v. Saunders*, 8 Humph. 663.

*Texas.* — *Kipper v. State*, 45 Tex. Crim. 377, 77 S. W. 611.

55. *Graham v. McReynolds*, 90 Tenn. 673, 18 S. W. 272; *Queener v.*

examination, the party calling the witness may re-examine upon the same matter,<sup>56</sup> but not on other matters.<sup>57</sup>

(B.) DRAWING OUT WHOLE OF TRANSACTION OR CONVERSATION. — (a.) *General Rule.* — Where a witness on cross-examination testifies as to a part of a conversation or transaction, or that a conversation was had or a transaction occurred, the party calling him is entitled, on redirect examination, to elicit from the witness testimony as to all

Morrow, 1 Coldw. (Tenn.) 123, 134.

56. *Alabama.* — Wadsworth v. Dunnam, 117 Ala. 661, 23 So. 699.

*Arkansas.* — Standard Life, etc. Ins. Co. v. Schmaltz, 66 Ark. 583, 53 S. W. 49, 74 Am. St. Rep. 112.

*California.* — California Elec. L. Co. v. California Safe D. & T. Co., 145 Cal. 124, 78 Pac. 372 (Code Civ. Proc. § 2048).

*Indiana.* — Strebin v. Lavengood, 163 Ind. 478, 71 N. E. 494; Lake Lighting Co. v. Lewis, 29 Ind. App. 164, 64 N. E. 35.

*Iowa.* — Luin v. Chicago Grill Co., 138 Iowa 268, 115 N. W. 1024; Jeffrey v. Keokuk, etc. R. Co., 56 Iowa 546, 9 N. W. 884; Farmers' & Merchants' Bank v. Young, 36 Iowa 44; Walkley v. Clarke, 107 Iowa 451, 78 N. W. 70.

*Kansas.* — Hamilton v. Miller, 46 Kan. 486, 26 Pac. 1030.

*Louisiana.* — State v. Williams, 111 La. 179, 35 So. 505; State v. McQueen, 108 La. 410, 32 So. 412.

*Maryland.* — Strouse v. American Credit I. Co., 91 Md. 244, 46 Atl. 328, 1063.

*Massachusetts.* — Com. v. Dill, 156 Mass. 226, 30 N. E. 1016.

*Michigan.* — People v. Robinson, 135 Mich. 511, 98 N. W. 12.

*Missouri.* — Northrup v. Diggs, 128 Mo. App. 217, 106 S. W. 1123; Nichols v. Nichols, 147 Mo. 387, 48 S. W. 947; Hume v. Hopkins, 140 Mo. 65, 41 S. W. 784.

\**Nebraska.* — Goodman v. Kennedy, 10 Neb. 270, 4 N. W. 987.

*New Hampshire.* — State v. Saidell, 70 N. H. 174, 46 Atl. 1083, 85 Am. St. Rep. 627.

*New York.* — People v. Noblett, 96 App. Div. 293, 89 N. Y. Supp. 181, judgment affirmed, 184 N. Y. 612, 77 N. E. 1193; Merritt v. Campbell, 79 N. Y. 625; May v. Curley, 113 N. Y. 575, 21 N. E. 698.

*North Carolina.* — State v. Us-

sery, 118 N. C. 1177, 24 S. E. 414; Gray v. Cooper, 65 N. C. 183.

*Oregon.* — Farmers' Bank v. Sal-  
ing, 33 Or. 394, 54 Pac. 190.

*Texas.* — Drye v. State (Tex. Crim.), 55 S. W. 65; Bassham v. State, 38 Tex. 622; Renfro v. State, 42 Tex. Crim. 393, 56 S. W. 1013.

*Utah.* — State v. Botha, 27 Utah 289, 75 Pac. 731; State v. McCoy, 15 Utah 136, 49 Pac. 420.

*Vermont.* — Hyde v. Swanton, 72 Vt. 242, 47 Atl. 790; State v. Hopkins, 50 Vt. 316.

*Washington.* — Larsen v. Sedro-Woolley, 49 Wash. 134, 94 Pac. 938; State v. Irving, 19 Wash. 435, 53 Pac. 717; State v. Anderson, 20 Wash. 193, 55 Pac. 39; Latimer v. Baker, 25 Wash. 192, 64 Pac. 899.

*Wisconsin.* — Tuckwood v. Hanthorn, 67 Wis. 326, 30 N. W. 705; Williams v. State, 61 Wis. 281, 21 N. W. 56.

**Time for Re-examination.** — A re-examination of a witness to enable him to reply to a question asked on cross-examination should be made at the conclusion of the cross-examination and not by calling the witness in rebuttal. Struth v. Decker, 100 Md. 368, 59 Atl. 727.

57. State v. Ussery, 118 N. C. 1177, 24 S. E. 414; McGee v. State (Tex. Crim.), 66 S. W. 562.

Where in an action to recover damages for the construction of an elevated railroad, plaintiff's expert witness is cross-examined by defendant as to the effect in specific instances on other property, it is competent, upon a redirect examination, for the plaintiff to make such full inquiry as he may be advised as to each one of the specific instances brought out on cross-examination, but he cannot give evidence as to additional property not embraced in such examination. Robinson v. New York, etc. R. Co., 175 N. Y. 219, 67 N. E. 431.



of such conversation or transaction, or at least as to so much as is material to the issue.<sup>58</sup>

(b.) *Statutory Enactments.*—In some jurisdictions there are express statutory enactments substantially in accord with the rule of the text.<sup>59</sup>

(c.) *Limitation of the Rule.*—The rule, however, is not without certain limitations. When a witness is introduced by a party, and is interrogated as to a particular fact, and the opposite party on cross-examination asks him, generally, if he ever communicated that fact to any one, and to whom, and he answers that he com-

58. *Alabama.*—Hudson v. State, 137 Ala. 60, 34 So. 854; Allen v. State, 145 Ala. 11, 40 So. 660; Doe v. Edmondson, 145 Ala. 557, 40 So. 505; Louisville, etc. R. Co. v. Malone, 109 Ala. 509, 20 So. 33; Pittman v. Pittman, 124 Ala. 306, 27 So. 242.

*California.*—People v. Smallman, 55 Cal. 185; People v. Corey (Cal. App.), 97 Pac. 907.

*Illinois.*—Chicago, etc. R. Co. v. Lowitz, 218 Ill. 24, 75 N. E. 755, affirming 119 Ill. App. 360.

*Indiana.*—Breedlove v. Breedlove, 27 Ind. App. 560, 61 N. E. 797.

*Iowa.*—In re Wharton's Will, 132 Iowa 714, 109 N. W. 492.

*Kentucky.*—Bess v. Com., 118 Ky. 858, 82 S. W. 576; Withers v. Richardson, 5 T. B. Mon. 94, 17 Am. Dec. 44; Taylor v. Com., 17 Ky. L. Rep. 1214, 34 S. W. 227.

*Louisiana.*—State v. Duplechain, 52 La. 448, 26 So. 1000.

*Massachusetts.*—Dole v. Wooldredge, 142 Mass. 161, 9 N. E. 832; Com. v. Armstrong, 158 Mass. 78, 32 N. E. 1032; Quigley v. Baker, 169 Mass. 303, 47 N. E. 1007.

*Michigan.*—Bennett v. Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442; Wilcox v. Ney, 47 Mich. 421, 11 N. W. 225; Alderton v. Wright, 81 Mich. 294, 45 N. W. 968; People v. Ryder, 151 Mich. 187, 114 N. W. 1021; Lange v. Klatt, 135 Mich. 262, 97 N. W. 708; Fox v. Barrett's Estate, 116 Mich. 162, 75 N. W. 440; Wilkins v. Flint, 128 Mich. 262, 87 N. W. 195.

*Missouri.*—Nichols v. Nichols, 147 Mo. 387, 48 S. W. 947.

*New Hampshire.*—State v. Saidell, 70 N. H. 174, 46 Atl. 1083, 85 Am. St. Rep. 627.

*New Jersey.*—Somerville, etc. R.

Co. v. Doughty, 22 N. J. L. 495.

*New York.*—Blanchard v. Steamboat Co., 67 Barb. 101; Clift v. Moses, 112 N. Y. 426, 20 N. E. 392; Chesebrough v. Conover, 66 Hun 634, 21 N. Y. Supp. 566, 568, judgment affirmed, 140 N. Y. 382, 35 N. E. 633; People v. Buchanan, 145 N. Y. 1, 39 N. E. 846; Blumenthal v. Bloomingdale, 100 N. Y. 558, 3 N. E. 292; Simmons v. Havens, 101 N. Y. 427, 5 N. E. 73; Sexton v. Onward Const. Co., 93 App. Div. 143, 87 N. Y. Supp. 550; Todd v. Vaughan, 90 Hun 70, 35 N. Y. Supp. 457.

*North Carolina.*—Roberts v. Roberts, 85 N. C. 9; Cabiness v. Martin, 15 N. C. (4 Dev. L.) 106; Gray v. Cooper, 65 N. C. 183.

*Ohio.*—Finnegan v. Sullivan, 18 Ohio C. C. 876.

*Pennsylvania.*—Walsh v. Porterfield, 87 Pa. St. 376.

*Texas.*—Renfro v. State, 42 Tex. Crim. 393, 56 S. W. 1013; Fitzpatrick v. State, 37 Tex. Crim. 20, 38 S. W. 806.

*Wisconsin.*—See Roszczyńska v. State, 125 Wis. 414, 104 N. W. 113.

Where in a prosecution for seduction prosecutrix was asked on cross-examination, for the evident purpose of contradicting her, as to whether she told a third person a certain matter, to which a negative reply was made, it was proper to allow the witness on redirect examination to state what was said. Bracken v. State, 111 Ala. 68, 20 So. 636, 56 Am. St. Rep. 23. But see Dickson v. State, 39 Ohio St. 73, holding that such evidence was not admissible on redirect, unless the cross-examiner had offered testimony to contradict the witness.

59. Lahue v. State, 51 Tex. Crim. 159, 101 S. W. 1008; State v. Hud-

municated it to the party calling him; this does not entitle the latter to pursue the inquiry on redirect examination as to his own reply.<sup>60</sup> And a party is not authorized to elicit, on redirect examination, hearsay testimony or testimony otherwise inadmissible, though a part of a conversation referred to or gone into on cross-examination,<sup>61</sup> unless such cross-examination has been conducted over the objections of the opposing party;<sup>62</sup> nor will he be permitted to inquire as to statements made in a conversation relating to a subject which has no bearing on the matters inquired into upon cross-examination, even though they may relate to the subject-matter of the suit.<sup>63</sup>

(4.) **Irrelevant, Collateral or Immaterial Matters.**—It is generally held that a witness cannot be examined on redirect examination as

son, 110 Iowa 663, 80 N. W. 232 (Code § 4615); *People v. Altmeyer*, 135 Cal. 80, 66 Pac. 974 (Code Civ. Proc. § 1854).

60. There would be no safety in putting a general question to a witness upon his cross-examination, if his answer might be the means of rendering the declaration of the opposite party evidence in his own favor, without being called for by his antagonist. *Winchell v. Latham*, 6 Cow. (N. Y.) 682. It was held that the rule would have been otherwise if the witness had been asked on cross-examination, specifically, whether he made the communication to the party calling him.

61. *McCracken v. West*, 17 Ohio 16; *Cusick v. Whitcomb*, 173 Mass. 330, 53 N. E. 815. See also *Redman v. Piersol*, 39 Mo. App. 173.

A witness for the prosecution is held to be as much the people's witness when under cross-examination as when on his examination in chief; and the fact that he is permitted on cross-examination, on a subject entered upon in the direct examination, to detail without objection a part of a hearsay story told him, will not authorize the calling out of the rest of it against objection on the redirect examination, upon a claim that it is a part of the same conversation. *Wagner v. People*, 30 Mich. 384.

Where a witness on his cross-examination voluntarily refers to a conversation he had with another party,—which conversation was not shown to be relevant to the case on trial,—for the purpose of fixing the

time he first had knowledge of the facts to which he was testifying, the opposite party is not entitled to bring out the full details of that conversation on redirect examination. *Uhe v. Chicago*, etc. R. Co., 3 S. D. 563, 54 N. W. 601.

62. *Veseley v. Engelkemeier*, 10 Okla. 290, 61 Pac. 924.

63. *England*.—*Prince v. Samo*, 7 Ad. & El. 627, 34 E. C. L. 183, expressly overruling *Abbott*, C. J.'s opinion in *The Queen's Case*, 2 Brod. & B. 297, 1 E. C. L. 112. Compare *Whitfield v. Aland*, 2 Car. & K. 1015, 61 E. C. L. 1014.

*United States*.—*Ballew v. United States*, 160 U. S. 187.

*California*.—*People v. Altmeyer*, 135 Cal. 80, 66 Pac. 974 (Code Civ. Proc. § 1854).

*Michigan*.—*Mott v. Detroit*, etc. R. Co., 120 Mich. 127, 79 N. W. 3; *Beaubien v. Cicotte*, 12 Mich. 459.

*New York*.—*Winchell v. Latham*, 6 Cow. 682; *People v. Beach*, 87 N. Y. 508; *Rouse v. Whited*, 25 N. Y. 170, 82 Am. Dec. 337.

*North Carolina*.—*Jackson v. Evans*, 73 N. C. 130.

*Ohio*.—*McCracken v. West*, 17 Ohio 16.

*Tennessee*.—*Colquit v. State*, 107 Tenn. 381, 64 S. W. 713.

In *Greer v. State*, 6 Baxt. (Tenn.) 629, it appeared that counsel for defendant asked a witness if he had made a certain statement to A, to-wit: "That he only wanted to get one swear at defendant, and he would hang him," etc. The witness denied that he had made the statement. On redirect examination the

to irrelevant, collateral or immaterial matters,<sup>64</sup> though he has been interrogated as to such matters on the previous cross-examination,<sup>65</sup> although the trial court has been said to have a discretion on this subject.<sup>66</sup>

(5.) **Repetition of Testimony on Direct or Cross-Examination.** Although it is usually held that a party cannot on redirect examination elicit a repetition of testimony detailed on either direct<sup>67</sup> or cross-examination,<sup>68</sup> the matter is sometimes said to rest within

attorney general asked the witness to state all he said to A in that connection, which was objected to by defendant. The objection was overruled by the court, and the witness was permitted to give the details of a quarrel between himself and defendant, in which he, defendant, cursed him, and used very abusive and insulting language toward him. The court said this was a misapplication of the familiar rule as stated in the text above, and continuing said: "Here, the defendant did not, by his question, bring out a part of a conversation by way of proving facts favorable to his side of the case, but only asked if the witness made a certain statement, which he positively denied. This gave the other party clearly no right to introduce an entire conversation, that might injuriously affect the defendant, about a matter not in any way connected with the case under interrogation, and shedding no light whatever on it."

64. *State v. Moran*, 112 Iowa 535, 84 N. W. 524; *People v. Biddlecome*, 3 Utah 208, 2 Pac. 194; *Foster v. Tanenbaum*, 2 App. Div. 168, 37 N. Y. Supp. 722; *Atchison, etc. R. Co. v. Briggs*, 2 Kan. App. 154, 43 Pac. 289; *McGee v. State* (Tex. Crim.), 66 S. W. 562; *White v. State*, 111 Ala. 92, 21 So. 330; *Ackerstadt v. Chicago City R. Co.*, 194 Ill. 616, 62 N. E. 884, *affirming* 94 Ill. App. 130.

65. *Struth v. Decker*, 100 Md. 368, 59 Atl. 727; *Smith v. Dreer*, 3 Whart. (Pa.) 154; *Roberts v. Boston*, 149 Mass. 346, 21 N. E. 668; *Gardner v. Brookline*, 127 Mass. 358; *Great Western R. Co. v. Haworth*, 39 Ill. 346; *Phifer v. Carolina Cent. R. Co.*, 122 N. C. 940, 29 S. E. 578.

But see *Chicago, etc. R. Co. v. Griffith*, 44 Neb. 690, 62 N. W. 868, which was a condemnation proceed-

ing, holding that while it is not competent to show the price at which other property has been sold, for the purpose of proving the value of that taken for railroad purposes, yet if on cross-examination of witnesses for the adverse party, the railroad company adopts that kind of inquiry, error will not be presumed from a re-examination confined to such lines followed on cross-examination.

*Compare International, etc. R. Co. v. Collins*, 33 Tex. Civ. App. 58, 75 S. W. 814, *holding* that where a defendant's counsel had propounded a question to plaintiff on cross-examination, carrying with it an unwarranted insinuation, and bringing out a statement that he had been married twenty-one years, it was not error for plaintiff's counsel to repeat the witness' former statement, on redirect examination, and ask further as to whether he was still unmarried, where such question was disallowed on objection.

66. *Lewis v. Susmilch*, 130 Iowa 203, 106 N. W. 624. See also *State v. Witham*, 72 Me. 531; *Mowry v. Smith*, 9 Allen (Mass.) 67.

67. *Hudspeth v. Allen*, 26 Ind. 165; *Watson Coal & M. Co. v. James*, 72 Iowa 184, 33 N. W. 622; *Marquette Cement Mfg. Co. v. Williams*, 132 Ill. App. 629, judgment *affirmed*, 230 Ill. 26, 82 N. E. 424; *Ackerstadt v. Chicago City R. Co.*, 194 Ill. 616, 62 N. E. 884, *affirming* judgment, 94 Ill. App. 130; *Driscoll v. Ansonia*, 73 Conn. 743, 47 Atl. 718.

68. *Winslow v. Covert*, 52 Ill. App. 63; *Ulrich v. People*, 39 Mich. 245; *Foster v. Tanenbaum*, 2 App. Div. 168, 37 N. Y. Supp. 722; *Baker v. Sherman*, 71 Vt. 439, 46 Atl. 57; *Phifer v. Carolina Cent. R. Co.*, 122 N. C. 940, 29 S. E. 578. But see *Anderson v. Jordan*, 15 S. D. 395, 89 N. W. 1015; *State v. McIntosh*, 109

the sound discretion of the trial court, which will not be reviewed in the absence of an abuse thereof.<sup>69</sup>

(6.) **Leading Questions.**—It is generally held that in the redirect examination of a witness, leading questions or questions tending to refresh the witness' memory may properly be allowed if the purpose is to explain, develop or modify new matter brought out on cross-examination,<sup>70</sup> and although there is some authority holding that leading questions are not permissible;<sup>71</sup> yet it has been further held that the fact that a leading question was asked and answered is not reversible error, where it appears that no objection was made as to the question.<sup>72</sup>

(7.) **Examination as to Writings.**—As a rule a witness may be interrogated on redirect examination with reference to writings, in connection with which, or in regard to which, or as to the existence of which he has testified on cross-examination;<sup>73</sup> but a witness will not be permitted, on redirect examination, to give the

Iowa 209, 80 N. W. 349; *People v. McArron*, 121 Mich. 1, 79 N. W. 944, and *Caven v. Bodwell Granite Co.*, 99 Me. 278, 59 Atl. 285, holding that it is not improper on cross-examination to test a witness by calling for his opinions and conclusions, for the purpose of affecting his credibility; and, if the cross-examiner happens to elicit an opinion unfavorable to his view of the case, it cannot be said that he is prejudiced if his adversary, on re-examination, obtains a repetition of the opinion. For a similar case, see *Goodman v. Kennedy*, 10 Neb. 270, 4 N. W. 987.

69. *California*.—*People v. McNamara*, 94 Cal. 509, 29 Pac. 953; *People v. Van Ewan*, 111 Cal. 144, 43 Pac. 520.

*Georgia*.—*Lauchheimer & Sons v. Jacobs*, 126 Ga. 261, 55 S. E. 55.

*Illinois*.—*Winslow v. Covert*, 52 Ill. App. 63.

*Minnesota*.—*Backus v. Barber & Co.*, 74 Minn. 262, 77 N. W. 959.

*Nebraska*.—*George v. State*, 61 Neb. 669, 85 N. W. 840.

*Pennsylvania*.—See *Stern v. Stanton*, 184 Pa. St. 468, 49 Atl. 404.

*South Dakota*.—See also *Comeau v. Hurley*, 115 N. W. 521.

*Utah*.—*Overholt v. Burbridge*, 28 Utah 408, 79 Pac. 561.

70. *Alabama*.—*Wadsworth v. Dunnam*, 117 Ala. 661, 23 So. 699.

*Illinois*.—*Chicago City R. Co. v. Rublee*, 136 Ill. App. 233.

*Kentucky*.—*Hess v. Com.*, 9 Ky. L. Rep. 590, 5 S. W. 751.

*Massachusetts*.—*Farrell v. Boston*, 161 Mass. 106, 36 N. E. 751.

*New York*.—*Gilbert v. Sage*, 57 N. Y. 639, affirming 5 Lans. 287.

*Rhode Island*.—*State v. Williams*, 6 R. I. 207; *State v. Babcock*, 25 R. I. 224, 55 Atl. 685.

*Texas*.—*Mulliner v. Shumake* (Tex. Civ. App.), 55 S. W. 983.

71. *Harvey v. State*, 35 Tex. Crim. 545, 34 S. W. 623. See also *Ball v. Skinner*, 134 Iowa 298, 111 N. W. 1022.

72. *Smith v. State* (Tex. App.), 17 S. W. 471; *Hess v. Com.*, 9 Ky. L. Rep. 590, 5 S. W. 751.

73. *Strouse v. American Credit Indemnity Co.*, 91 Md. 244, 46 Atl. 328, 1063; *Simmons v. Accident Assn.*, 79 Neb. 20, 112 N. W. 365; *Norwegian Plow Co. v. Hanthorn*, 71 Wis. 529, 37 N. W. 825; *Missisquoi Bank v. Everts*, 45 Vt. 293; *Vaughan v. McCarthy*, 63 Minn. 221, 65 N. W. 249. Compare *Fremont Butter & Egg Co. v. Peters*, 45 Neb. 356, 63 N. W. 791.

**Former Testimony.**—It is proper to allow a party on redirect examination to read to a witness such of his former testimony as is material and examine him upon it where the same was first used on cross-examination in a similar manner by the opposite party. *Fitzpatrick v. State*, 37 Tex. Crim. 20, 38 S. W. 806. See also *Lahue v. State*, 51 Tex.

substance of a writing, where no reason has been shown for its non-production.<sup>74</sup>

(8.) **Introduction of Writings.**—Where, on cross-examination, a witness is interrogated with reference to a writing for the manifest purpose of impeachment, the writing is generally held to be admissible as a part of the redirect examination to fortify the witness' testimony;<sup>75</sup> but the rule appears to be otherwise where the writing is for the first time referred to on the witness' examination in chief,<sup>76</sup> and where it appears that a witness on cross-examination has been asked merely as to the existence of a certain writing,<sup>77</sup> or to identify a writing presented to him,<sup>78</sup> the party calling the witness is not entitled by reason thereof to introduce the same in evidence on the witness' redirect examination.

**B. CROSS-EXAMINATION.**—a. *Generally.*—(1.) **Discretion of Court.** It is within the discretion of the trial court to permit or refuse to permit a party to recall a witness for cross-examination, or for further cross-examination, and this discretion is not reviewable on appeal where it is not clearly shown to have been abused.<sup>79</sup>

Crim. 159, 101 S. W. 1008; *People v. Tubbs*, 147 Mich. 1, 110 N. W. 132; *Chesebrough v. Conover*, 66 Hun 634, 21 N. Y. Supp. 566, 568.

**Letters.**—*State v. Erving*, 19 Wash. 435, 53 Pac. 717.

**74.** *Redman v. Piersol*, 39 Mo. App. 173.

**75.** *Strebin v. Lavengood*, 163 Ind. 478, 71 N. E. 494; *Missisquoi Bank v. Evarts*, 45 Vt. 293; *Wilkinson v. Eilers*, 114 Mo. 245, 21 S. W. 514; *Aulls v. Young*, 98 Mich. 231, 57 N. W. 119; *Spaulding v. Chicago, etc. R. Co.*, 98 Iowa 205, 67 N. W. 227; *Smith v. Morrill*, 71 N. H. 409, 52 Atl. 928; *Fillmore v. Union Pac. R. Co.*, 2 Wyo. 94.

**76.** In *Ball v. Skinner*, 134 Iowa 298, 111 N. W. 1022, which was an action against a physician to recover damages for an alleged negligent treatment of an injured limb, a druggist testifying for plaintiff, stated that he compounded the solution used in such treatment according to a formula found in the United States Dispensatory. On cross-examination a colloquy arose between witness and counsel over the fact and witness was asked to look at the book and see if the assumption of counsel was not right. On redirect examination plaintiff's counsel was permitted to read an extended extract from the book, and ask the

witness if he did not find it there. It was held that this should not have been permitted. The witness having first testified concerning the book formula, it was proper to cross-examine him thereon; but such cross-examination did not open the door to plaintiff to place the contents of the book before the jury in support of his case.

**77.** *Avery v. Mattice*, 56 Hun 639, 9 N. Y. Supp. 166, judgment affirmed, 132 N. Y. 601, 30 N. E. 1152.

**Writing May Be Introduced To Prove Its Own Existence.**—A party who calls out on cross-examination the fact that a writing is in existence cannot complain of the production of the instrument on redirect examination. *Fillmore v. Union Pac. R. Co.*, 2 Wyo. 94; *Blitz v. Roach*, 121 Mich. 135, 79 N. W. 1095.

**78.** *People v. Van Ewan*, 111 Cal. 144, 43 Pac. 520.

**79.** *Alabama.*—*Morningstar v. State*, 59 Ala. 30; *Thompson v. State*, 100 Ala. 70, 14 So. 878; *Hall v. State*, 51 Ala. 9. See *Williams v. State*, 98 Ala. 52, 13 So. 333.

*California.*—*People v. Keith*, 50 Cal. 137.

*Illinois.*—*United States Wringer Co. v. Cooney*, 214 Ill. 520, 73 N. E. 803; *Hirsch & Sons v. Coleman*,

As a rule a party is not permitted to recall a witness for further cross-examination where the object is to bring out new matter,<sup>80</sup> or where the subject has been fully gone into on a previous cross-examination.<sup>81</sup>

**Where Cross-Examination Has Been Only Temporarily Suspended,** with the knowledge and implied assent of the court and prosecuting officer, for the purpose of preparing questions by which to lay a predicate for impeaching him, it is error for the court to refuse to permit him to be recalled and the cross-examination continued.<sup>82</sup>

**(2.) Accused May Be Recalled.**— A defendant in a criminal case may, in the court's discretion, be recalled by the state for further cross-examination.<sup>83</sup>

**(3.) Recalling To Lay Predicate for Impeachment.**— (A.) **IN GENERAL.** It is within the discretion of the court to allow a witness to be recalled for further cross-examination, for the purpose of laying a

227 Ill. 149, 81 N. E. 21, *affirming* 128 Ill. App. 245.

*Iowa.*— *Fowler v. Strawberry Hill*, 74 Iowa 644, 38 N. W. 521; *Chapman v. James*, 96 Iowa 233, 64 N. W. 795.

*Michigan.*— *People v. Hossler*, 135 Mich. 384, 97 N. W. 754.

*Minnesota.*— *Cummings v. Taylor*, 24 Minn. 429.

*New Jersey.*— *Sperbeck v. Camden & S. R. Co.*, 64 Atl. 1012.

*North Carolina.*— *State v. Hoppiess*, 27 N. C. (5 Ired. L.) 406.

*Oregon.*— *State v. Robinson*, 32 Or. 43, 48 Pac. 357.

**Explanation of Previous Cross-Examination Allowed.**— *Nichols v. New Britain*, 77 Conn. 695, 60 Atl. 655.

**Further Cross-Examination on Matter Already Brought Out Properly Refused.**— *Chicago & A. R. Co. v. Eaton*, 194 Ill. 441, 62 N. E. 784, *affirming* 96 Ill. App. 570.

**Cross-Examination Closed With Notice.**— After cross-examination has been closed with notice to cross-examiner there is no error in refusing to require production of witness for further cross-examination. *Simonds Roll-Mach. Co. v. Hathorn Mfg. Co.*, 83 Fed. 490.

**Where Cross-Examination Is erroneously Forbidden by the Court** who thereafter admits his error, the party who called the witness should be required to restore him for further cross-examination. *Perry v. Jefferies*, 61 S. C. 292, 39 S. E. 515.

80. Where a witness is examined

and cross-examined, and the party calling him calls and examines another witness who gives an account of the same transaction as detailed by the first witness, but differing somewhat from the latter's relation, this does not give the opposing party a right to recall the first witness for further cross-examination. *People v. Parton*, 49 Cal. 632.

**Proper Course Where New Matter Is Sought To Be Brought Out.**

Where a state's witness has been examined and cross-examined, and impeached by other evidence, the defendant cannot call the witness to prove by him original defensive facts without vouching for him as a witness. The proper course is to put the witness on the stand as any other witness testifying originally in his behalf. *Williams v. State*, 48 Tex. Crim. 325, 87 S. W. 1155. See also *People v. Parton*, 49 Cal. 632.

81. *Hoover v. State*, 161 Ind. 348, 68 N. E. 591; *Knight v. Cunningham*, 6 Hun (N. Y.) 100.

82. *Hall v. State*, 51 Ala. 9.

83. *Thomas v. State*, 100 Ala. 53, 14 So. 621; *State v. Kennade*, 121 Mo. 405, 26 S. W. 347; *State v. Lewis*, 56 Kan. 374, 43 Pac. 265; *State v. Johnson*, 72 Iowa 393, 34 N. W. 177; *Stout v. Com.*, 29 Ky. L. Rep. 627, 94 S. W. 15.

"Where a defendant on trial for a criminal offense introduces himself as a witness, he thereby offers to reveal all he knows material to the cause. He swears to tell the whole

foundation for his impeachment.<sup>84</sup> And when he has been so recalled, it is error to rule out the impeaching evidence on the ground that the party had made the witness his own by recalling him.<sup>85</sup>

(B.) RECALLING ACCUSED BY PROSECUTION. — When an accused in a criminal case takes the stand in his own behalf he becomes a witness, like other witnesses, subject to all the rules of evidence. After he has testified in his own behalf and has been fully cross-examined by the state and excused from the witness stand, the state may be allowed in the discretion of the court to recall and re-examine him for the purpose of laying a predicate for his impeachment.<sup>86</sup>

b. *Recross-Examination*. — (1.) *In General*. — Where on the redirect examination of a witness new matter is elicited which is neither explanatory of the direct examination, nor in rebuttal of the cross-examination, the opposite party has a right to a recross-examination as to such matter.<sup>87</sup> On the other hand, if no new matter has been brought out on redirect examination, recross-examination rests entirely in the discretion of the trial court.<sup>88</sup>

truth. He voluntarily removes the constitutional safeguard which would protect him from self crimination, so far as concerns the crime for which he is being tried, and becomes as any other witness, and compellable to disclose all he knows, whether for or against him." *Thomas v. State*, 100 Ala. 53, 14 So. 621. And see cases cited in next following note 86 (*Recalling Accused by Prosecution*).

84. *Perkins v. State*, 78 Wis. 551, 47 N. W. 827; *People v. Thiede*, 11 Utah 241, 39 Pac. 837; *Vann v. State*, 140 Ala. 122, 37 So. 158; *Crawleigh v. Galveston, etc. R. Co.*, 28 Tex. Civ. App. 260, 67 S. W. 140; *Savage v. Bowen*, 103 Va. 540, 49 S. E. 668. See also *State v. Winter*, 72 Iowa 627, 34 N. W. 475.

**Where a Party Has Been Warned** at the time of the original cross-examination to lay the foundation, he will be refused the privilege of recalling for that purpose. *Huff v. Latimer*, 33 S. C. 255, 11 S. E. 758.

85. *Perkins v. State*, 78 Wis. 551, 47 N. W. 827.

86. *Alabama*. — *Dudley v. State*, 121 Ala. 4, 25 So. 742; *Thomas v. State*, 100 Ala. 53, 14 So. 621.

*Kansas*. — *State v. Horne*, 9 Kan. 119.

*Kentucky*. — *Abbott v. Com.*, 23 Ky. L. Rep. 226, 62 S. W. 715;

*Stout v. Com.*, 29 Ky. L. Rep. 627, 94 S. W. 15.

*Louisiana*. — *State v. Walsh*, 44 La. Ann. 1122, 11 So. 811; *State v. Favre*, 51 La. Ann. 434, 25 So. 93.

*Texas*. — *Hays v. State*, 51 Tex. Crim. 111, 100 S. W. 926; *Clay v. State*, 40 Tex. Crim. 593, 51 S. W. 370.

Court may recall an accused after his examination in his own behalf, for the purpose of laying a foundation for an impeachment by another witness. *Chapman v. State (Tex. Crim.)*, 30 S. W. 225.

87. *Wood v. McGuire*, 17 Ga. 303; *State v. Haab*, 105 La. 230, 29 So. 725; *State v. Wolfley*, 75 Kan. 406, 89 Pac. 1046, 93 Pac. 337, 11 L. R. A. (N. S.) 87. See also *Thornton's Exrs. v. Thornton's Heirs*, 39 Vt. 122.

88. *Kansas*. — *State v. Wolfly*, 75 Kan. 406, 89 Pac. 1046, 93 Pac. 337, 11 L. R. A. (N. S.) 87.

*Kentucky*. — *Stout v. Com.*, 29 Ky. L. Rep. 627, 94 S. W. 15.

*Louisiana*. — *State v. Turner*, 25 La. Ann. 573; *State v. Haab*, 105 La. 230, 29 So. 725.

*New Jersey*. — *Sperbeck v. Camden & S. R. Co.*, 64 Atl. 1012.

*North Carolina*. — *State v. Hop-piss*, 27 N. C. (5 Ired. L.) 406.

*Texas*. — *Presidio County v.*

(2.) **Limitations of Recross-Examination.** — Where a witness has been recalled and re-examined, the recross-examination is generally said to be limited to the matter on which he has been re-examined.<sup>89</sup> Especially will a cross-examiner be precluded from going outside of matters brought out on redirect examination where he had an ample opportunity to cross-examine as to the fact sought to be brought out on the original cross-examination.<sup>90</sup>

## IX. PRIVILEGE.

**1. Of Refusing To Produce Evidence or Testify.** — **A. DISCLOSURE OF PRIVATE AFFAIRS.** — *a. Generally.* — It is of course a universal general rule that a witness cannot refuse to give evidence on the ground that it will result in disclosing his private affairs, yet in some classes of cases the court in the exercise of its discretion will sustain such an objection.<sup>91</sup>

*b. Religious Beliefs and Opinions.* — Subject to the right to inquire into a witness' religious belief for the purpose of determining his competency<sup>92</sup> and the form of oath most binding upon his conscience<sup>93</sup> he is privileged against testifying as to his peculiar theological beliefs and opinions.<sup>94</sup> At least the court will not ordinarily

Clarke, 38 Tex. Civ. App. 320, 85 S. W. 475.

*Vermont.* — Thornton's Exrs. v. Thornton's Heirs, 39 Vt. 122.

*Virginia.* — Atlantic, etc. R. Co. v. Reiger, 95 Va. 418, 28 S. E. 590.

**No Error in Stopping Examination.** — Where the court after permitting recross-examination to commence interrupted counsel as he was about to ask a question and stopped the examination without knowing what the question was, there was held to be no error. Atlantic, etc. R. Co. v. Reiger, 95 Va. 418, 28 S. E. 590.

**Immaterial That Question Was Germane to Prior Cross-Examination.** — It is immaterial that a question excluded on recross-examination was germane to a prior cross-examination, if not germane to the re-direct examination. Hamilton v. Smith, 74 Conn. 374, 50 Atl. 884.

*89. Connecticut.* — Mechanics' Bank v. Woodward, 73 Conn. 470, 47 Atl. 762; Hamilton v. Hamilton, 74 Conn. 374, 50 Atl. 884.

*Iowa.* — Stutsman v. Sharpless, 125 Iowa 335, 101 N. W. 105.

*Kansas.* — State v. Wolfley, 75 Kan. 406, 89 Pac. 1046, 93 Pac. 337, 11 L. R. A. (N. S.) 87.

*Louisiana.* — State v. Southern, 48 La. Ann. 628, 19 So. 668; State v. Heidelberg, 120 La. 300, 45 So. 256. *Massachusetts.* — See also Com. v. Hudson, 11 Gray 64.

*Minnesota.* — Butler v. Bohn, 31 Minn. 325, 17 N. W. 862.

*Missouri.* — State v. Pyscher, 179 Mo. 140, 77 S. W. 836.

*Oregon.* — State v. Doris, 94 Pac. 44.

*Vermont.* — Thornton's Exrs. v. Thornton's Heirs, 39 Vt. 122.

*90.* Butler v. Bohn, 31 Minn. 325, 17 N. W. 862; Mechanics' Bank v. Woodward, 73 Conn. 470, 47 Atl. 762.

*91.* See discussion following.

**Disclosure of Contents of Will.** On a petition by a son for the appointment of a guardian for his mother, the court may properly refuse to compel her to disclose the contents of her will. Alvord v. Alvord, 109 Iowa 113, 80 N. W. 306.

*92.* See articles "ARTHERIST," Vol. II; "COMPETENCY," Vol. III; "VOIR DIRE," Vol. XIII.

*93.* See *infra*, VII, 3.

*94.* See the following cases: Darby v. Ousley, 1 H. & N. 1, 25 L. J., Ex. 227, 2 Jur. (N. S.) 497; Searcy v. Miller, 56 Iowa 613, 10



or in the absence of unusual circumstances permit such an examination.<sup>95</sup>

**c. Business and Trade Secrets.**—While a party or witness has no absolute privilege against disclosure of his business or trade secrets,<sup>96</sup> the court may in its discretion protect him from an examination into or discovery of such matters when it is not absolutely necessary and would be prejudicial to his interests,<sup>97</sup> as where it would compel him to divulge a secret machine,<sup>98</sup> formula or process,<sup>99</sup> or the names of his customers.<sup>1</sup> And to avoid injury from the disclosure the evidence may be taken in camera.<sup>2</sup>

**B. FACTS CAUSING CIVIL LIABILITY OR PECUNIARY LOSS.—a. Civil Liability.**—A witness cannot lawfully refuse to answer a

N. W. 912; *Dedric v. Hopson*, 62 Iowa 562, 17 N. W. 772; *Com. v. Smith*, 2 Gray 516, 61 Am. Dec. 478; *Com. v. Burke*, 16 Gray 33; *Com. v. Batchelder*, Thach, Crim. Cas. (Mass.) 197.

<sup>95.</sup> *Free v. Buckingham*, 59 N. H. 219.

<sup>96.</sup> *England.*—*Tetley v. Easton*, 18 C. B. 643, 25 L. J. C. P. 293; *British Empire S. S. Co. v. Somes*, 3 Kay & J. 433, 26 L. J., Ch. 759, 3 Jur. (N. S.) 883; *The Don Francisco*, 31 L. J. Adm. 205, 6 L. T. 133; *Howe v. McKernan*, 30 Beav. 547; *Renard v. Levinstein*, 10 L. T. 94; *Saccharin Co. v. Chemicals & D. Co.* (1900), 2 Ch. 557.

*United States.*—*Johnson Steel St. R. Co. v. North Branch Steel Co.*, 48 Fed. 191.

*New York.*—*Burnett v. Phalon*, 11 Abb. Pr. 157, 19 How. Pr. 530. See *Ashworth v. Roberts*, 60 L. J., Ch. 27, 45 Ch. Div. 623, 63 L. T. 160. But see *Herreshoff v. Knietsch*, 127 Fed. 492.

**Fraudulent Use Of.**—The privilege will be denied where it is apparent that it is being used as a cloak to cover an invasion of another's rights. *Dobson v. Graham*, 49 Fed. 17.

**Partial Disclosure.**—A witness who makes a partial disclosure of an alleged trade secret cannot on cross-examination claim privilege. *Nichols v. Harris*, 18 Fed. Cas. No. 10,243. See *infra*, IX, H, c, (4.), (D.).

**Before Master in Chancery.**—It is the right of a witness apprehensive that some wrong will be done to his personal or property rights, to refuse to answer questions before

a master in chancery until the matter has been determined by the court. *Fahrney & Sons Co. v. Ruminer*, 153 Fed. 735, 82 C. C. A. 621.

<sup>97.</sup> See *Robinson v. Philadelphia & R. Co.*, 28 Fed. 340; *Gorham Mfg. Co. v. Emery D. G. Co.*, 92 Fed. 774; *Taylor Iron & Steel Co. v. Nichols*, 70 N. J. Eq. 541, 61 Atl. 946; *Sterling Varnish Co. v. Macon*, 217 Pa. St. 7, 66 Atl. 78.

**Books.**—Examination may be refused. *Shelling v. Farmer*, 1 Stra. (Eng.) 646. See *infra*, IX, 1, H, a, (10.).

<sup>98.</sup> *Dobson v. Graham*, 49 Fed. 17.

<sup>99.</sup> *Badische A. & S. V. Fabrik, L. R. 24 Ch. Div. (Eng.) 156*; *Star Kidney P. Co. v. Greenwood*, 3 Ont. 280; *Tetlow v. Savournin*, 15 Phila. (Pa.) 170; *Moxie Nerve-Food Co. v. Beach*, 35 Fed. 465; *Herreshoff v. Knietsch*, 127 Fed. 492. See *Ashworth v. Roberts*, 60 L. J., Ch. 27, 45 Ch. Div. 623, 63 L. T. 160. But see *Renard v. Levinstein*, 10 L. T. 94; *Saccharin Co. v. Chemicals & D. Co.*, (1900) 2 Ch. (Eng.) 557.

1. *Carver v. Pinto Lette*, 41 L. J., Ch. 92, 7 Ch. 90, 25 L. T. 722; *Heugh v. Garrett*, 44 L. J. Ch. 305, 32 L. T. 45. But see *Howe v. McKernan*, 30 Beav. (Eng.) 547; *Ashworth v. Roberts*, 60 L. J., Ch. 27, 45 Ch. Div. 623, 63 L. T. 160.

But a disclosure, by an alleged infringer, of the names and addresses of his customers is not privileged merely because they may be thereby subjected to a suit. *Tetley v. Easton*, 18 C. B. (Eng.) 643, 25 L. J., C. P. 293.

2. *Badische A. & S. V. Fabrik, L. R. 24 Ch. Div. (Eng.) 156*; *Tay-*

question solely because his answer may tend to subject him to a civil suit or liability; the privilege against self-incrimination has no application to such a case.<sup>3</sup>

b. *Pecuniary Loss*.—A witness may be called and examined in a matter pertinent to the issue, where his answers will not expose him to criminal prosecution or tend to subject him to a penalty or forfeiture, although it may adversely affect his pecuniary interest.<sup>4</sup>

lor Iron & Steel Co. v. Nichols (N. J.), 69 Atl. 186. See Stone v. Grasselli Chem. Co., 65 N. J. Eq. 756, 55 Atl. 736, 103 Am. St. Rep. 794, 63 L. R. A. 344.

3. *England*.—Doe v. Date, 3 Ad. & El. 609, 43 E. C. L. 889.

*United States*.—In re Cliffe, 97 Fed. 540; In re Danforth, 6 Fed. Cas. No. 3,566.

*Alabama*.—Alexander v. Knox, 7 Ala. 503.

*Delaware*.—Knowles v. Knowles, 2 Houst. 133.

*Illinois*.—Brooks v. McKinney, 5 Ill. 309.

*Kentucky*.—Gorham v. Carroll, 3 Litt. 221; Black v. Crouch, 3 Litt. 226; Com. v. Thruston, 7 J. J. Marsh. 62.

*Louisiana*.—Planters' Bank v. George, 6 Mart. (O. S.) 670, 12 Am. Dec. 487.

*Maryland*.—Taney v. Kemp, 4 Har. & J. 348, 7 Am. Dec. 673; Hays v. Richardson, 1 Gill & J. 366.

*Massachusetts*.—Bull v. Loveland, 10 Pick. 9.

*Mississippi*.—Judge of Probate v. Green, 1 How. 146.

*Missouri*.—Ex parte Munford, 57 Mo. 603.

*New Hampshire*.—Copp v. Upham, 3 N. H. 159.

*New York*.—In re Kip, 1 Paige 601; Stewart v. Turner, 3 Edw. Ch. 458; Taylor v. Jennings, 7 Rob. 581.

*North Carolina*.—Jones v. Lanier, 13 N. C. 480.

*Ohio*.—Cox's Admrs. v. Hill, 3 Ohio 411.

*Pennsylvania*.—Baird v. Cochran, 4 Serg. & R. 397.

*South Carolina*.—Hawkins v. Sumter, 4 Desaus. 103, 446.

*Tennessee*.—Zollicoffer v. Turney, 6 Yerg. 297. See, however, In re Bell, 1 Browne 376.

*Vermont*.—Stevens v. Whitcomb, 16 Vt. 121.

"In England this subject underwent much discussion pending the impeachment against Lord Melville in 1806, upon which occasion the question was put to the judges by the House of Lords. The question was presented in two or three different forms, slightly varying in terms, but it was substantially the same in each. Eight judges and the chancellor were of opinion that the witness was bound to answer a question, although his answer might render him liable to a civil action; the other four judges expressed a contrary opinion. In order to remove the doubts, which such a difference of opinion among eminent judges implied, an act was passed, 46 Geo. III, c. 37, declaring that a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to a penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground, that the answering of such question may establish or tend to establish that he owes a debt or is otherwise subject to a civil suit." Shaw, C. J., in Bull v. Loveland, 10 Pick. (Mass.) 9. See also Pye v. Butterfield, 5 B. & S. 829, 117 E. C. L. 828.

4. *Alabama*.—Planters & Merchants Bank v. Willis, 5 Ala. 770 (surety is not privileged); Garey v. Frost, 5 Ala. 636 (same).

*Illinois*.—Brooks v. McKinney, 5 Ill. 309.

*Kentucky*.—Robinson v. Neal, 5 T. B. Mon. 212; Gorham v. Carroll, 3 Litt. 221.

*Maine*.—Lowney v. Perham, 20 Me. 235.

*Maryland*.—Naylor v. Simmes, 4

There are, however, some early cases which hold to the contrary.<sup>5</sup>

**C. FACTS TENDING TO DEGRADE OR DISGRACE WITNESS.**—*a. Material to Issue.*—A witness cannot lawfully refuse to testify to facts material to the issue because his testimony may have a direct tendency to disgrace or degrade him.<sup>6</sup> The refusal of a witness to

Gill & J. 273; *City Bank of Baltimore v. Bateman*, 7 Har. & J. 104.

*Massachusetts.*—*Bull v. Loveland*, 10 Pick. 9 (witness compelled to produce promissory note, although it would show his liability); *Devoll v. Brownell*, 5 Pick. 448.

*North Carolina.*—*Harper v. Burrow*, 28 N. C. (6 Ired. L.) 30.

*Ohio.*—*Ex parte Jennings*, 60 Ohio St. 319, 54 N. E. 262.

*Pennsylvania.*—*Baird v. Cochran*, 4 Serg. & R. 397 (answer would show a debt); *Ralph v. Brown*, 3 Watts & S. 395.

*South Carolina.*—*Miller v. Creydon*, 2 Brev. 108.

*Tennessee.*—*Zollicoffer v. Turney*, 6 Yerg. 297.

*Vermont.*—*Ward v. Sharp*, 15 Vt. 115.

See article "TRANSACTIONS WITH DECEASED PERSONS," Vol. XII.

**5.** *Starr v. Tracy*, 2 Root (Conn.) 528 ("a witness may not deprive a party of his testimony by any voluntary interest he may take upon himself, as by wagering, etc., but a witness is not obliged to disclose what will make against him"); *Simons v. Payne*, 2 Root (Conn.) 406; *Gee v. Warwick*, 3 N. C. (2 Hayw.) 358; *Carne v. McLane*, 1 Cranch C. C. 351, 5 Fed. Cas. No. 2,416; *Pritchard v. Georgetown*, 2 Cranch C. C. 191, 19 Fed. Cas. No. 11,437; *Bank of the United States v. Washington*, 3 Cranch C. C. 295, 2 Fed. Cas. No. 940; *Holmes v. Holloman*, 12 Mo. 535. But a witness whose interest arose by his own voluntary act for the purpose of shielding one of the parties was not privileged. *Phelps v. Riley*, 3 Conn. 266.

**6.** *England.*—*Chetwynd v. Lindon*, 2 Ves. Sr. 450, 28 Eng. Reprint 288; *Franco v. Bolton*, 3 Ves. Jr. 368, 30 Eng. Reprint 1058.

*United States.*—*Brown v. Walker*, 161 U. S. 591.

*Alabama.*—*Hall v. State*, 40 Ala.

698; *Ex parte Boscowitz*, 84 Ala. 463, 4 So. 279, 5 Am. St. Rep. 384. *California.*—*Clark v. Reese*, 35 Cal. 89.

*Connecticut.*—*Skinner v. Judson*, 8 Conn. 528, 21 Am. Dec. 691.

*Delaware.*—*Knowles v. Knowles*, 2 Houst. 133.

*Illinois.*—*Weldon v. Burch*, 12 Ill. 374; *Waters v. West Chicago St. R. Co.*, 101 Ill. App. 265.

*Indian Territory.*—*Oxier v. United States*, 1 Ind. Ter. 85, 38 S. W. 331.

*Kentucky.*—*McC Campbell v. McC Campbell*, 103 Ky. 745, 46 S. W. 18.

*Maine.*—*Foss v. Haynes*, 31 Me. 81.

*Michigan.*—*Jennings v. Prentice*, 39 Mich. 421 (witness was asked if, when an assignment to him was made, he was not wholly irresponsible; material for purpose of showing an intended fraud on creditors).

*Mississippi.*—*Watts v. Smith*, 2 Cushm. 77.

*Montana.*—*State v. Rogers*, 31 Mont. 1, 77 Pac. 293 (under Code Civ. Proc., § 3401).

*New York.*—*Attwood v. Coe*, 4 Sandf. Ch. 412; *Lohman v. People*, 1 N. Y. 379, 49 Am. Dec. 340; *Taylor v. Jennings*, 7 Robt. 581.

*North Carolina.*—*Lassiter v. Phillips*, 70 N. C. 462 (compelled to answer whether he had consulted a spiritualist, although answer would hold him up to ridicule).

*Pennsylvania.*—*In re Doran*, 2 Pars. Eq. Cas. 467.

*Utah.*—*Conway v. Clinton*, 1 Utah 215.

*West Virginia.*—*State v. Hill*, 52 W. Va. 296, 43 S. E. 160.

**Reasons for Rule.**—"A party ought not to be deprived of the benefit of testimony material to the issue in the case, nor ought the course of public justice to be defeated merely because a witness may subject himself to disgrace or reproach. The privilege of the witness ought

testify to material facts upon such ground justifies inferences unfavorable to his testimony by a jury.<sup>7</sup> In some early cases, however, the rule was broadly stated that the tendency to degrade or disgrace the witness was ground for a claim of privilege.<sup>8</sup> Others held the exclusion of the evidence a matter resting in the court's discretion.<sup>9</sup> In one state privilege is apparently extended by statute.<sup>10</sup>

b. *Facts Immaterial to Issue*.—A witness has the privilege of declining to answer questions irrelevant and collateral to the main issue<sup>11</sup> or merely affecting his credibility when the answer will

not to be considered as superior to the rights of individuals, or the demands of public justice. He is required to speak of a transaction in which he voluntarily participated. If he sustains a loss of reputation in consequence of his disclosures, it is but the result of his own wrong." *Weldon v. Burch*, 12 Ill. 374.

**Fraud**.—The fact that discovery may show the witness guilty of fraud not constituting a crime, forms no ground of privilege. *Skinner v. Judson*, 8 Conn. 528, 21 Am. Dec. 691; *Attwood v. Coe*, 4 Sandf. Ch. (N. Y.) 412; *Frothingham v. Broadway*, etc. R. Co., 9 N. Y. Civ. Proc. 304; *Bennet v. Musgrove*, 2 Ves. Sr. 51, 28 Eng. Reprint 34; *Chetwynd v. London*, 2 Ves. Sr. 450, 28 Eng. Reprint 288; *Bicknell v. Gough*, 3 Ark. 558, 26 Eng. Reprint 1121.

7. *Clementine v. State*, 14 Mo. 112.

See *infra*, IX, 1, H, d.

8. *Vaughn v. Perrine*, 3 N. J. L. 728, 4 Am. Dec. 411. And see *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122, and dissent by Field, Jr., in *Brown v. Walker*, 161 U. S. 591. See also *United States v. Craig*, 4 Wash. C. C. 729, 25 Fed. Cas. No. 14,883; *United States v. Dickinson*, 2 McLean 325, 25 Fed. Cas. No. 14,958; *Gravett v. State*, 74 Ga. 191.

9. In *State v. Bilansky*, 3 Minn. 169, the court said: "From a careful examination of the authorities that have been cited, and such others as I have had access to, I am quite clear that no absolute rule can be collected from them which will govern the admission or rejection of testimony of this character, and that the power over it must rest in

the sound discretion of the court, the exercise of which will not be disturbed, except in cases of clear abuse." See also *Warren v. Com.*, 99 Ky. 370, 35 S. W. 1028; *Ring v. Jamison*, 2 Mo. App. 584.

10. **Iowa Statute**.—In Iowa it is provided by statute (Rev. Stat. §§ 3988, 3989) that "when the matter sought to be elicited would tend to render him criminally liable, or to expose him to public ignominy, he is not compelled to answer." The term "public ignominy" has been interpreted to mean public disgrace or dishonor. Accordingly it is held that a witness need not answer a question tending to show that prior to her seduction by the defendant she had had illicit intercourse with other men. *Brown v. Kingsley*, 38 Iowa 220. It is intimated in this case that the holding might be different in cases where previous chaste character is an essential ingredient of the offense.

11. *United States*.—In *re Lewis*, 39 How. Pr. 155, 15 Fed. Cas. No. 8,312; *Brown v. Walker*, 161 U. S. 591.

*Delaware*.—*Knowles v. Knowles*, 2 Houst. 133.

*Indian Territory*.—*Oxier v. United States*, 1 Ind. Ter. 85, 38 S. W. 331.

*Maryland*.—*Merluzzi v. Gleeson*, 59 Md. 214.

*Montana*.—*State v. Rogers*, 31 Mont. 1, 77 Pac. 293 (under Code Civ. Proc., § 3401).

*New Jersey*.—*Vaughn v. Perrine*, 31 N. J. L. 728, 4 Am. Dec. 411 (in action for seduction, plaintiff may refuse to testify as to intercourse with other men).

*New York*.—*People v. Brown*,

tend to disgrace or degrade him,<sup>12</sup> though it has apparently been held to the contrary.<sup>13</sup>

**D. IRRELEVANT EVIDENCE.**—A witness cannot properly refuse to answer questions or produce evidence on the ground that the matter called for is irrelevant.<sup>14</sup> It has, however, been held to the contrary,<sup>15</sup> especially where the statute governing the duty of a witness to testify apparently gives him the right<sup>16</sup> to refuse to an-

72 N. Y. 571, 28 Am. Rep. 183; *People v. Blakeley*, 4 Park. Crim. 176 (witness may be asked if he has committed adultery and if he has had a venereal disease; if collateral he may refuse to answer; no inference against character can be drawn from refusal).

*Pennsylvania.*—*In re Doran*, 2 Pars. Eq. Cas. 467.

*Texas.*—*Clark v. Reese*, 26 Tex. Civ. App. 619, 64 S. W. 783 (in breach of promise suit witness cannot be compelled to answer as to her illicit intercourse with others before her engagement to marry defendant).

*Utah.*—*Conway v. Clinton*, 1 Utah 215 (plaintiff not obliged to answer whether she had been convicted of keeping a house of prostitution).

*West Virginia.*—*State v. Hill*, 52 W. Va. 296, 43 S. E. 160, (question tending to show that witness kept a house of prostitution).

*Wisconsin.*—*Emery v. State*, 101 Wis. 627, 78 N. W. 145; *Crawford v. Christian*, 101 Wis. 51, 78 N. W. 406.

**There Is no Error in Allowing a Question** tending to disgrace the witness to be asked. It is then time for the witness to assert his privilege. *People v. Blakeley*, 4 Park. Crim. (N. Y.) 176; *State v. Patterson*, 24 N. C. (2 Ired. L.) 346, 38 Am. Dec. 699. Compare *infra*, IX 1, H, a, (5).

The legislature can compel witnesses to answer questions, the answers to which may not show them to be criminal, but may involve them in shame and reproach. *Com. v. Roberts*, Brightly N. P. (Pa.) 109 (compelled to testify as to purchase of lottery tickets).

**The Privilege Is Personal.**—*State v. Hill*, 52 W. Va. 296, 43 S. E. 160. See *infra*, IX, 1, H, c, (1).

12. *State v. Staples*, 47 N. H. 113, 90 Am. Dec. 565; *Lohman v. People*, 1 N. Y. 379, 49 Am. Dec. 340. *Contra*, *Rutherford v. Com.*, 2 Met. (Ky.) 387.

A witness who has testified on cross-examination to having been discharged from police force for charges made against him, may decline to state the nature of the charges where his testimony in chief related merely to method of stopping a car on a grade. *Walters v. Seattle R. & S. R. Co.*, 48 Wash. 233, 93 Pac. 419.

13. *State v. Davidson*, 67 N. C. 119; *Hall v. State*, 40 Ala. 698.

14. *England.*—*Ashton v. Ashton*, 1 Vern. 165, 23 Eng. Reprint 390.

*United States.*—*Walker's Trial*, 23 How. St. Trial 1098; *Peoples' Bank v. Brown*, 112 Fed. 652, 50 C. C. A. 411.

*Georgia.*—*Williams v. Turner*, 7 Ga. 350.

*Illinois.*—*Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189, 64 L. R. A. 738.

*Maine.*—*Bradley v. Veazie*, 47 Me. 85.

*Missouri.*—*Ex parte McKee*, 18 Mo. 599. But see *Ex parte Krieger*, 7 Mo. App. 367.

15. *Ex parte Jennings*, 60 Ohio St. 319, 54 N. E. 262, 71 Am. St. Rep. 720 (during taking of deposition before notary). See *Ehrmann v. Ehrmann*, 65 L. J., Ch. 889, (1896) 2 Ch. 826, 75 L. T. 243. But see *DeCamp v. Archibald*, 50 Ohio St. 618, 35 N. E. 1056, 40 Am. St. Rep. 692; *In re Rauh*, 65 Ohio St. 128, 61 N. E. 701.

16. *Ex parte Zeehandelaar*, 71 Cal. 238, 12 Pac. 259. See also *In re Rogers*, 129 Cal. 468, 62 Pac. 47; *People v. Glaze*, 139 Cal. 154, 72

swer irrelevant questions. The privilege against giving irrelevant evidence tending to disgrace the witness has been hereinbefore discussed.<sup>17</sup>

**E. PRODUCTION OF BOOKS AND DOCUMENTS.** — *a. Generally.* As a general rule a third party cannot refuse to produce books and documents merely on the ground that they are his private property,<sup>18</sup> although it has been held to the contrary.<sup>19</sup> The right of a party or witness to refuse to produce his books or documents on the ground of privilege against self-crimination is discussed elsewhere in this article.<sup>20</sup>

*b. Documents of Title.* — In England a disinterested witness has a quasi privilege against the compulsory production or disclosure of his documents of title. The matter, however, is one which apparently rests to a considerable extent in the discretion of the court.<sup>21</sup>

*c. Lienor's Privilege.* — One who is in possession of a document on which he has a lien may be compelled to produce the same at the instance of third parties for evidentiary purposes,<sup>22</sup> although he cannot be required to surrender possession where this would defeat his lien.<sup>23</sup> But a disclosure of the contents of the document

Pac. 965; and also similar statutes in other states.

17. See *infra*, IX, 1, C.

18. *England.* — *Amey v. Long*, 9 East 473; *Geery v. Hopkins*, 2 Ld. Raym. 851; *Doe v. Seaton*, 2 Ad. & El. 171, 29 E. C. L. 62; *Doe v. Date*, 3 Q. B. 609, 6 Jur. 990.

*United States.* — *Wertheim v. Continental R. & T. Co.*, 15 Fed. 716; *United States v. Tilden*, 10 Ben. 566, 28 Fed. Cas. No. 16,522.

*Massachusetts.* — *Bull v. Loveland*, 10 Pick. 9; *Burnham v. Morrissey*, 14 Gray 226, 240, 74 Am. Dec. 676.

*Pennsylvania.* — *Gray v. Pentland*, 2 Serg. & R. 23.

*South Carolina.* — *Hawkins' Exr. v. Sumter*, 4 Desaus. Eq. 446.

*West Virginia.* — *Moats v. Rymer*, 18 W. Va. 642, 41 Am. Rep. 703.

**Business Secrets.** — As to the right of a party to refuse to allow examination of his books because it would reveal business secrets, see *supra*, IX, 1, A, c.

19. *Masters v. Marsh*, 19 Neb. 458, 27 N. W. 438. And see *Goss Portg. P. Co. v. Scott*, 89 Fed. 818; *United States v. Tilden*, 10 Ben. 566, 28 Fed. Cas. No. 16,522.

20. See *infra* IX, 1, H, a, (10.).

21. See the following cases: *Doe v. Langdon*, 12 Q. B. 711, 18 L. J., Q. B. 17, 13 Jur. 96; *Mills v. Oddy*, 6 Car. & P. 728, 25 E. C. L. 620; *Rex v. Hunter*, 3 Car. & P. 591, 14 E. C. L. 469; *Roberts v. Simpson*, 2 Stark. 203, 3 E. C. L. 314; *Reed v. James*, 1 Stark. 132, 2 E. C. L. 326; *Copeland v. Watts*, 1 Stark. (Eng.) 96; *Miles v. Dawson*, 1 Esp. (Eng.) 402.

22. *Commerell v. Poynton*, 1 Swanst. 1, 36 Eng. Reprint 273; *Hunter v. Leathley*, 10 B. & C. 858, 8 L. J. (O. S.) K. B. 274, *affirmed*, 5 M. & P. 457, 7 Bing. 517; *Thompson v. Mosely*, 5 Car. & P. 501, 24 E. C. L. 428; *Ley v. Barlow*, 5 Railw. Cas. 1, 5 D. & L. 375, 1 Ex. 800, 17 L. J., Ex. 105; *Deadman v. Ewen*, 27 U. C. Q. B. 176; *Marley v. Green*, 11 Paige (N. Y.) 240, 42 Am. Dec. 112.

23. *Morley v. Green*, 11 Paige (N. Y.) 240, 42 Am. Dec. 112; *Thompson v. Mosely*, 5 Car. & P. 501, 24 E. C. L. 428; *Ley v. Barlow*, 5 Railw. Cas. 1, 5 D. & L. 375, 1 Ex. 800, 17 L. J., Ex. 105. See also *Mayne v. Hawkey*, 3 Swanst. 93, 36 Eng. Reprint 786; *Deadman v. Ewen*, 27 U. C. Q. B. 176. But

cannot be compelled where such action would in effect destroy the value of the lien.<sup>24</sup> The court cannot adjudicate the rights of the witness to the document in a suit to which he is not a party.<sup>25</sup>

F. PRIVILEGE AGAINST BODILY EXPOSURE OR PHYSICAL EXAMINATION.—The general question whether a party is privileged against a physical examination or bodily exposure at the instance of the adverse party is discussed elsewhere in this work.<sup>26</sup> Whether such proceeding is a violation of the privilege against self-crimination will be treated at a later stage of this article.<sup>27</sup>

G. SECRECY OF BALLOT.—a. *Generally*.—A legally qualified elector cannot be compelled to divulge how he voted.<sup>28</sup> The privilege, however, does not extend to an illegal voter,<sup>29</sup> but the court must decide the preliminary question of illegality before compelling

see *Bull v. Loveland*, 10 Pick. (Mass.) 9; *White v. Harlow*, 5 Gray (Mass.) 463; *Doe v. Clifford*, 2 Car. & K. 448, 61 E. C. L. 447.

24. *Davis v. Davis*, 90 Fed. 791. In this case the witness was an attorney and claimed a lien as such against the party calling him. It was held that since the value of the lien depended upon the power of the witness to withhold the papers from use as evidence he could not be compelled to produce them. *Compare Cobb v. Tirrell*, 141 Mass. 459, 5 N. E. 828.

25. *Morley v. Green*, 11 Paige (N. Y.) 240, 42 Am. Dec. 112. See also *Cobb v. Tirrell*, 141 Mass. 459, 5 N. E. 828.

26. See article "PHYSICAL EXAMINATION," Vol. IX.

27. See *infra*, IX, 1, H, a, (II), (D.)

28. *Alabama*.—*Black v. Pate*, 130 Ala. 514, 30 So. 534.

*Arkansas*.—*Dixon v. Orr*, 49 Ark. 238, 4 S. W. 774, 4 Am. St. Rep. 42.

*Illinois*.—*Eggers v. Fox*, 177 Ill. 185, 52 N. E. 269; *Gill v. Shurtleff*, 183 Ill. 440, 56 N. E. 164; *Sorenson v. Sorenson*, 189 Ill. 179, 59 N. E. 555; *Welch v. Shumway*, 232 Ill. 54, 83 N. E. 549.

*Indiana*.—*Pedigo v. Grimes*, 113 Ind. 148, 13 N. E. 700 (not when vote is lawful).

*Kentucky*.—*Com. v. Barry*, 98 Ky. 394, 33 S. W. 400; *Tunks v. Vincent*, 106 Ky. 829, 51 S. W. 622; *Major v. Barker*, 99 Ky. 305, 35 S. W. 543.

*Louisiana*.—*Tullos v. Lane*, 45 La. Ann. 333, 12 So. 508.

*Michigan*.—*Attorney-General v. McQuade*, 94 Mich. 439, 53 N. W. 944; *People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141.

*Nevada*.—*Schneider v. Bray*, 22 Nev. 272, 39 Pac. 326.

*New York*.—*People v. Pease*, 27 N. Y. 45. See *People v. Thacher*, 55 N. Y. 525, 535, 14 Am. Rep. 312; *People ex rel. Deister v. Wintermute*, 122 App. Div. 349, 106 N. Y. Supp. 1076.

*Oregon*.—*State v. Kraft*, 18 Or. 550, 23 Pac. 663.

*Pennsylvania*.—*In re Kneass*, 2 Pars. Eq. Cas. 553; *In re Orphans' Court*, 1 Brewst. 67.

*South Carolina*.—See *Johnston v. Corporation of Charleston*, 1 Bay 441.

29. *Alabama*.—*Black v. Pate*, 130 Ala. 514, 30 So. 434.

*Illinois*.—*Sorenson v. Sorenson*, 189 Ill. 179, 59 N. E. 555.

*Indiana*.—*Pedigo v. Grimes*, 113 Ind. 148, 13 N. E. 700.

*Kentucky*.—*Tunks v. Vincent*, 106 Ky. 829, 51 S. W. 622.

*North Carolina*.—*People v. Teague*, 106 N. C. 576, 11 S. E. 655, 19 Am. St. Rep. 547.

*Oregon*.—*State v. Kraft*, 18 Or. 550, 23 Pac. 663.

*Pennsylvania*.—*In re Locust Ward*, 3 Pa. L. J. 11, 4 Pa. L. J. 341.

*South Dakota*.—*Vallier v. Brakke*, 7 S. D. 343, 64 N. W. 180.

*Wisconsin*.—*State ex rel. Doerflinger v. Hilmantel*, 23 Wis. 422 (the court cannot discriminate be-

him to answer.<sup>30</sup> Of course, even in such a case, the witness cannot be compelled to give an answer that will incriminate himself.<sup>31</sup> The fact, however, that a legal voter casts his ballot in an illegal manner does not deprive him of his privilege.<sup>32</sup> The privilege is personal and may be waived by the witness.<sup>33</sup>

b. *Other Evidence.* — (1.) *Generally.* — It seems that the same public policy which protects the voter from compulsory disclosure of how he voted also forbids other proof of the same fact so long as the voter is entitled to claim the privilege.<sup>34</sup>

(2.) *Disclosure by Election Officers.* — Statutes allowing election officers to assist a disabled or illiterate voter may provide that such

tween cases where many qualifications are lacking and those where there are but few).

The limits of this rule are well stated in *People v. Cicotte*, 16 Mich. 283, 314: "It is clear that this privilege of secrecy is given only to those who are recognized by the constitution as electors. And whenever the person who has voted admits that he was not constitutionally qualified, or the fact clearly appears, so that it no longer remains a question for the jury, he can claim no protection from this privilege. But when his qualification is a disputed question of fact, which is to be determined by the jury in rendering their verdict, he cannot be compelled to disclose his vote."

30. *Pedigo v. Grimes*, 113 Ind. 148, 13 N. E. 700; *People v. Teague*, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547.

31. *Eggers v. Fox*, 117 Ill. 185, 52 N. E. 269; *Sorenson v. Sorenson*, 189 Ill. 179, 59 N. E. 555; *People v. Pease*, 27 N. Y. 45; *State v. Olin*, 23 Wis. 309.

Where the witness' testimony would tend to show a criminal violation of the election laws he cannot be compelled to answer. *Eggers v. Fox*, 177 Ill. 185, 52 N. E. 269.

32. *Gill v. Shurtleff*, 183 Ill. 440, 56 N. E. 164; *Schoil v. Bell*, 31 Ky. L. Rep. 335, 102 S. W. 248; *O'Neal v. Barth*, 31 Ky. L. Rep. 363, 102 S. W. 263.

33. See article "ELECTIONS," Vol. V, p. 72, n. 17, and the following: *Alabama*. — *Black v. Pate*, 130 Ala. 514, 30 So. 434.

*Arkansas*. — *Dixon v. Orr*, 49 Ark. 238, 4 S. W. 774.

*California*. — *Patterson v. Hanley*, 136 Cal. 265, 68 Pac. 821, 975.

*Delaware*. — *State v. Matlack*, 5 Penne. 401, 64 Atl. 259.

*Illinois*. — *Eggers v. Fox*, 177 Ill. 185, 52 N. E. 269.

*Indiana*. — *Pedigo v. Grimes*, 113 Ind. 148, 13 N. E. 700.

*Michigan*. — *People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141.

*Montana*. — *Lane v. Bailey*, 29 Mont. 548, 29 Pac. 548.

*New York*. — *People v. Thatcher*, 55 N. Y. 525, 14 Am. Rep. 312; *People ex rel. Deister v. Wintermute*, 122 App. Div. 349, 106 N. Y. Supp. 1076.

*North Carolina*. — *People v. Teague*, 106 N. C. 576, 11 S. E. 665.

*Oregon*. — *State v. Kraft*, 18 Or. 550, 23 Pac. 663.

*Pennsylvania*. — *In re Kneass*, 2 Pars. Eq. Cas. 553.

But see *Mayor v. Barker*, 99 Ky. 305, 35 S. W. 543.

A party cannot complain of error in compelling the witness to answer. *Sorenson v. Sorenson*, 189 Ill. 179, 59 N. E. 555; *People v. Pease*, 27 N. Y. 45. Compare *infra*, IX, 1, H, c, (3.), (C.)

**Instruction by Court to Witness.** *Necessity.* — See *supra*, IX, 1, H, b.

The privilege can be claimed only by the witness himself. *People ex rel. Deister v. Wintermute*, 122 App. Div. 349, 106 N. Y. Supp. 1076; *Eggers v. Fox*, 177 Ill. 185, 52 N. E. 269.

34. See article "ELECTIONS," Vol. V, p. 72, and *People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141. But see *People v. Pease*, 27 N. Y. 45;



officers shall not disclose how he voted.<sup>35</sup> As to whether such statutes apply to the case of illegal voters the courts are not in accord.<sup>36</sup>

H. PRIVILEGE AGAINST SELF-CRIMINATION. — a. *Nature and Extent.* — (1.) *Basis of Privilege.* — (A.) *GENERALLY.* — Historically,<sup>37</sup> the privilege against self-crimination is a development of the common law of England, although it has become embodied in statutes and constitutional provisions.<sup>38</sup>

(B.) *CONSTITUTIONAL PROVISIONS.* — (a.) *Generally.* — In England and Canada where written constitutions have not been formulated, the privilege still rests in the common law and statutes.<sup>39</sup> But in the United States it has been incorporated into the constitutions of the federal, and, with a few exceptions,<sup>40</sup> state governments and statutes pursuant thereto.<sup>41</sup>

(b.) *Application.* — The fifth amendment to the federal constitution embodying the privilege against self-crimination does not control the courts and legislatures of the several states, but applies to the federal government.<sup>42</sup> It has been held, however, that this privilege is a part of "due process of law," and may therefore be claimed under a constitutional provision guaranteeing due process

Widmayer v. Davis, 231 Ill. 42, 83 N. E. 87.

35. See Patterson v. Hanley, 136 Cal. 265, 68 Pac. 821; Welch v. Shumway, 232 Ill. 54, 83 N. E. 549. Under such a statute it is not material that the requisite affidavit was not made by the voter. Gill v. Shurtleff, 183 Ill. 440, 56 N. E. 164.

36. See Montgomery v. Dormer, 181 Mo. 5, 79 S. W. 913 (*holding* that they do not); Welsh v. Shumway, 232 Ill. 54, 83 N. E. 549 (*holding* that they do).

37. For a history of its development, see Wigmore on Ev., Vol. III, § 2250.

38. State v. Jack, 69 Kan. 387, 76 Pac. 911, 1 L. R. A. (N. S.) 167, 2 Ann. Cas. 171; Bram v. United States, 168 U. S. 533; Counselman v. Hitchcock, 142 U. S. 547.

39. See *infra*, IX, 1, H. a, (2).

40. Iowa has no express constitutional provision. State v. Height, 117 Iowa 650, 91 N. W. 935.

In New Jersey although there is no constitutional provision embodying the privilege, the common law doctrine is in force. State v. Zdunowicz, 69 N. J. L. 619, 55 Atl. 743.

41. *Provisions of State Constitutions.* — "In the constitutions of Georgia, California and New York

the provision is identically, or substantially, that of the constitution of the United States, namely, that no person shall 'be compelled in any criminal case to be a witness against himself'; while in the constitutions of Pennsylvania, Arkansas, Indiana, Massachusetts, Virginia, New Hampshire and North Carolina it is different in language, and to the effect that 'no man can be compelled to give evidence against himself'; or that, in prosecutions, the accused 'shall not be compelled to give evidence against himself'; or that 'no person in any criminal prosecution shall be compelled to testify against himself'; or that no person shall be 'compelled to accuse or furnish evidence against himself'; or that no man can 'be compelled to give evidence against himself'; or that, in all criminal prosecutions, 'every man has the right to not be compelled to give evidence against himself.' Counselman v. Hitchcock, 142 U. S. 547.

42. State v. Comer, 157 Ind. 611, 62 N. E. 452; *In re Briggs*, 135 N. C. 118, 47 S. E. 403; State v. Atkinson, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 877; *s. c.*, 41 S. C. 551, 19 S. E. 691; State v. Height, 117 Iowa 650, 91 N. W. 935; Jack v. Kansas, 199 U. S. 372.

of law, even though it is not otherwise expressly provided for.<sup>43</sup> So, also, it has been held that constitutional inhibition against unreasonable seizures and searches creates a privilege against compulsory production of incriminating papers and documents.<sup>44</sup> The general rule, however, seems to be that there is no connection between the privilege against self-crimination and the constitutional immunity from unreasonable seizures and searches, and that consequently the use of evidence obtained by violation of such immunity is not an infringement of the privilege, although some courts distinguish in this respect between the acts of individuals and those of the state.<sup>45</sup>

(c.) *Interpretation.* — The provisions of the federal and state constitutions though varying in language have a common purpose, namely, protection against self-crimination,<sup>46</sup> and are generally held to merely embody the privilege as it existed at common law.<sup>47</sup> They are usually briefly expressed but have been broadly interpreted to serve their manifest purpose,<sup>48</sup> although some courts have

43. *State v. Height*, 117 Iowa 650, 91 N. W. 935. See *Jack v. Kansas*, 199 U. S. 372.

**Fourteenth Amendment.** — *Quaere* but not decided whether it extends the 4th and 5th Amendments of the federal constitution to the states. *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541.

44. *State v. Height*, 117 Iowa 650, 91 N. W. 935. See also *Boyd v. United States*, 116 U. S. 616.

**Relation Between Fourth and Fifth Amendment.** — See *Boyd v. United States*, 116 U. S. 616.

45. See article "COMPETENCY," Vol. III, p. 182, and *Adams v. People*, 192 U. S. 585, *affirming* 176 N. Y. 351, 68 N. E. 636, 63 L. R. A. 406; *Shields v. State*, 104 Ala. 35, 16 So. 85; *State v. Pomeroy*, 130 Mo. 489, 32 S. W. 1002 (lottery tickets unlawfully seized); *State v. Flynn*, 36 N. H. 64; *State v. Atkinson*, 40 S. C. 363, 18 S. E. 1021.

46. See *Ex parte Senior*, 37 Fla. 1, 19 So. 652, 32 L. R. A. 133; *Tuttle v. People*, 33 Colo. 243, 79 Pac. 1035, 7 L. R. A. 33.

Justice Blatchford said of these provisions, in *Counselman v. Hitchcock*, 142 U. S. 547: "As the manifest purpose of the constitutional provisions, both of the states and of the United States, is to prohibit the compelling of testimony of a self-incriminating kind from a party or a witness, the liberal construction

which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation; and that where the constitution, as in the cases of Massachusetts and New Hampshire, declares that the subject shall not be 'compelled to accuse or furnish evidence against himself,' such a provision should not have a different interpretation from that which belongs to constitutions like those of the United States and of New York, which declare that no person shall be 'compelled in any criminal case to be a witness against himself.'" See also *In re Beer* (N. D.), 115 N. W. 672.

47. *State v. Quarles*, 13 Ark. 307, 311; *Counselman v. Hitchcock*, 142 U. S. 547; *Higdon v. Heard*, 14 Ga. 255.

**English Decisions Entitled to Great Weight.** — Since the constitutional provisions were merely an embodiment of the preexisting principles of common law, the interpretation given these principles by the English courts is entitled to great weight. *Brown v. Walker*, 161 U. S. 591.

48. *Boyd v. United States*, 116 U. S. 616; *Counselman v. Hitchcock*, 142 U. S. 547. See *State v. Height*, 117 Iowa 650, 91 N. W. 935; *In re*

intimated that the privilege created by them should be restricted rather than enlarged.<sup>49</sup>

(2.) **Statutory Abridgment.**—In those jurisdictions where the matter is not controlled by constitutional provisions the privilege may be abridged or abolished by statute.<sup>50</sup> But an act making the accused competent and compellable to testify in a certain class of cases does not destroy his previous statutory privilege against self-incrimination.<sup>51</sup> Where the privilege is embodied in the constitution it cannot be infringed by legislative enactment unless an adequate substitute is provided.<sup>52</sup>

(3.) **Two Branches.**—There are two branches of the privilege, first, that of an accused person, which though it arises only in proceedings looking toward the determination of his guilt or innocence,<sup>53</sup> is absolute and not subject to statutory regulation;<sup>54</sup> second, that of an ordinary witness,<sup>55</sup> which, though it may be claimed in any sort of judicial proceedings,<sup>56</sup> is confined, in general, to matters having a tendency to incriminate him,<sup>57</sup> and which may be removed by statute if an equivalent protection is substituted therefor.<sup>58</sup> The difference between the two branches of privilege is illustrated by the fact that an accused though he waive his privilege as such by becoming a witness, may nevertheless, in some states at least,

Beer (N. D.), 115 N. W. 672; Thornton v. State, 117 Wis. 338, 93 N. W. 1107.

"'When a proper case arises' the constitutional provisions 'should be applied in a broad and liberal spirit, in order to secure to the citizen that immunity from every species of self-accusation implied in the brief and comprehensive language in which they are expressed.'" People v. Forbes, 143 N. Y. 219, 38 N. E. 303; People v. Reardon, 124 App. Div. 18, 109 N. Y. Supp. 504.

The supreme court of Indiana, referring to the constitutional provision that "no person, in any criminal prosecution, shall be compelled to testify against himself," said: "Literally, this provision extends to criminal prosecutions only, and not to civil actions; but we think its spirit and intent go much farther, and protect a person from a compulsory disclosure, in a civil suit, of facts tending to criminate the party, wherever his answer could be given in evidence against him in a subsequent criminal prosecution." Wilkins v. Malone, 14 Ind. 153. See also Higdon v. Heard, 14 Ga. 255.

49. "It is the privilege of crime; the interests of justice would be little promoted by its enlargement." State v. Wentworth, 65 Me. 234, 241, per Appleton, C. J. See also *Ex parte Reynolds*, 15 Cox C. C. (Eng.) 108, 115.

50. See *Queen v. Fee*, 13 Ont. 590; *Queen v. Hammond*, 29 Ont. 211; *Queen v. McLinehy*, 2 Can. Crim. Cas. (Queb.) 416; *Reg. v. Cross*, 7 Cox C. C. (Eng.) 226; *Reg. v. Cherry*, 12 Cox C. C. (Eng.) 32; *Ex parte Scofield*, 6 Ch. Div. (Eng.) 230.

51. *Queen v. Halpin*, 12 Ont. 330; *Queen v. Connolly*, 4 Can. L. T. 301.

52. See *infra* IX, 1, H, f.

53. See *infra*, IX, 1, H, a, (4).

54. See *Counselman v. Hitchcock*, 142 U. S. 547.

55. *State v. Quarles*, 13 Ark. 307; *Com. v. Emery*, 107 Mass. 171; *People v. Kelly*, 24 N. Y. 74; *Cullen v. Com.*, 24 Gratt. (Va.) 624; *Counselman v. Hitchcock*, 142 U. S. 547.

56. See *infra*, X, 1, H, a, (4); also *Ex parte Senior*, 37 Fla. 1, 19 So. 652.

57. See *infra*, IX, 1, H, a, (6).

58. See *infra*, IX, 1, H, f.

claim his privilege as an ordinary witness against testifying to facts tending to incriminate him in some independent matter.

(4.) **Proceedings in Which May Be Claimed.**—(A.) **ORDINARY WITNESS.** The qualified privilege of a mere witness extends to every sort of a proceeding<sup>59</sup> in which he is called upon to testify or disclose incriminating facts, whether civil or criminal,<sup>60</sup> legal or equitable,<sup>61</sup> litigious or *ex parte*.<sup>62</sup> It therefore may be invoked in an examination before a grand jury<sup>63</sup> or a legislative body,<sup>64</sup> such as a city council,<sup>65</sup> bankruptcy proceedings,<sup>66</sup> in an examination of parties before trial,<sup>67</sup> and in an infringement suit.<sup>68</sup>

(B.) **ACCUSED.**—The privilege of an accused against being called upon or compelled to give testimony against himself extends to all proceedings of a criminal or quasi criminal nature, the primary purpose of which is to investigate or determine his alleged criminal conduct,<sup>69</sup> or to proceedings which are instituted for the purpose

59. See *Kanter v. Circuit Court Clerk*, 108 Ill. App. 287; *Counselman v. Hitchcock*, 142 U. S. 547; *Kellogg v. Sowerby*, 32 Misc. 327, 66 N. Y. Supp. 542.

**Taking Deposition Under Commission From Another State.**—Privilege may be claimed. *In re Tappan*, 9 How. Pr. (N. Y.) 394. But see *infra*, IX, 1, H, a, (6.) (A.)

60. *Ex parte Senior*, 37 Fla. 1, 19 So. 652; *Wilkins v. Malone*, 14 Ind. 153. See *infra*, IX, 1, H, a, (6.), (B.).

61. See *infra*, IX, 1, H, a, (7.).

62. See notes following.

63. *United States.*—*Foot v. Buchanan*, 113 Fed. 156; *Counselman v. Hitchcock*, 142 U. S. 547, 563.

*Indiana.*—*State v. Comer*, 157 Ind. 611, 62 N. E. 452.

*Minnesota.*—*State v. Gardner*, 88 Minn. 130, 92 N. W. 529; *State v. Froiseth*, 16 Minn. 296.

*Missouri.*—*State v. Faulkner*, 175 Mo. 546, 75 S. W. 116.

*New York.*—*People ex rel. Taylor v. Seaman*, 8 Misc. 152, 29 N. Y. Supp. 329; *People v. Kelly*, 24 N. Y. 74.

*Texas.*—*Ex parte Wilson*, 39 Tex. Crim. 630, 47 S. W. 996; *Wilson v. State*, 41 Tex. Crim. 115, 51 S. W. 916; *Elliott v. State* (Tex. App.), 19 S. W. 249.

*Compare infra*, IX, 1, H, a, (4.), (B.).

64. *Com. v. Emery*, 107 Mass. 172, 9 Am. Rep. 22.

65. *Matter of Van Tine*, 12 How. Pr. (N. Y.) 507.

66. See *infra*, IX, 1, H, f, (5), (A), and *United States v. Goldstein*, 132 Fed. 789. But see *In re Sapiro*, 92 Fed. 340.

**Bankruptcy Proceedings in England.**—In England in bankruptcy proceedings the privilege of the bankrupt seems to have been largely abrogated, even before the statute extending immunity. *Rex v. Scott*, 1 Dears. & B. (Eng.) 47; *Rex v. Erdheim*, 65 L. J., M. C. 176, (1896) 2 Q. B. 260, 74 L. T. 734, 44 W. R. 607; *In re X. Y.*, (1902) 1 K. B. 98; *In re Smith*, 2 Deac. & C. 230; *In re Heath*, 2 Deac. & C. 214, Mont. & B. 184, 2 L. J., Bk. 27. But the privilege of witness in such proceedings is still maintained. *Ex parte Schofield*, L. R. 6 Ch. Div. (Eng.) 230.

67. *Kugelman v. Barry*, 17 Misc. 30, 40 N. Y. Supp. 767. See *infra*, IX, 1, H, a, (7.).

68. *Snow v. Mast*, 63 Fed. 623; *Chapman v. Ferry*, 12 Fed. 693.

69. See *People v. Kelly*, 24 N. Y. 74; *United States v. McCarthy*, 18 Fed. 87, 21 Blatchf. 468.

**Proceedings Before Grand Jury.** A witness cannot refuse to be sworn before the grand jury when no indictment has been found and no proceedings are pending against him. *United States v. Kimball*, 117 Fed. 156; *State v. Lewis*, 96 Iowa 286, 65 N. W. 295. He may refuse to be sworn, however, when his own

conduct is under investigation by the grand jury. *United States v. Edgerton*, 80 Fed. 374; *State v. Gardiner*, 88 Minn. 130, 92 N. W. 529; *Wilson v. State*, 41 Tex. Crim. 115, 51 S. W. 916. Compare *Lindsay v. State*, 24 Ohio C. C. 1, and *supra*, IX, 1, H, a, (4), (A).

**A Proceeding Before a Superintendent of Elections** under a statute authorizing him to superintend registration and investigate all matters relating thereto and for this purpose to examine the inmates or owners of any house or building and to issue subpoenas, is not criminal in its nature. Such officer is a merely administrative officer. The fact that he entitles the proceeding "The People vs. C." is not material. *People v. Cahill*, 126 App. Div. 391, 110 N. Y. Supp. 728 (But see dissent), judgment affirmed in 193 N. Y. 232, 86 N. E. 39.

**Inspection of Stock Brokers Books.** Under a constitutional provision that "no person shall be compelled in any criminal case to be a witness against himself" the immunity "extends to any preliminary investigation, or even collateral or independent proceeding, in which it is sought to elicit evidence which may result in prosecution. . . . It extends . . . to all manner of proceedings in which testimony is to be taken, whether litigious or not, and whether ex parte or otherwise." Hence a statute compelling stock brokers to produce their books and memoranda for the inspection of the state comptroller, or his representatives, for the purpose of detecting and punishing violations of the law imposing a tax on transfers of stock, is unconstitutional. *People v. Reardon*, 124 App. Div. 18, 109 N. Y. Supp. 504.

**Wife Desertion.**—Under a Pennsylvania statute, wife desertion is a quasi-criminal offense, and therefore the defendant cannot be compelled to testify. *Com. v. Reed*, 5 Pa. Dist. 57.

**Proceeding for Removal of a Public Officer** is quasi-criminal. *Thurston v. Clark*, 107 Cal. 285, 40 Pac. 435.

**Proceedings Before State Legislature.**—Such proceedings may be

quasi-criminal. *In re Emery*, 107 Mass. 172, 9 Am. Rep. 22.

**Bastardy Proceedings** not criminal. See *Miller v. State*, 110 Ala. 69, 20 So. 392; *Burt v. State*, 79 Ind. 359.

**Statutory Proceedings Supplementary to Execution** are not in violation of the constitutional provision. *In re Burrows*, 33 Kan. 675, 7 Pac. 148.

**A Statute Requiring Bankers To Appear and Testify** before commissioners, and providing penalties for failure to appear without just cause, is valid, for if the facts will criminate just cause appears. *Com. v. Farmers & Merchants Bank*, 21 Pick. (Mass.) 542, 32 Am. Dec. 290.

**Disbarment Proceedings** are not criminal, and the defendant's refusal to testify therefore subjects him to unfavorable inferences. *In re Randall*, 158 N. Y. 216, 52 N. E. 1106.

**Contempt Proceedings** not criminal in nature. *State v. Sieber*, 49 Or. 1, 88 Pac. 313 (violation of injunction); *State v. Soule*, 8 Rob. (La.) 500.

**Contempt Proceedings Criminal.** *Ex parte Gould*, 99 Cal. 360, 33 Pac. 1112, 37 Am. St. Rep. 57, 21 L. R. A. 751. See also *Louisville, H. & St. L. R. Co. v. Schwab*, 31 Ky. L. Rep. 1313, 105 S. W. 110; *In re Nickel*, 47 Kan. 734, 28 Pac. 1076, 27 Am. St. Rep. 315.

Contempt proceedings are of two classes, first, where the alleged contemptuous act is aimed directly at the power or dignity of the court, or subversive of the due administration of public law, and where the responsive act of the court is purely punitive in character to vindicate the rights of the people at large; second, where the act complained of consists merely in the refusal to do or refrain from doing some act commanded or prohibited for the benefit primarily at least of a party litigant. Proceedings to determine the first class of contempts are essentially criminal, while in the second class they are civil in nature. *Patterson v. Wyoming Val. Dist. Council*, 31 Pa. Super. 112, citing *Thompson v. Pennsylvania R. Co.*, 48 N. J. Eq. 105, 21 Atl. 182. See also *In re Haines*, 67 N. J. L. 442, 51 Atl. 929.

of enforcing against him a penalty or forfeiture.<sup>70</sup> The question here involved, however, must be distinguished from the question whether the former testimony of an accused was given voluntarily and can therefore be used against him in a subsequent proceeding.<sup>71</sup>

(5.) **Right To Propound Questions.** — Inasmuch as it is the answer of the witness and not the question which may tend to incriminate him, and since the witness may elect to waive his privilege it is always proper to propound questions though they may call for incriminating answers.<sup>72</sup> It is error, however to even call upon the

**A Deportation Proceeding** is civil in its nature since it does not involve punishment for a crime, the imposition of a fine, or the enforcement of a penalty or forfeiture. Hence the defendant cannot refuse to testify against himself. *United States v. Tom Wah*, 160 Fed. 207, affirmed in (C. C. A.) 163 Fed. 1008; *Lau Chin Woon v. United States*, 147 Fed. 227, 77 C. C. A. 369.

**Investigation by Commissioner of Corporations.** — **Criminal.** — The investigation which the commissioner of corporations is authorized to make into the conduct and business of interstate commercial corporations is a judicial proceeding in which the witness may claim his privilege although he appears without subpoena and is not under oath. *United States v. Armour & Co.*, 143 Fed. 808.

**Forfeiture of License of Foreign Corporation.** — A proceeding provided for in an anti-trust law to prohibit foreign corporations from doing business in violation of the law and to forfeit its license to do business is not a criminal proceeding and does not involve the infliction of a penalty. *State v. Standard Oil Co.*, 61 Neb. 28, 84 N. W. 413.

**The Remedy of Quo Warranto** to forfeit a charter of a corporation for violating the law is a civil remedy and does not involve penal consequences. *State v. Standard Oil Co.*, 61 Neb. 28, 84 N. W. 413.

70. *Robson v. Doyle*, 191 Ill. 566, 61 N. E. 435 (recovery by informer, of penalty for gaming); *Lees v. United States*, 150 U. S. 476; *Boyd v. United States*, 116 U. S. 616; *United States v. Collins*, 1 Woods 499, 25 Fed. Cas. No. 14,837; *Bryan v. State*, 40 Ga. 688. See *infra*, IX,

1, H, a, (6), (B); IX, 1, H, a, (7).

71. See *infra*, IX, 1, H, a, (11), (B).

72. *England* — *Allhusen v. Labouchere*, 47 L. J., Ch. 819, 3 Q. B. D. 654, 39 L. T. 207, 27 W. R. 12; *Paxton v. Douglas*, 16 Ves. Jr. 239, 33 Eng. Reprint 975.

*Canada*. — *Power v. Ellis*, 20 N. Bruns. 40, 6 Can. Sup. 1.

*Delaware*. — *Short v. State*, 4 Har. 568.

*Louisiana*. — *Macarty v. Bond*, 9 La. 351.

*New Jersey*. — *Fries v. Brugler*, 12 N. J. L. 79, 21 Am. Dec. 52.

*New York*. — *Southard v. Rexford*, 6 Cow. 254; *People v. Abbot*, 19 Wend. 192; *Great Western Tpk. Co. v. Loomis*, 32 N. Y. 127, 138, 88 Am. Dec. 311.

*South Carolina*. — *State v. Butler*, 47 S. C. 25, 24 S. E. 991.

**Interrogatories** in a bill of discovery or the statutory equivalent are not improper because they call for answers which may be refused on the ground of privilege. *Allhusen v. Labouchere*, 47 L. J. Ch. 819, 3 Q. B. D. 654, 39 L. T. 207; *Spokes v. Hotel Co.*, 66 L. J., Q. B. 572 (1897), 2 Q. B. 124, 36 L. T. 679; *Fisher v. Owen*, 47 L. J., Ch. 681, 8 Ch. Div. 645, 38 L. T. 577, 26 W. R. 581; *Paxton v. Douglas*, 16 Ves. Jr. 239, 33 Eng. Reprint 975; *Osborn v. London Dock Co.*, 10 Exch. 698, 3 C. L. R. 313, 24 L. J., Ex. 140, 1 Jur. (N. S.) 93. See *Bartlett v. Lewis*, 12 C. B. N. S. 249, 31 L. J., C. P. 230, 9 Jur. (N. S.) 202, 6 L. T. 388. But see *Tupling v. Ward*, 6 H. & N. (Eng.) 749, 30 L. J., Ex. 222, 7 Jur. (N. S.) 314, 4 L. T. 20; *Thornton v. Adkins*, 19 Ga. 464; *Simpson v. Smith*, 27 Kan. 565. See *infra*, IX, 1, H, a, (7).

defendant in a criminal case in the presence of the jury to testify<sup>73</sup> or produce documents,<sup>74</sup> against his will even though he makes no objection thereto.

(6.) **Matters Covered by Privilege.**—(A.) **LIABILITY UNDER LAW OF ANOTHER SOVEREIGNTY.**—The bare possibility of a criminal prosecution under the law of another sovereignty is not a sufficient basis for a claim of privilege.<sup>75</sup> But where discovery is sought for the express purpose of enforcing a forfeiture under the laws of a foreign state, a disclosure will not be compelled in aid thereof.<sup>76</sup>

(B.) **MATTERS TENDING TO SUBJECT WITNESS TO PENALTIES OR FORFEITURE.**  
(a.) *Generally.*—The privilege protects a witness in his refusal to answer questions which will tend to subject him to penalties or forfeitures.<sup>77</sup>

**Discovery** of facts tending to subject the witness or party to a penalty or forfeiture cannot be compelled.<sup>78</sup>

(b.) *Illustrations of Penalty or Forfeiture.*—(AA.) **GENERALLY.**—While no general rule as to what facts constitute or tend to show a penalty or forfeiture can be laid down, illustrations of what have been held to be such are given in the notes.<sup>79</sup>

73. *Town Council v. Owens*, 61 S. C. 22; 39 S. E. 184. See IX, 1, H, a, (11), and *People v. Cahill*, 126 App. Div. 391, 110 N. Y. Supp. 728.

74. *McKnight v. United States*, 115 Fed. 972.

75. *Rex v. Willcox*, 1 Sim. (N. S.) 301, 14 Jur. 751, 61 Eng. Reprint 116; *Jack v. Kansas*, 199 U. S. 372, 4 Ann. Cas. 689, *affirming* 69 Kan. 387, 76 Pac. 911; *People v. Butler St. Foundry & I. Co.*, 201 Ill. 236, 66 N. E. 349; *Nelson v. United States*, 201 U. S. 92 (anti-trust act grants sufficient immunity although it does not protect witness in state courts); *State v. March*, 46 N. C. (1 Jones L.) 526; *State v. Thomas*, 98 N. C. 599, 4 S. E. 518. But see *Nye v. Daniels*, 75 Vt. 81, 53 Atl. 150 (*holding* a postmaster privileged from refusing to disclose the secrets of the postoffice where such disclosure would, by virtue of the federal postal regulations, subject him to removal from office); and *In re Tappan*, 9 How. Pr. (N. Y.) 394 (examination under commission from another state).

76. *United States v. McRae*, L. R. 3 Ch. 79, 37 L. J. Ch. 79, *distinguishing* *Rex v. Wilcox*, 1 Sim. N. S. (Eng.) 301. See *Heriz v. Riera*, 5 Jur. 20, 10 L. J. Ch. 47, 11 Sim. 318;

*United States v. Saline Bank*, 1 Pet. (U. S.) 100.

77. *United States*.—*La Bourgogne*, 104 Fed. 823; *Snow v. Mast*, 63 Fed. 623; *Chapman v. Terry*, 12 Fed. 693.

*Illinois*.—*Robson v. Doyle*, 191 Ill. 566, 61 N. E. 435, *reversing* 94 Ill. App. 281.

*Indiana*.—*Lister v. Baker*, 6 Blackf. 439.

*New York*.—*Davies v. Lincoln Nat. Bank*, 16 Civ. Proc. 68, 4 N. Y. Supp. 373; *Gadsden v. Woodward*, 103 N. Y. 242, 8 N. E. 653; *Henry v. Bank of Salina*, 1 N. Y. 83, 3 Denio 593; *Anable v. Anable*, 24 How. Pr. 92; *People v. Rector*, 19 Wend. 569. This rule is declared in Code Civ. Proc. § 837.

*Tennessee*.—*Johnson v. Goss*, 2 Yerg. 10.

*Vermont*.—*Nye v. Daniels*, 75 Vt. 81, 53 Atl. 150.

*Virginia*.—*Langhorne v. Com.*, 76 Va. 1012.

78. See *infra*, IX, 1, H, a, (7).

79. **Fraudulent Conveyance.** Penalty for by statute. *Skinner v. Judson*, 8 Conn. 528; *Brown v. Hooper*, 3 Manitoba 86. But see *Bunn v. Bunn*, 4 De G., J. & G. (Eng.) 316. Where no element of criminal fraud or penalty is involved privilege cannot be claimed against the disclosure of a fraudulent con-

(BB.) **PECUNIARY PENALTY FOR WRONGDOING.** — Where the law inflicts a pecuniary penalty for wrongdoing which may be recovered by the informer or injured person, the guilty party may claim privilege in an action against him based upon the statute.<sup>80</sup>

(CC.) **DAMAGES.** — The fact that the damages recovered may be punitive<sup>81</sup> does not make the action penal in its nature, although the rule is held to be otherwise where the statute doubles or trebles the damages.<sup>82</sup>

(DD.) **FORFEITURE OF ESTATE.** — Disclosure of facts subjecting the witness to liability to forfeiture of an estate, as distinguished from termination by conditional limitation, is privileged.<sup>83</sup>

veyance. *Foss v. Haynes*, 31 Me. 89. But where the statute imposes a penalty of one year's value of the land for such a conveyance, privilege may be claimed against its disclosure. *Northrop v. Hatch*, 6 Conn. 361.

**Illegality of Contract.** — A discovery of facts showing the illegality of the contract sued on does not subject the party to a forfeiture. *Sloman v. Kelly*, 1 Y. & C. Exch. (Eng.) 169. But see *infra* IX, 1, H, a, 6, (B.), (b), (EE.).

**Showing Incapacity as Elector or Juror.** — See *Republica v. Gibbs*, 3 Yeates (Pa.) 429.

**Loss of Limited Liability.** — Compulsory disclosure of facts defeating a shipowner's limitation of liability does not subject him to a forfeiture. *LaBourgogne*, 104 Fed. 823.

**The Revocation of a License of a Foreign Corporation** to do business within the state is merely the withdrawal of a privilege and not the infliction of a penalty. *State v. Standard Oil Co.*, 61 Neb. 28, 84 N. W. 413.

80. *England.* — *Glynn v. Houston*, 1 Keen 329, 48 Eng. Reprint 333; *Mayor, etc. of London v. Levy*, 8 Ves. Jr. 398, 32 Eng. Reprint 408; *Bullock v. Richardson*, 11 Ves. Jr. 373, 32 Eng. Reprint 1131; *East India Co. v. Campbell*, 1 Ves. Sr. 246, 27 Eng. Reprint 1010; *East India Co. v. Neave*, 5 Ves. Jr. 173, 31 Eng. Reprint 530.

*Canada.* — *Burton v. Young*, 17 Low. Can. 379.

*United States.* — *Lees v. United States*, 150 U. S. 476; *Newgold v. A. E. N. & M. Co.*, 108 Fed. 341; *Johnson v. Donaldson*, 18 Blatchf. 287, 3 Fed. 22; *United States v.*

*Twenty-Eight Packages*, Gilp. 306, 28 Fed. Cas. No. 16,561.

*Illinois.* — *Robson v. Doyle*, 191 Ill. 566, 61 N. E. 435.

81. *Southern R. Co. v. Bush*, 122 Ala. 470, 26 So. 168 (action by administrator for wrongful death of intestate); *Masseth v. Johnston*, 59 Fed. 613 (against an infringer).

82. *Logan v. R. Co.*, 132 Pa. St. 403, 19 Atl. 137 (treble damages for discrimination in freight rates). See *Anonymous*, 1 Vern. 60, 23 Eng. Reprint 310. *Contra*, *Levy v. Superior Court*, 105 Cal. 600, 38 Pac. 965 (*McFarland and DeHaven, JJ., dissenting*). And see *Masseth v. Johnston*, 59 Fed. 613.

83. *Pye v. Butterfield*, 5 B. & S. 829, 34 L. J., Q. B. 17, 11 Jur. (N. S.) 220, 11 L. T. 448; *Chauncey v. Tahourden*, 2 Atk. 392, 26 Eng. Reprint 637; *Jordan v. Holkham*, Ambl. 209, 27 Eng. Reprint 139. See also *Lucas v. Evans*, 3 Atk. 260, 26 Eng. Reprint 951; *Hambrook v. Smith*, 17 Sim. 209, 60 Eng. Reprint 1109. But see *Horsburg v. Baker*, 1 Pet. (U. S.) 232.

**Forfeiture of Lease.** — *Lansing v. Pine*, 4 Paige (N. Y.) 639; *Firebrass's Case*, 2 Salk. (Eng.) 550; *Uxbridge v. Staveland*, 1 Ves. Sr. 56, 27 Eng. Reprint 888.

**Waste.** — *Attorney-General v. Vincent*, Bunb. (Eng.) 192.

**Disability To Take Estate or Land.** Discovery of a disability to take an estate by reason of being a Papist cannot be compelled (*Smith v. Reed*, 1 Atk. (Eng.) 526), but disability of an alien to take or hold land is not a penalty or forfeiture and is not privileged from disclosure. *Duples-*



(EE.) **USURY.** — Where the taking of usurious interest is penalized by forfeiture, a witness or party cannot be compelled to disclose such fact.<sup>84</sup> The interest agreed upon is privileged from disclosure because of its tendency to show the interest taken.<sup>85</sup>

(FF.) **REMOVAL OR IMPEACHMENT OF PUBLIC OFFICER.** — A public officer charged with misconduct in office need not testify as to facts which might furnish grounds for his removal or impeachment,<sup>86</sup> nor where he is forbidden by law to disclose the facts called for, on pain of removal.<sup>87</sup>

(C.) **NATURE OF EVIDENCE TO WHICH PRIVILEGE APPLIES.** — (a.) *In General.* A witness may claim his privilege not only when his answer may directly show or tend to show conduct rendering him liable to penal consequences,<sup>88</sup> but also when it may disclose facts constitut-

sis *v. Attorney-General*, 1 Bro. P. C. 415, 1 Eng. Reprint 658.

84. *Livingston v. Harris*, 3 Paige (N. Y.) 528; *Perrine v. Striker*, 7 Paige (N. Y.) 598.

85. *Chauncey v. Tahourden*, 2 Atk. 392, 26 Eng. Reprint 637; *Légoux v. Wante*, 3 Har. & J. (Md.) 184. *Contra*, *Taylor v. Matchell*, 1 How. (Miss.) 596, *Perrine v. Striker*, 7 Paige (N. Y.) 598 (under statute).

86. *United States v. Collins*, 1 Woods 499, 25 Fed. Cas. No. 14,837.

**Forfeiture of Office.** — Facts which would result in a forfeiture of office are privileged from discovery. *Honeywood v. Selwin*, 3 Atk. 276, 26 Eng. Reprint 961.

87. **A Postmaster being prohibited** by the Postal Laws and Regulations, under penalty of removal, from disclosing the addresses of letters passing through the postoffice, he may refuse to testify whether a certain registered letter passed through his office. *Nye v. Daniels*, 79 Vt. 81, 53 Atl. 150.

88. *United States.* — *United States v. Goosely*, 25 Fed. Cas. No. 15,230; *United States v. Moses*, 1 Cranch C. C. 170, 27 Fed. Cas. No. 15,824 (witness not obliged to say whether he had sold certain goods, alleged to have been stolen, to the defendant); *United States v. Burr*, 25 Fed. Cas. No. 14,692; *Taylor v. Angevine*, 15 Blatchf. 536, 24 Fed. Cas. No. 14,306; *In re Rosser*, 96 Fed. 305; *In re Hooks Smelt. Co.*, 138 Fed. 954; *In re Smith*, 112 Fed. 509; *United States v. Lynn*, 2 Cranch C. C. 309, 26 Fed. Cas. No. 15,649; *In re Walsh*,

104 Fed. 518; *In re Kock*, 14 Fed. Cas. No. 7,916; *In re Graham*, 8 Ben. 419, 10 Fed. Cas. No. 5,659.

*Alabama.* — *Alston v. State*, 109 Ala. 51, 20 So. 81; *Ex parte Boschwitz*, 84 Ala. 463, 4 So. 279, 5 Am. St. Rep. 384.

*Arkansas.* — *Pleasant v. State*, 15 Ark. 624.

*California.* — *Rogers v. Superior Court*, 145 Cal. 88, 78 Pac. 344; *Ex parte Clarke*, 103 Cal. 352, 37 Pac. 230.

*Connecticut.* — *Grannis v. Branden*, 5 Day 260, 5 Am. Dec. 143.

*Delaware.* — *Knowles v. Knowles*, 2 Houst. 133; *Short v. State*, 4 Har. 568.

*Georgia.* — *Gravett v. State*, 74 Ga. 191.

*Illinois.* — *Mackin v. People*, 115 Ill. 312, 3 N. E. 222; *Taylor v. McIrwin*, 94 Ill. 488; *Minters v. People*, 139 Ill. 363, 29 N. E. 45.

*Indiana.* — *French v. Venneman*, 14 Ind. 282; *Lister v. Baker*, 6 Blackf. 439.

*Iowa.* — *Printz v. Cheeney*, 11 Iowa 469.

*Kentucky.* — *Rutherford v. Com.* 2 Metc. 387; *Louisville, H. & St. L. R. Co. v. Schwab*, 31 Ky. L. Rep. 1313, 105 S. W. 110.

*Maine.* — *State v. Blake*, 25 Me. 350 (cannot be compelled to testify that he had sworn falsely upon another trial).

*Michigan.* — *Foster v. People*, 18 Mich. 266.

*Minnesota.* — *State v. Bilansky*, 3 Minn. 246; *State v. Thaden*, 43 Minn. 253, 45 N. W. 447.

*Missouri.* — *State v. Marshall*, 36

ing a link in a chain of incriminating circumstances.<sup>89</sup> If the matter called for is of such a nature that a full disclosure thereof on cross-examination might tend to incriminate the witness, it is priv-

Mo. 400; *State v. Talbott*, 73 Mo. 347; *In re Green*, 86 Mo. App. 216; *Ward v. State*, 2 Mo. 120, 22 Am. Dec. 449; *State v. Simmons Hdw. Co.*, 109 Mo. 118, 18 S. W. 1125, 15 L. R. A. 676.

*New Hampshire*.—*State v. Staples*, 47 N. H. 113, 90 Am. Dec. 565; *Coburn v. Odell*, 30 N. H. 540; *Janvrin v. Scammon*, 29 N. H. 280; *State v. Farmer*, 46 N. H. 200.

*New York*.—*People v. Herrick*, 13 Johns. 82, 7 Am. Dec. 364; *Wheeler v. Dixon*, 14 How. Pr. 151; *Byass v. Sullivan*, 21 How. Pr. 50; *Boston Marine Ins. Co. v. Slocovitch*, 23 Jones & S. 452 (witness had been accused of setting fire to a vessel; held, he is not obliged to answer whether he had any conversation in regard to the setting of the fire); *Cullinan v. Quinn*, 95 App. Div. 492, 88 N. Y. Supp. 963 (defendant was asked whether premises where liquor was sold were in same condition when subsequently examined by excise commissioners as when certain sales were made); *People v. Seaman*, 8 Misc. 152, 29 N. Y. Supp. 329 (in a grand jury investigation of death caused by generation of a deadly gas in jugs provided for that purpose, witness is not obliged to answer questions as to whether he knew where and by whom the jugs were purchased).

*Tennessee*.—*Douglass v. Wood*, 1 Swan 393 (not obliged to answer a question which might subject him to a prosecution for champerty).

*Vermont*.—*Chamberlain v. Wilson*, 12 Vt. 491, 36 Am. Dec. 356.

*Virginia*.—*Cullen v. Com.*, 24 Gratt. 624; *Langhorne v. Com.*, 76 Va. 1012.

*Washington*.—*State v. Coella*, 3 Wash. 99, 28 Pac. 28 (female witness cannot be compelled to answer whether she is a prostitute).

*West Virginia*.—*State v. Hill*, 52 W. Va. 296, 43 S. E. 160.

*Wisconsin*.—*Emery v. State*, 101 Wis. 627, 78 N. W. 145; *State v. Olin*, 23 Wis. 309 (alien cannot be compelled to testify that he voted at an election).

*Wyoming*.—*Miskimmins v. Shaver*, 8 Wyo. 392, 58 Pac. 411. See also cases cited in following notes, and *infra* IX, 1, H, a, (7).

**Verification of Pleading**.—An answer to a complaint on file need not be verified when it will incriminate. *Moloney v. Dows*, 2 Hilt. (N. Y.) 247.

<sup>89</sup> *Canada*.—*D'Ivry v. World Newspaper Co.*, 17 Ont. Pr. 387.

*United States*.—*Wyckoff v. Wagner Typewriter Co.*, 99 Fed. 158; *United States v. Burr*, 25 Fed. Cas. No. 14,692e; *Sanderson's Case*, 3 Cranch C. C. 638, 21 Fed. Cas. No. 12,297.

*Alabama*.—*Ex parte Boscowitz*, 84 Ala. 463, 4 So. 279, 5 Am. St. Rep. 384 (not obliged to answer as to illicit sexual intercourse, for that is an essential element in certain statutory crimes).

*Colorado*.—*Tuttle v. People*, 33 Colo. 243, 79 Pac. 1035, 7 L. R. A. 33, 3 Ann. Cas. 513.

*Florida*.—*Wallace v. State*, 41 Fla. 547, 26 So. 713.

*Georgia*.—*Higdon v. Heard*, 14 Ga. 255.

*Illinois*.—*Minters v. People*, 139 Ill. 363, 29 N. E. 45, reversing 39 Ill. App. 438.

*Iowa*.—*Printz v. Cheeney*, 11 Iowa 469.

*Kansas*.—*Stevens v. State*, 50 Kan. 712, 32 Pac. 350.

*Michigan*.—*Foster v. People*, 18 Mich. 266.

*Minnesota*.—*State v. Bilansky*, 3 Minn. 246; *State v. Thaden*, 43 Minn. 253, 45 N. W. 447.

*Missouri*.—*Ward v. State*, 2 Mo. 120, 22 Am. Dec. 449; *State v. Simmons Hdw. Co.*, 109 Mo. 118, 18 S. W. 1125, 15 L. R. A. 676.

*New Hampshire*.—*Noyes v. Heard*, 73 N. H. 481, 62 Atl. 787; *State v. Staples*, 47 N. H. 113, 90 Am. Dec. 565; *Janvrin v. Scammon*, 29 N. H. 280; *State v. Farmer*, 46 N. H. 200.

*New York*.—*People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 38 N. E. 303; *Henry v. Bank of Salina*, 1

ileged.<sup>90</sup> But it seems that a fact which, though it must be proved, does not constitute part of nor tend to show any criminal conduct, is not incriminating.<sup>91</sup>

(b.) *Presence or Participation of Others in Crime.*—A witness may be compelled to testify as to his knowledge of the presence or participation of others in a criminal act, notwithstanding the fact that he himself may have participated in the same act.<sup>92</sup> A witness cannot be compelled to testify as to criminal acts done in his presence which could not have been done without his concurrence and assent.<sup>93</sup>

N. Y. 83, 3 Denio 593; *Moloney v. Dows*, 2 Hilt. 247.

*North Carolina.*—*State v. Spier*, 86 N. C. 600; *Smith v. Smith*, 116 N. C. 386, 21 S. E. 196.

*South Carolina.*—*State v. Edwards*, 2 Nott & McC. 14, 10 Am. Dec. 557.

*Tennessee.*—*Lea v. Henderson*, 1 Coldw. 146.

*Utah.*—*People v. Reggel*, 8 Utah 21.

*Virginia.*—*Langhorne v. Com.*, 76 Va. 1012.

*Wyoming.*—*Miskimmins v. Shaver*, 8 Wyo. 392, 58 Pac. 411. See *infra*, IX, 1, H, 2, (7).

**Reasons.**—"The rights intended to be protected by this constitutional provision are so sacred, and the pressure so great toward their relaxation in cases where suspicion of guilt is strong and evidence obscure, that it is the duty of the courts to liberally construe the prohibition in favor of private rights, and to refuse to permit those first and doubtful steps which may invade it in any respect." *Thornton v. State*, 117 Wis. 338, 93 N. W. 1107, per Dodge, J. See also the opinion of Chief Justice Marshall, 1 Burr's Tr. 245, 25 Fed. Cas. No. 14,692, *et seq.*

The privilege extends not only to the testimony which may itself be used against the witness, but which discloses facts or circumstances from which his connection with or guilt of a crime may be proven through other sources than his answers. *In re Beer* (N. D.), 115 N. W. 672; *Emery's Case*, 107 Mass. 172, 9 Am. Rep. 22; *Counselman v. Hitchcock*, 142 U. S. 547.

90. *Ex parte Park*, 37 Tex. Crim. 590, 40 S. W. 300, 66 Am. St. Rep. 835. But see *State v. Bond*, 12

Idaho 424, 86 Pac. 43. See *infra*, IX, 1 H, c, (4), (D).

91. See *Rudolph v. State*, 128 Wis. 222, 231, 107 N. W. 466.

92. *Wheatley v. State*, 114 Ga. 175, 39 S. E. 877; *Ward v. State*, 2 Mo. 120; *Ex parte Lindo*, 1 Cranch C. C. 445, 15 Fed. Cas. No. 8,364; *Lord Chancellor Maccelsfield's Trial*, 16 How. St. Trial 767, 920, 1146, 1150; *Ex parte Buskett*, 106 Mo. 602, 17 S. W. 753; *LaFontaine v. Southern Underwriters Assn.*, 83 N. C. 132. But see *Rex v. Slaney*, 5 Car. & P. 213, 24 E. C. L. 285, holding the question whether the witness knew who wrote the libel in question was not privileged, but that the witness could refuse to name the person because it might be himself. And see *contra*, *Minters v. People*, 139 Ill. 363, 29 N. E. 45.

In *Richman v. State*, 2 Greene (Iowa) 532, it was held that the witness could not refuse to answer the question, "Do you know of any other person than yourself being engaged in gaming?" But in *Printz v. Cheney*, 11 Iowa 469, it was held that the witness could refuse to answer as to what he knew in regard to any person's participation in the act in question. See, however, *State v. Duffey*, 15 Iowa 425.

Under the statute of Indiana providing that any person legally called to give evidence against another for gaming shall be deemed a competent witness to prove such gaming, although such person may have been concerned as a party, a witness may be compelled to testify as to the fact that wagers had been made on a horse race. *Cheesum v. State*, 8 Blackf. (Ind.) 332, 44 Am. Dec. 771.

93. *Ex parte Merrell*, 50 Tex. Crim. 193, 95 S. W. 1047.

(D.) SPECIFIC INSTANCES OF INCRIMINATING FACTS. — (a.) *Gaming*. A witness cannot be compelled to answer when an answer will show that he has violated statutory provisions against gaming,<sup>94</sup> but a witness cannot refuse to answer whether he saw others engaged in gaming<sup>95</sup> or knew of their gambling.<sup>96</sup>

(b.) *Sexual Intercourse*. — Testimony as to sexual intercourse is privileged where it would expose the witness to criminal prosecution;<sup>97</sup> not, however, where such act constitutes no crime or part of crime.<sup>98</sup>

(c.) *Sale or Purchase of Intoxicating Liquor*. — Where the purchaser of liquors unlawfully sold is not punishable, he may be compelled to testify against the seller;<sup>99</sup> but not where he is punishable.<sup>1</sup>

94. *In re Patterson*, 1 Ben. 544, 18 Fed. Cas. No. 10,816 (bankrupt asked, "have you lost any part of it in gaming?"); *In re Feldstein*, 103 Fed. 269 (a witness cannot be compelled to state consideration for checks when the answer would render him liable for gaming); *Higdon v. Heard*, 14 Ga. 255 (see *Wheatley v. State*, 114 Ga. 75, 39 S. E. 877); *Anderson v. State*, 7 Ohio 250. See also *Minter v. People*, 139 Ill. 363, 29 N. E. 45, reversing 39 Ill. App. 438.

95. *Ex parte Lindo*, 1 Cranch C. C. 445, 15 Fed. Cas. No. 8,364. See *supra*, IX, 1, H, a, (6.), (C.), (b.).

96. *Wheatley v. State*, 114 Ga. 175, 39 N. E. 877; *Richman v. State*, 2 Greene (Iowa) 532.

A witness must answer as to whether he knew of any persons having played cards for money within the county in the last eighteen months. *Smith v. People*, 20 Ill. App. 591.

A witness may be compelled to answer as to what persons other than himself have bet on faro. *Ward v. State*, 2 Mo. 120, 22 Am. Dec. 449.

97. *England*. — *King v. King*, 2 Rob. Ecc. 153.

*Alabama*. — *Ex parte Boscowitz*, 84 Ala. 463, 4 So. 279, 5 Am. St. Rep. 384.

*Kansas*. — *Stevens v. State*, 50 Kan. 712, 32 Pac. 350.

*Michigan*. — *People v. Brewer*, 27 Mich. 134.

*New Jersey*. — *Vaughn v. Perine*, 3 N. J. L. 728, 4 Am. Dec. 411.

*North Carolina*. — *Smith v. Smith*, 116 N. C. 386, 21 S. E. 196.

*Tennessee*. — *Reed v. Williams*, 5 Sneed 580, 73 Am. Dec. 157 (woman not compelled to answer, because fornication is a crime); *Lea v. Henderson*, 1 Coldw. 146.

*Adultery*. — In an action for divorce the party is privileged against discovery as to facts showing his adultery, where the same would constitute a crime. *Redfern v. Redfern*, (1891) P. D. 139; *Marsh v. Marsh*, 16 N. J. Eq. 391.

In an action for seduction, the daughter of plaintiff cannot be compelled to answer as to unlawful intercourse with other men. *Dodd v. Norris*, 3 Camp. (Eng.) 519, 14 R. R. 832.

98. In a prosecution for bastardy a witness cannot refuse to answer whether he had ever had intercourse with the relatrix where it is shown by other witnesses that a secret marriage existed between the relatrix and witness and that the act of intercourse would not under such circumstances be criminal. *Ford v. State*, 29 Ind. 541, 95 Am. Dec. 658. See also *Hill v. State*, 4 Ind. 112.

99. *Wakeman v. Chambers*, 69 Iowa 169, 28 N. W. 498, 58 Am. Rep. 218; *Com. v. Willard*, 22 Pick. (Mass.) 476; *State v. Rand*, 51 N. H. 361, 12 Am. Rep. 127; *Page v. State*, 11 Lea (Tenn.) 202.

1. *State v. Bach Liquor Co.*, 67 Ark. 163, 55 S. W. 854 (minor cannot be compelled to testify that he purchased liquor from certain party, because statute makes such act on his part a crime).

Likewise, one who is merely interested in the profits of the unlawful sale may be compelled to testify.<sup>2</sup>

(d.) *Usury*.—Where usury is a crime a witness may refuse to disclose facts which might subject him to a criminal prosecution therefor.<sup>3</sup>

(e.) *Miscellaneous Illustrations*.—A witness cannot be compelled to testify that the house he lives in is a house of ill-fame,<sup>4</sup> nor to disclose matter which might subject him to prosecution for criminal libel,<sup>5</sup> or to answer a question as to his previous testimony if the answer might subject him to a prosecution for perjury.<sup>6</sup> So the rule applies to numerous other matters which may be of a criminal nature such as fraud,<sup>7</sup> criminal conspiracy,<sup>8</sup> compounding felony,<sup>9</sup>

2. *State v. Davis*, 23 Me. 403. But where liquor is sold by a club, all the members of which are liable to prosecution for the offense, each one may refuse to answer questions tending to show the offense. *Chesapeake Club v. State*, 63 Md. 446.

3. *Burns v. Kempshall*, 24 Wend. (N. Y.) 360, affirmed in 4 Hill 468; *Bank of Salina v. Henry*, 2 Denio (N. Y.) 155; *Fellows v. Wilson*, 31 Barb. (N. Y.) 162. Compare *Mayham v. Coombs*, 14 Ohio 428.

If usury is only a crime where there is a corrupt agreement to receive more than the statutory rate of interest, an order for examination to disclose usury is properly allowed. *Fox v. Miller*, 20 App. Div. 333, 46 N. Y. Supp. 837.

**Penalty or Forfeiture for Usury.** See *supra*, IX, 1, H, a, (6.), (B.), (b.), (EE.).

4. *Com. v. Trider*, 143 Mass. 180, 9 N. E. 510.

5. *Simmons v. Holster*, 13 Minn. 249; *Thorpe v. Macauley*, 5 Madd. 218, 56 Eng. Reprint 877; *Riddle v. Blackburne*, 125 App. Div. 893, 110 N. Y. Supp. 748.

The manager of a newspaper corporation, in an action against it for libel, can claim its privilege against producing its files which might show it guilty of criminal libel. *D'Ivry v. World Newspaper Co.*, 17 Ont. Pr. 387.

In a civil action for libel defendant is privileged from discovery of facts which might subject him to criminal prosecution. *March v. Davidson*, 9 Paige (N. Y.) 580. But it seems that the plaintiff by bringing the action waives his privi-

lege against discovery as to the truth of the alleged libel, although it involves his criminal conduct. *Macauley v. Shackell*, 1 Bligh (N. S.) 96, 121, 133, 4 Eng. Reprint 809.

6. *Bellinger v. People*, 8 Wend. (N. Y.) 595.

To the effect that a witness cannot be compelled to testify that he has committed perjury, see *Friess v. New York C. & H. R. R. Co.*, 67 Hun 205, 22 N. Y. Supp. 104, affirmed 140 N. Y. 639, 35 N. E. 892; *State v. Simpson*, 9 N. C. (2 Hawks) 580.

7. *Ex parte Symes*, 11 Ves. Jr. 521, 32 Eng. Reprint 1191.

In an action by an administrator to recover property of decedent alleged to have been fraudulently obtained and disposed of or concealed by defendant, the latter is privileged as to facts relating to the alleged fraudulent transaction which constitutes a crime. *Chappell v. Chappell*, 116 App. Div. 573, 101 N. Y. Supp. 846.

8. **Criminal Conspiracy**.—*Dummer v. Chippenham*, 14 Ves. Jr. 245, 33 Eng. Reprint 515; *Michael v. Gay*, 1 F. & F. (Eng.) 409. But the allegation of an unlawful confederation or conspiracy which is usually introduced in bills of equity is ordinarily merely a formal part of the bill requiring no particular answer, and does not entitle defendant to claim privilege against discovery. *Adams v. Porter*, 1 Cush. (Mass.) 170. See *Chetwynd v. Lindon*, 2 Ves. Sr. 450, 28 Eng. Reprint 288.

9. *Claridge v. Hoarse*, 14 Ves. Jr. 59, 33 Eng. Reprint 443.

duelling,<sup>10</sup> subornation of perjury,<sup>11</sup> and such contempts as are regarded as criminal.<sup>12</sup> A witness cannot be required to testify as to his former incriminating admissions.<sup>13</sup>

(E.) DISCLOSURE OF MISDEMEANOR. — The privilege exists although the offense which may be disclosed is merely a misdemeanor.<sup>14</sup>

(F.) EFFECT OF CLAIM OF INNOCENCE. — The fact that the evidence of the witness shows that he is guiltless of crime does not deprive him of his right to claim privilege against disclosing facts which might be used in a chain of evidence against him.<sup>15</sup> It is for the protection of innocent parties that the privilege is given.<sup>16</sup> But it has been held that a party cannot claim privilege against producing a document which, if his contention regarding the same be true, would only tend to prove his innocence.<sup>17</sup>

(7.) Discovery. — A person cannot be compelled to discover matters which would subject or tend to subject him to criminal prosecution,<sup>18</sup> and the same rule applies in the case of forfeitures and

10. See *State v. Edwards*, 2 Nott & McC. (S. C.) 13; *Cullen v. Com.*, 24 Gratt. (Va.) 624.

11. *Selby v. Crew*, 2 Anstr. (Eng.) 504.

12. *Louisville, H. & St. L. R. Co. v. Schwab*, 31 Ky. L. Rep. 1313, 105 S. W. 110 (a jury commissioner cannot be compelled to testify concerning his wrongful delegation to clerks of his duty to personally select the jury panel in the manner provided by law, such conduct being a contempt of court). But see *supra*, IX, 1, H, 2, (4.), (B.).

13. **Incriminating Admissions.** *Rex v. Pegler*, 5 Car. & P. 521, 24 E. C. L. 436. See *State v. Blake*, 25 Me. 250.

14. *Noyes v. Thorp*, 73 N. H. 48, 62 Atl. 787; *Wheeler v. Dixon*, 14 How. Pr. (N. Y.) 151; *Byass v. Smith*, 4 Bosw. (N. Y.) 679 (selling goods with counterfeited labels); *Kugelman v. Barry*, 17 Misc. 30, 40 N. Y. Supp. 767.

15. In *People v. Seaman*, 8 Misc. 152, 29 N. Y. Supp. 329, the grand jury had been investigating the death of a woman caused by the generation of a deadly gas in jugs which had been provided for that purpose. The witness testified that he did not know what was in the jugs at the time of or immediately after their purchase, and that he did not know for what purpose they were bought. He was then asked if he knew who purchased the jugs,

and where. It was held that he might claim a privilege to refuse to answer. "Notwithstanding his assertion of innocence, if he answers questions asked, revealing the fact that he purchased those jugs, a jury might well, with other circumstances, fasten the crime upon him." See also *People v. Forbes*, 143 N. Y. 219, 38 N. E. 303 (a case growing out of the same act as the preceding case). But see *O'Connor v. Jack*, 2 Brewst. (Pa.) 407. Compare *Ex parte Wilson*, 39 Tex. Crim. 630, 47 S. W. 996.

16. *Bartlett v. Lewis*, 12 C. B. (N. S.) 249, 265, 31 L. J., C. P. 230, 9 Jur. (N. S.) 202, 6 L. T. 388, *per Byles, J.*

17. *Hilliker v. Farr*, 149 Mich. 444, 112 N. W. 1116.

18. *England.* — *Paxton v. Douglas*, 19 Ves. Jr. 225, 34 Eng. Reprint 502; *Lloyd v. Passingham*, 16 Ves. Jr. 59, 33 Eng. Reprint 906; *Claridge v. Hoare*, 14 Ves. Jr. 59, 33 Eng. Reprint 442; *Cartwright v. Green*, 8 Ves. Jr. 405, 32 Eng. Reprint 412; *Ex parte Symes*, 11 Ves. Jr. 521, 32 Eng. Reprint 1191; *East India Co. v. Campbell*, 1 Ves. Sr. 246, 27 Eng. Reprint 1010; *Lee v. Read*, 5 Beav. 381, 6 Jur. 1026; *Lichfield v. Bond*, 6 Beav. 88, 7 Jur. 209; *Hatfield v. Hatfield*, 5 Bro. P. C. 103; *Heriz v. Riera*, 11 Sim. 318, 5 Jur. 20, 59 Eng. Reprint 896; *Fisher v. Owen*, 47 L. J., Ch. 681, 8 Ch. Div. 645, 38 L. T. 577; *Christie v.*

penalties.<sup>19</sup> A proceeding for discovery cannot be maintained when it appears that the evidence to be discovered will be incrim-

Christie, 42 L. J., Ch. 544. L. R. 8 Ch. 499, 28 L. T. 607; *Maccalum v. Turton*, 2 Y. & J. 183; *Nobkissen v. Hastings*, 2 Ves. Jr. 84, 4 Bro. C. C. 252, 30 Eng. Reprint 535; *Sharp v. Carter*, 3 P. Wms. 375, 24 Eng. Reprint 1108; *Wallis v. Portland*, 8 Bro. P. C. 161, 3 Ves. 494, 4 R. R. 78, 30 Eng. Reprint 1123.

*United States*.—*Stewart v. Drasha*, 4 McLean 563, 23 Fed. Cas. No. 13,424; *Daisley v. Dunn*, 98 Fed. 497; *Ocean Ins. Co. v. Fields*, 2 Story 59, 18 Fed. Cas. No. 10,406.

*Alabama*.—*Morris v. McClellan*, 154 Ala. 639, 45 So. 641.

*Connecticut*.—*Northrop v. Hatch*, 6 Conn. 363; *Skinner v. Judson*, 8 Conn. 533; *Butler v. Catling*, 1 Root 310.

*Georgia*.—*Thornton v. Adkins*, 19 Ga. 464; *Higdon v. Heard*, 14 Ga. 255; *Marshall v. Riley*, 7 Ga. 367.

*Illinois*.—*Robson v. Doyle*, 191 Ill. 566, 61 N. E. 435.

*Kentucky*.—*Leigh v. Everheart*, 4 T. B. Mon. 381.

*Maryland*.—*Salmon v. Clagett*, 3 Bland 125; *Wolf v. Wolf*, 2 Har. & J. 388; *Broadbent v. State*, 7 Md. 416.

*Massachusetts*.—*Adams v. Porter*, 1 Cush. 170.

*New Hampshire*.—*Bay State Iron Co. v. Goodall*, 39 N. H. 223.

*New Jersey*.—*Marsh v. Marsh*, 16 N. J. Eq. 391; *Bailey v. Stiles*, 3 N. J. Eq. 245; *Black v. Black*, 26 N. J. Eq. 431.

*New York*.—*March v. Davison*, 9 Paige 580; *Taylor v. Bruen*, 2 Barb. Ch. 301; *Leggett v. Postley*, 2 Paige 599; *Union Bank v. Barker*, 3 Barb. Ch. 358; *Deas v. Harvie*, 2 Barb. Ch. 448; *Conant v. Delafield*, 3 Edw. Ch. 201.

*North Carolina*.—*Patterson v. Patterson*, 2 N. C. (1 Hayw.) 167.

*Tennessee*.—*Shea v. Knoxville*, etc. R. Co., 6 Baxt. 277.

*Virginia*.—*Northwestern Bank v. Nelson*, 1 Gratt. 108.

*West Virginia*.—*Thompson v. Whitaker Iron Co.*, 41 W. Va. 574.

This rule exists independently of the constitutional privilege of parties

and witnesses. *United States v. National Lead Co.*, 75 Fed. 94.

Discovery of an alleged libel cannot be compelled where it might be used in a criminal prosecution. *Riddle v. Blackburn*, 125 App. Div. 893, 110 N. Y. Supp. 748; *D'Ivry v. World Newspaper Co.*, 17 Ont. Pr. 387.

**Inspection of Mine.**—An order allowing an inspection of underground workings of a tunnel or mine through which alleged trespass is being committed, does not compel one to furnish evidence against himself. *Howe's C. L. & C. Co. v. Howe's C. Assn.*, 88 Hun 554, 34 N. Y. Supp. 848, judgment affirmed, 147 N. Y. 721 (mem.), 42 N. E. 723.

<sup>19</sup>. See article "DISCOVERY," Vol. IV, and *supra*, IX, 1, H, a, (6), (B.), also the following cases:

*England*.—*Selwyn v. Honeywood*, 9 Mod. 419, 88 Eng. Reprint 546; *Firebrass's Case*, 2 Salk. 550; *Attorney-General v. Lucas*, 2 Hare 566, 7 Jur. 1080, 67 Eng. Reprint 234; *United States of America v. M'Rae*, 37 L. J. Ch. 129, L. R. 3 Ch. 79, 17 L. T. 428; *Chambers v. Thompson*, 4 Bro. C. C. 434; *East India Co. v. Campbell*, 1 Ves. Sr. 246, 27 Eng. Reprint 1010; *Cousins v. Smith*, 13 Ves. Jr. 164, 542, 33 Eng. Reprint 257, 397.

*United States*.—*United States v. National Lead Co.*, 75 Fed. 94; *Stewart v. Drasha*, 4 McLean 563, 23 Fed. Cas. No. 13,424; *United States v. Saline Bank*, 1 Pet. 100; *Atwill v. Ferrett*, 2 Blatchf. 39, 2 Fed. Cas. No. 640; *Snow v. Mast*, 63 Fed. 623; *Finch v. Rikeman*, 2 Blatchf. 301, 9 Fed. Cas. No. 4,788.

*Connecticut*.—*Northrop v. Hatch*, 6 Conn. 363; *Skinner v. Judson*, 8 Conn. 528.

*Georgia*.—*Marshall v. Riley*, 7 Ga. 367; *Higdon v. Heard*, 14 Ga. 255; *Thornton v. Adkins*, 19 Ga. 464.

*Illinois*.—*People v. Western Manuf. Mut. Ins. Co.*, 40 Ill. App. 428; *Crandall v. Sorg*, 99 Ill. App. 22.

*Kentucky*.—*Atterberry v. Knox*, 8 Dana 282.

inating,<sup>20</sup> nor unless it affirmatively appears that the party is to be examined as to some fact which will not tend to incriminate him.<sup>21</sup> When, however, some of the matters called for are material and not incriminating the order may issue,<sup>22</sup> leaving the witness the right to claim his privilege at the proper time.<sup>23</sup> An order for examination before trial will not be denied merely because questions may be asked which will tend to criminate the witness since the privilege may be claimed and determined when such questions are

*Maryland.*—Legoux v. Wante, 3 Har. & J. 184; Salmon v. Clagett, 3 Bland 125; Wolf v. Wolf, 2 Har. & G. 388.

*New Jersey.*—Vanderveer v. Holcomb, 17 N. J. Eq. 87, 547.

*New York.*—Lansing v. Pine, 4 Paige 639; March v. Davison, 9 Paige 580; Taylor v. Bruen, 2 Barb. Ch. 301.

*Ohio.*—Cadwallader v. Granville Alexandrian Soc., 11 Ohio 292.

*Tennessee.*—Lindsley v. James, 3 Coldw. 477.

*Virginia.*—Northwestern Bank v. Nelson, 1 Gratt. 108.

**Discovery in Equity.**—“The rule of equity on this subject is not confined to cases where the purpose of the suit itself, or of the action to which it is ancillary, is to enforce the penalty or forfeiture; but extends to those where the discovery itself would expose the party to some other action or suit, or any criminal or penal prosecution tending to the like result. Nor is it material whether the penalty or forfeiture arises out of the common or statute law, or is imposed by some conveyance, devise or contract, giving to the act of the party which he is called upon to discover, the effect of divesting or defeating his title or estate.” Poindexter v. Davis, 6 Gratt. (Va.) 481.

<sup>20.</sup> *England.*—Duncalf v. Blake, 1 Atk. 52, 26 Eng. Reprint 35; Attorney-General v. Vincent, Bunb. 192.

*Canada.*—D'Ivry v. World Newspaper Co., 17 Ont. Pr. 387.

*United States.*—United States v. National Lead Co., 75 Fed. 94.

*Georgia.*—Higdon v. Heard, 14 Ga. 255.

*New York.*—Kugelman v. Barry, 17 Misc. 37, 40 N. Y. Supp. 767, Yamato Trading Co. v. Brown, 27

Hun 248; Kinney v. Roberts, 26 Hun 166.

*Compare In re Knickerbocker Steamboat Co.*, 136 Fed. 956. See Spence v. Sprinkle, 1 B. Mon. (Ky.) 43, and article “Discovery,” Vol. IV, p. 708, *et seq.*

If the order is granted improperly the party need not wait until the question is put to him before claiming his privilege. *People v. Nussbaum*, 55 App. Div. 245, 67 N. Y. Supp. 492, *reversing* 32 Misc. 1, 66 N. Y. Supp. 129.

Where a law court has been given the chancery power of compelling a discovery the same rule applies. *United States v. National Lead Co.*, 75 Fed. 94. See *D'Ivry v. World Newspaper Co.*, 17 Ont. Pr. 387.

Where the purpose of the bill of discovery is to compel the disclosure of incriminating matters it is demurrable. *Noyes v. Thorpe*, 73 N. H. 481, 62 Atl. 787. See also *United States v. National Lead Co.*, 75 Fed. 948, and *infra*, IX, 1, H. c. (2.), (C.).

<sup>21.</sup> *Ely v. Perkins*, 57 Misc. 361, 108 N. Y. Supp. 613; *Abbott v. Faber*, 87 Hun 299, 34 N. Y. Supp. 433.

<sup>22.</sup> *Skinner v. Steele*, 88 Hun 307, 34 N. Y. Supp. 748; *Fisher v. Price*, 11 Beav. 194, 50 Eng. Reprint 791; *Cadwallader v. Alexandrian Soc.*, 11 Ohio 292. See *supra*, IX, 1, H. a, (5.) But where the plaintiff so combines the two classes of matters that it is difficult or impossible for the defendant to answer any portion of the interrogatories without incriminating himself he is not bound to answer at all. *Lichfield v. Bond*, 6 Beav. 88, 7 Jur. 209, 49 Eng. Reprint 758.

<sup>23.</sup> See *infra*, IX, 1, H. c.



propounded.<sup>24</sup> But in an action to enforce a penalty or forfeiture,<sup>25</sup> or the sole purpose of which is to establish conduct constituting a crime,<sup>26</sup> the privilege exempts the defendant from all discovery even on incidental points, the same as in the case of a prosecution for crime.

(8.) **Privilege as to Accounting.**—Where a person has voluntarily assumed an office or relation which imposes upon him a legal obligation to render an account, the privilege against self-incrimination will not relieve him from the necessity of accounting.<sup>27</sup>

(9.) **Records Required as Police Regulation.**—Where as a matter of police regulation records are required to be made<sup>28</sup> or kept<sup>29</sup> by persons engaged in certain classes of business, they cannot refuse to make such records or to allow inspection of them by proper officers, or object to their use in aid of a criminal prosecution of themselves,<sup>30</sup> nor it has been held, refuse to produce them,<sup>31</sup> on the ground of privilege. A statute requiring persons slaughtering animals to furnish information with respect to the same is no violation of privilege.<sup>32</sup>

(10.) **Privilege as to Production of Books and Papers.**—(A.) **IN GENERAL.**—The law excuses a witness from producing books and papers, the contents of which may tend to incriminate him.<sup>33</sup>

24. *Campbell v. Brock's Com. Agency*, 38 App. Div. 137, 56 N. Y. Supp. 540; *Rosenbaum v. Rice*, 36 Misc. 410, 73 N. Y. Supp. 714; *Ryan v. Reagan*, 46 App. Div. 590, 62 N. Y. Supp. 39; *Meade v. Southern Tier Masonic Relief Assn.*, 119 App. Div. 761, 104 N. Y. Supp. 523. See *supra*, IX, 1, H, a, (5.).

25. *Green v. Weaver*, 1 Sim. 404, 57 Eng. Reprint 630; *Burton v. Young*, 17 L. Can. 379.

26. *Thorpe v. Macauley*, 5 Madd. 218, 56 Eng. Reprint 877; *Hopkins v. Smith*, 1 Ont. L. R. 659. But see *Lichfield v. Bond*, 6 Beav. 88, 7 Jur. 209; *Fisher v. Price*, 11 Beav. 194, 50 Eng. Reprint 791.

27. **Accounting by Executor or Administrator.**—An executor or administrator cannot refuse to file an account on the ground that he would thereby disclose evidence tending to incriminate himself. *Ex parte Hurt* (Ala.), 47 So. 264.

28. **Registration of Internal Revenue Receipts.**—An act which requires the registration and publication of internal revenue tax receipts does not violate the constitutional immunity from self-incrimination, but is a valid exercise of po-

lice power. *State v. Hanson*, 16 N. D. 347, 113 N. W. 371.

29. *City of St. Joseph v. Levin*, 128 Mo. 588, 31 S. W. 101, 49 Am. St. Rep. 577.

30. *State v. Smith*, 74 Iowa 580, 38 N. W. 492 (pharmacists' reports); *State v. Cummings*, 76 Iowa 133, 40 N. W. 124; *State v. Donovan*, 10 N. D. 203, 86 N. W. 709.

Fictitious public records made by the defendant and produced by his clerk under a subpoena may be used against him. *People v. Coombs*, 158 N. Y. 532, 53 N. E. 527, *affirming* 36 App. Div. 284, 55 N. Y. Supp. 276.

31. *Louisville & N. R. Co. v. Com.*, 106 Ky. 633, 51 S. W. 164, 1012, 90 Am. St. Rep. 236, *holding* that the tariff sheet of a railroad publicly posted was not a private document, and that its production might therefore be compelled. See also *Bradshaw v. Murphy*, 7 Car. & P. (Eng.) 612. But see *City of St. Joseph v. Levin*, 128 Mo. 588, 31 S. W. 101, 49 Am. St. Rep. 577, and *infra*, IX, 1, H, a, (10.), (F.).

32. *Aston v. State*, 27 Tex. App. 574, 11 S. W. 637.

33. *England.*—*Hill v. Campbell*, 44 L. J., C. P. 97, L. R. 10 C. P.

(B.) NECESSITY OF PRODUCING FOR INSPECTION BY COURT. — Notwithstanding a witness claims privilege against the production of books on the ground that their contents may tend to incriminate him, he

222, 32 L. T. 59. See *Hunnings v. Williamson*, 52 L. J., Q. B. 273, 10 Q. B. D. 459, 48 L. T. 581, 31 W. R. 336. But see *Webb v. East*, 49 L. J., Ex. 250, 5 Ex. D. 108, 41 L. T. 715.

*Canada*. — *D'Ivry v. World Newspaper Co.*, 17 Ont. Pr. 387.

*United States*. — *In re Kanter*, 117 Fed. 356 (bankrupt not obliged to produce books which would incriminate him).

*Illinois*. — *Lamson v. Boyden*, 160 Ill. 613, 43 N. E. 781; *Kanter v. Clerk of Circuit Court*, 108 Ill. App. 287.

*Maryland*. — *Blum v. State*, 94 Md. 375, 51 Atl. 26, 56 L. R. A. 322.

*Missouri*. — *Ex parte Conrades* (Mo. App.), 85 S. W. 150.

*Nevada*. — *Ex parte Hedden*, 29 Nev. 352, 90 Pac. 737.

*New York*. — *Byass v. Sullivan*, 21 How. Pr. 50.

*North Dakota*. — *State v. Donovan*, 10 N. D. 203, 86 N. W. 709.

A federal statute requiring an accused to produce books and papers, and providing that a failure to produce shall be equivalent to a confession of the matters alleged to be contained therein, is unconstitutional and is in violation of the fifth amendment to the constitution of the United States. *Boyd v. United States*, 116 U. S. 616.

It is error to demand from the defendant, in the presence of the jury, the production of such books and documents. *McKnight v. United States*, 115 Fed. 972.

The rule is well stated, with its limitations, in *In re Moser*, 138 Mich. 302, 101 N. W. 588, *per Grant, J.*: "One cannot be compelled to produce his own books, or the books of another, which are under his control as agent or otherwise, where their production would tend to incriminate him; neither can his clerk, whose possession is in his possession, be required to produce them; but when, as the agent of another, he chooses to make entries on the books of that other, and those books

are in the actual and legal possession and control of another officer of the corporation, or of the corporation itself, such officer may be compelled to produce them, in a proper case, under a *subpoena duces tecum*."

As a wife cannot be compelled to be a witness against her husband, she cannot be compelled to produce papers against him on a *subpoena duces tecum*. Upon her refusal to produce, however, secondary evidence of their contents may be given. *Farmer v. State*, 100 Ga. 41, 28 S. E. 26.

Where the witness' answer shows that the document will not incriminate him, he may be compelled to produce them. *In re Peasley*, 44 Fed. 271.

A person is not privileged to refuse to produce documents merely because they are private. *Burnham v. Morrissey*, 14 Gray (Mass.) 226, 74 Am. Dec. 676. See *supra*, IX, 1, A.

The fact that the production will tend to lead to pecuniary loss gives no privilege. *Bull v. Loveland*, 10 Pick. (Mass.) 9; *Hawkins v. Sumter*, 4 Desaus. (S. C.) 102, 446. See *supra*, IX, 1, B.

Where the books were ordered to be produced for the purpose of determining the nature of certain entries therein, it was held that the witness must produce the books but might refuse to exhibit any entry which would incriminate him. *In re Lippman*, 3 Ben. 95, 15 Fed. Cas. No. 8,382.

In *Titus v. Cortelyou*, 1 Barb. (N. Y.) 444, it was said that if the books contain accounts and transactions which in no way relate to the subject of examination, it is the right of the party to seal up such parts of the books so that they shall not be exposed to the observation of those who have no right to examine them.

**Claim. — Where Must Be Made.** See *infra*, IX, 1, H, c.

cannot lawfully refuse to produce them for the inspection of the court for the purpose of determining the merit of the claim.<sup>34</sup>

(C.) OBJECTION TO PRODUCTION BY ANOTHER. — The privilege being personal to the witness he cannot urge it against the compulsory production of his books by another person in whose possession they are,<sup>35</sup> though it has been held to the contrary.<sup>36</sup>

(D.) PRIVILEGE OF CORPORATION OFFICER OR EMPLOYEE. — An officer or employe of a corporation cannot be compelled to produce its books and papers in his possession containing the record of his actions where the purpose is to get evidence which may tend to incriminate him,<sup>37</sup> or where such a result would follow.<sup>38</sup> But such a person who is not the legal custodian of books which are not in any sense his private property cannot lawfully refuse to produce them.<sup>39</sup> But a corporate officer cannot by a claim of privilege prevent the examination of the books of the corporation, although they disclose his criminal conduct.<sup>40</sup>

(E.) OF BANKRUPT. — Where a voluntary petition in bankruptcy is filed the privilege is waived.<sup>41</sup> But the filing of an involuntary petition in bankruptcy, being the act of another, does not deprive the bankrupt of the privilege,<sup>42</sup> although for the purpose of determining whether they would be incriminating he may be compelled to submit such documents to the court or referee.<sup>43</sup>

34. Consolidated Rendering Co. v. Vermont, 207 U. S. 541. See also *In re Hess*, 134 Fed. 109; *In re Hark*, 136 Fed. 986; *In re Consol. Rendering Co.*, 80 Vt. 55, 66 Atl. 790; *United States v. Collins*, 146 Fed. 553; *In re Lippman*, 3 Ben. 95, 15 Fed. Cas. No. 8,382.

35. *State v. Strait*, 94 Minn. 384, 102 N. W. 913 (books of bankrupt in hands of trustee in bankruptcy). Compare *infra*, IX, 1, H, c, (1.), (B.).

36. *Hazlett's Estate*, 8 Pa. Dist. 201 (holding that an insolvent, on the ground of privilege, could prevent compulsory production of his books by his assignee to whom they had been delivered).

37. *Ex parte Chapman*, 153 Fed. 371. But see *Pray v. Todd*, 95 App. Div. 423, 88 N. Y. Supp. 650.

Officers of a corporation cannot be compelled to produce the corporate books where the purpose of the application is to show their criminal conduct by such books. *United States v. National Lead Co.*, 75 Fed. 94.

38. *Rex v. Granatelli*, 7 St. Tr. (N. S.) 979.

39. *Ex parte Hedden*, 29 Nev.

352, 90 Pac. 737, where the legal custodian placed the books in the custody of petitioner, another officer of the corporation, after they had both been summoned to appear before the grand jury. Compare *infra*, IX, 1, H, c, (1.), (B.).

40. *McElree v. Darlington*, 187 Pa. St. 593, 41 Atl. 456, 67 Am. St. Rep. 592. See also *Pray v. Todd*, 95 App. Div. 423, 88 N. Y. Supp. 650. Compare *infra*, IX, 1, H, c, (1.), (B.).

41. *In re Sapiro*, 92 Fed. 340. But as to oral testimony the privilege is not thereby waived. *United States v. Goldstein*, 132 Fed. 789.

42. *In re Hess*, 134 Fed. 109; *In re Kanter*, 117 Fed. 356.

43. The witness "should be required to bring the books and papers which he alleges contain the incriminating evidence before either the court or referee in bankruptcy; and, when it is made to appear that his plea is well founded, the court can make such order in the case as will fully protect him from discovery of such evidence, and at the same time, if possible, enable the trustee to obtain such information from the books as is always neces-

(F.) PUBLIC RECORDS. — The privilege in regard to private documents does not extend, however, to public records, which must be produced.<sup>44</sup>

(11.) Privilege of Accused in Criminal Cases. — (A.) IN GENERAL. The accused in a criminal prosecution cannot be compelled to be a witness against himself.<sup>45</sup> The privilege of an accused protects him not only from the necessity of furnishing evidence against himself, but even from being called upon to do so against his will; it is therefore error for the court or counsel to place him in such a position that he is compelled either to waive his privilege or subject himself to the unfavorable inference arising from his claiming it.<sup>46</sup> The privilege is attempted to be confined by some authorities to testimonial utterances.<sup>47</sup>

(B.) DISTINGUISHED FROM CONFESSIONS UNDER DURESS. — The privilege against self-crimination is distinct from the exclusion of admissions or confessions given under compulsion.<sup>48</sup>

sary and indispensable in the settlement of bankrupt estates." *In re Hess*, 134 Fed. 109, *per Holland*, Dist. J. See also *In re Hark*, 136 Fed. 986. But see *In re Kanter*, 117 Fed. 356.

When it is determined that the books contain no incriminating matters they must be produced. *In re Hess & Co.*, 136 Fed. 988.

44. *Bradshaw v. Murphy*, 7 Car. & P. (Eng.) 612; *Louisville & N. R. Co. v. Com.*, 106 Ky. 633, 51 S. W. 164, 1012, 90 Am. St. Rep. 236. But see *Rex v. Cornelius*, 2 Str. (Eng.) 1210. See *supra*, IX, 1, H, a, (9.).

45. *Ex parte Sauls*, 46 Tex. Crim. 209, 78 S. W. 1073; *Thornton v. State*, 117 Wis. 338, 93 N. W. 1107. See also cases cited in following notes.

A codefendant cannot be compelled to be a witness for the other defendant in a criminal case. *Holman v. State*, 72 Miss. 108, 16 So. 204. See also *State v. Enochs*, 69 Ind. 314.

Evidence of voluntary statements made out of court is admissible; the accused is not thereby compelled to testify against himself. *State v. Inman*, 70 Kan. 894, 79 Pac. 162.

Testimony Against Accomplice. In *State v. Rose*, 61 N. C. (Phill.) 406, it is held that where two persons are under one indictment each may be compelled to testify for or against the other, although neither

can be forced to give testimony which will incriminate himself.

46. See *supra*, IX, 1, H, a, (3.), and (5.); *State v. Merkley*, 74 Iowa 695, 39 N. W. 111; *McKnight v. United States*, 115 Fed. 972, 54 C. C. A. 358. But see *Johnson v. Com.*, 115 Pa. St. 369, 9 Atl. 78; *Sprouse v. Com.*, 81 Va. 374.

"Because the defendant made no objection to his being sworn and no objection as to his testifying, does not alter his constitutional right. A man might subject himself to punishment for contempt, if he objected to testifying when forced or called upon to do so. It is not in accord with the orderly administration of justice to swear a defendant as a witness against himself in any court; if a defendant asks to be sworn when charged with a crime, that presents a different question." *Cross Hill v. Owens*, 61 S. C. 22, 39 S. E. 184. See also *Blum v. State*, 94 Md. 375, 51 Atl. 26.

It is misconduct for the prosecuting officer to demand or to request the accused, in the presence of the jury, to be sworn or to take the witness stand. *United States v. Kimball*, 117 Fed. 156.

47. *Magee v. State* (Miss.), 46 So. 529.

48. *Magee v. State* (Miss.), 46 So. 529; *State v. Graham*, 74 N. C. 646, 21 Am. Rep. 493; *Rex v. Scott*, 1 Dears. & B. 47, *per Campbell*, C. J.; *People v. McMahon*, 15 N. Y. 384.

(C.) **EXPERIMENTS AND COMPARISONS.** — An accused cannot be compelled to perform or submit to experiments in court,<sup>40</sup> even though he has voluntarily taken the stand in his own behalf.<sup>50</sup> It is not proper to require an accused to try on a shoe<sup>51</sup> or to make footprints for comparison,<sup>52</sup> in court. The cases are not in accord as to whether evidence is admissible of a forced comparison of his feet with footprints of the supposed guilty party.<sup>53</sup> Evidence is admissible, however, as to the results of a comparison made between such footprints and shoes forcibly taken from a prisoner.<sup>54</sup>

(D.) **COMPULSORY PHYSICAL EXAMINATION OR INSPECTION.** — (a.) *Out of Court.* — According to the weight of authority the admission of testimony as to the results of an examination or inspection of the accused's person, forcibly made, does not constitute a violation<sup>55</sup> of

386; *Hendrickson v. People*, 10 N. Y. 13, 33, 61 Am. Dec. 721. See article "CONFESSIONS," Vol. III. But see *Jordan v. State*, 32 Miss. 382; *Tuttle v. People*, 33 Colo. 243, 79 Pac. 1035, 70 L. R. A. 33.

49. See *Encyc. of Ev.*, Vol. V, p. 501; *Turman v. State* (Tex. Crim.), 95 S. W. 533. But see *Johnson v. Com.*, 115 Pa. St. 369, 9 Atl. 78 (where accused was called upon to repeat certain words for purpose of identification); *Sprouse v. Com.*, 81 Va. 378 (where defendant wrote his name at the request of the court).

50. Accused cannot be compelled to place a cap on his head for the purpose of identification by the prosecuting witness, even though he has voluntarily taken the stand in his own behalf. *Turman v. State*, (Tex. Crim.), 95 S. W. 533. See *Encyc. of Ev.*, Vol. V, p. 501. But compare *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382.

51. *People v. Mead*, 50 Mich. 228, 15 N. W. 95.

52. *Stokes v. State*, 5 Baxt. (Tenn.) 619, 30 Am. Rep. 72 (pan of soft mud was taken into court room at the trial, and the prisoner was asked, in the presence of the jury, to put his foot into it).

*Contra*, *Walker v. State*, 7 Tex. App. 245, 32 Am. Rep. 595 (magistrate compelled prisoner to make footprints in ash heap).

53. **Forced Comparison.** — **Evidence Admissible.** — *State v. Graham*, 74 N. C. 646, 21 Am. Rep. 493; *Magee v. State* (Miss.), 46 So. 529 (the defendant "is not in such cases giving evidence. He is not

testifying as a witness. He is not delivering any testimonial utterance").

**Forced Comparison.** — **Evidence Inadmissible.** — *Day v. State*, 63 Ga. 669.

54. *Meyers v. State*, 97 Ga. 76, 25 S. E. 252; *People v. VanWormer*, 175 N. Y. 188, 67 N. E. 299; *Thornton v. State*, 117 Wis. 338, 93 N. W. 1107, 98 Am. St. Rep. 924. But see *Davis v. State*, 131 Ala. 10, 31 So. 569 (evidence that the defendant refused to allow his shoes to be taken to be compared with tracks is inadmissible).

55. *O'Brien v. State*, 125 Ind. 38, 25 N. E. 137, 9 L. R. A. 323; *State v. Miller*, 71 N. J. L. 527, 60 Atl. 202; *People v. Truck*, 170 N. Y. 203, 63 N. E. 281 (defendant was taken to a room outside the jail and was there examined by insanity experts). See *People v. Kemmler*, 119 N. Y. 580, 24 N. E. 9; *State v. Eastwood*, 73 Vt. 205, 50 Atl. 1077; *Magee v. State* (Miss.), 46 So. 529; *State v. Jones*, 153 Mo. 457, 55 S. W. 80; *People v. Glover*, 71 Mich. 303, 38 N. W. 874.

"A thief may be forcibly examined and the stolen property may be taken from his person and brought into court for his condemnation. A prisoner's person may be examined for marks and bruises, and then they may be proved upon his trial to establish his guilt; and it would be stretching the constitutional inhibition too far to make it cover such cases . . . and cases like this, and the inhibition thus applied would greatly embarrass the ad-

his privilege, although it has sometimes been held to the contrary.<sup>56</sup>

(b.) *In Court*. — Requiring an accused on his trial to exhibit his person in the condition in which people are ordinarily dressed does not compel him to be a witness against himself;<sup>57</sup> thus he may be compelled to rise or otherwise exhibit himself for identification.<sup>58</sup> The limits of the right to compel submission to inspection or examination are not however clearly determined by the cases, though it has been held proper to compel an accused to bare his arm.<sup>59</sup> By voluntarily testifying<sup>60</sup> or offering evidence<sup>61</sup> in his own behalf in regard to his physical condition or peculiarities the accused waives his privilege against submitting to measurements or physical ex-

amination of justice." *People v. Gardner*, 144 N. Y. 119, 38 N. E. 1003.

Physicians' testimony as to the condition of a wound on defendant's head, shaved by compulsion, is admissible. *State v. Tettaton*, 159 Mo. 354, 60 S. W. 743.

"A murderer may be forcibly taken before his dying victim for identification, and the dying declaration of his victim may then be proved upon his trial for his identification." *People v. Gardner*, 144 N. Y. 119, 38 N. E. 1003.

A photograph taken of the accused by a police officer, after his arrest and while in the custody of the officer, is admissible for the purpose of identification. *Shaffer v. United States*, 24 App. Cas. (D. C.) 417.

Measurements of the accused taken while he is in custody may be given in evidence though taken by force. *United States v. Cross*, 20 D. C. 365, 382.

56. *State v. Height*, 117 Iowa 650, 91 N. W. 935, 94 Am. St. Rep. 323, 59 L. R. A. 437 (where prisoner was examined by physician to determine whether he had a venereal disease). See also *People v. McCoy*, 45 How. Pr. (N. Y.) 216; *Agnew v. Jobson*, 13 Cox. C. C. (Eng.) 625.

57. *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382.

58. *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *People v. Oliveria*, 127 Cal. 376, 59 Pac. 772; *Benson v. State* (Tex. Crim.), 69 S. W. 165; *State v. Reasby*, 100 Iowa 231, 69 N. W. 451; *People v. Gardner*, 144 N. Y. 119, 38 N. E. 1003 ("His mere standing up did not identify him

with the alleged crime, and did not disclose any act connected with the crime"); *Coles v. State*, 23 Ohio Cir. Ct. 313 (compelled to stand up and turn back to witness). *Johnson v. Com.*, 115 Pa. St. 369, 9 Atl. 78. But see *State v. Jacobs*, 50 N. C. (5 Jones L.) 259 (cannot compel defendant to exhibit himself for purpose of enabling jury to determine his status as a free negro); *Blackwell v. State*, 67 Ga. 76, 44 Am. Rep. 717 (*holding* that accused could not be compelled to stand up to enable a witness to testify from inspection as to the character and extent of the amputation of his leg); *Williams v. State*, 98 Ala. 52, 13 So. 333.

The accused may be compelled to take his feet from under a chair, thus enabling a witness who had seen tracks of the murderer to state how the prisoner's feet corresponded therewith. *State v. Prudhomme*, 25 La. Ann. 522.

59. *State v. Ah Chuey*, 14 Nev. 79, 33 Am. Rep. 530 (defendant compelled to draw up his shirt sleeve so as to exhibit tattoo mark). See also *State v. Garrett*, 71 N. C. 85, 17 Am. Rep. 1 (defendant compelled to unwrap hand and exhibit it at coroner's inquest). But see *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382; *Agnew v. Jobson*, 13 Cox C. C. (Eng.) 625.

60. *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382 (testimony as to inability to wear boots justifies the compulsory measurement of his feet).

61. *Gordon v. State*, 68 Ga. 814 (voluntary exhibition of scar). See *Lipes v. State*, 15 Lea (Tenn.) 125, 54 Am. Rep. 402.

amination to determine the truth as to such matters, at least in so far as the privilege against self-incrimination is concerned.<sup>62</sup>

(E.) **STATUTORY PRESUMPTIONS.** — Statutory provisions that certain facts<sup>63</sup> or failure to perform certain acts<sup>64</sup> shall constitute *prima facie* evidence of guilt do not infringe the usual constitutional provision.

(F.) **EVIDENCE GIVEN AT FORMER HEARING.** — Although the defendant does not take the stand in his own behalf, evidence of the testimony he voluntarily gave at a former hearing is admissible.<sup>65</sup>

b. *Cautioning Witness.* — While the court should not actively interfere to prevent a witness or an accused from giving testimony tending to incriminate himself,<sup>66</sup> it may properly instruct him as to his privilege.<sup>67</sup> Many courts have said that it is the court's duty to give such caution<sup>68</sup> especially where the witness is inexperienced

62. As to the general question of the right to compel physical examination, see Vol. IX, p. 783.

63. **Possession of Intoxicating Liquors.** — *Parsons v. State*, 61 Neb. 244, 85 N. W. 65 (possession of intoxicating liquor made *prima facie* evidence of violation of statute against illegal sale).

64. **Failure To Register Automobile.** — *People v. Schneider*, 139 Mich. 673, 103 N. W. 172, 69 L. R. A. 345.

**Failure To Keep Record.** — *State v. Davis*, 117 Mo. 614, 23 S. W. 759 (druggists compelled to produce prescription when called upon). See also *People v. Shuler*, 136 Mich. 161, 98 N. W. 986 (provision that druggists must report weekly all sales of liquor); *St. Joseph v. Levin*, 128 Mo. 588, 31 S. W. 101, 49 Am. St. Rep. 577 (pawnbrokers compelled to keep and exhibit a list).

65. See articles "ADMISSIONS," Vol. I; "CONFESSIONS," Vol. III; "FORMER TESTIMONY," Vol. V; *People v. Willard*, 150 Cal. 543, 89 Pac. 124; *People v. Furlong*, 187 N. Y. 198, 79 N. E. 978; *Bess v. Com.*, 26 Ky. L. Rep. 839, 82 S. W. 576; *Com. v. House*, 28 Pitts. Leg. J. 210, 41 Wkly. Notes Cas. 246; *Alston v. State*, 41 Tex. 39; *Armstrong v. State*, 34 Tex. Crim. 248, 30 S. W. 235. But it cannot be shown that he refused to answer certain questions upon another trial upon the ground of privilege against self-incrimination. *State v. Bailey*, 54 Iowa 414, 6 N. W. 589.

66. *Eggers v. Fox*, 177 Ill. 185, 52 N. E. 269.

67. *England.* — *Millman v. Tucker*, Peake Ad. C. 222; *Fisher v. Ronalds*, 16 Eng. L. & Eq. 417.

*Illinois.* — *Eggers v. Fox*, 177 Ill. 185, 52 N. E. 269.

*Minnesota.* — *State v. Bilansky*, 3 Minn. 246.

*New York.* — *People v. Priori*, 164 N. Y. 459, 58 N. E. 668.

*North Carolina.* — *State v. Weaver*, 93 N. C. 595.

*Ohio.* — *Mimms v. State*, 16 Ohio St. 221.

*South Carolina.* — *State v. Edwards*, 2 Nott & Mc C. 13, 10 Am. Dec. 557.

*Wisconsin.* — *Emery v. State*, 101 Wis. 627, 78 N. W. 145. See *Janvrin v. Scammon*, 29 N. H. 280.

"It Is Within the Discretion of the court, and the usual practice, to advise a witness that he is not bound to criminate himself where it appears necessary to protect the rights of the witness." *Mayo v. Mayo*, 119 Mass. 290.

68. *Florida.* — *Ex parte Senior*, 37 Fla. 1, 19 So. 652, 32 L. R. A. 133 (when circumstances of case call for it).

*Minnesota.* — *State v. Bilansky*, 3 Minn. 246. See *Simmons v. Holster*, 13 Minn. 249.

*Mississippi.* — See *Ivy v. State*, 84 Miss. 264, 36 So. 265.

*New York.* — *Friess v. New York C. & H. R. R. Co.*, 67 Hun 205, 22 N. Y. Supp. 104, affirmed 140 N. Y.

or ignorant,<sup>69</sup> others hold that no such duty rests upon the court.<sup>70</sup> But the failure of the court to instruct a witness of his privilege cannot be assigned by a party as error.<sup>71</sup> If a witness who knows of his privilege does not claim it, and testifies falsely, he may be prosecuted for perjury;<sup>72</sup> but if he does not know of his privilege,

639, 35 N. E. 892; *Southard v. Rexford*, 6 Cow. 254; *New v. Fisher*, 11 Daly 308; *Boston Marine Ins. Co. v. Slocovitch*, 23 Jones & S. 452.

*North Carolina*.—*State v. Weaver*, 93 N. C. 595.

*Pennsylvania*.—*Ralph v. Brown*, 3 Watts & S. 395.

*Texas*.—*Starr v. State* (Tex. Crim.), 86 S. W. 1023 (witness should be informed of the privilege; it is immaterial whether court or counsel gives the warning).

*Vermont*.—See *Smith v. Crane*, 12 Vt. 487.

*Washington*.—*Perkins v. North End Bank*, 17 Wash. 100, 49 Pac. 241 (it is the duty of the court to caution the witness, and of counsel to suggest that the caution be given).

*Wisconsin*.—*Emery v. State*, 101 Wis. 627, 78 N. W. 145 (when it is evident that the witness is ignorant of his rights the court should instruct him). *Close v. Olney*, 1 Denio (N. Y.) 319.

"The better practice is, not only to notify a witness that he will not be compelled to testify to anything that will criminate him, but also when a particular question is asked, to warn him that the answer to such question might have that effect; and especially is this true where the witness belongs to an ignorant class." *Davis v. State*, 122 Ga. 564, 50 S. E. 376. But in *United States v. Darnaud*, 3 Wall. Jr. 143, 25 Fed. Cas. No. 14,918, it was said that the court should not give a general instruction, but should wait until a question which may incriminate is asked before interfering.

**Where the Witness Has Claimed Privilege** the court should instruct him fully as to his rights in the matter and as to what facts will tend to incriminate him. *Close v. Olney*, 1 Denio (N. Y.) 319.

69. *Emery v. State*, 101 Wis. 627,

78 N. W. 145. See *Davis v. State*, 122 Ga. 564, 50 S. E. 376; *Ex parte Senior*, 37 Fla. 1, 19 So. 652, 32 L. R. A. 133.

70. *Attorney-General v. Radloff*, 10 Exch. 84, 2 C. L. R. 1116, 23 L. J., Ex. 240; *Reg. v. Coote*, 12 Cox C. C. 557; *Com. v. Shaw*, 4 Cush. (Mass.) 594, 50 Am. Dec. 813; *Com. v. Howe*, 13 Gray (Mass.) 31; *Cullen v. Com.*, 24 Gratt. (Va.) 624; *State v. Comer*, 157 Ind. 611, 62 N. E. 452; *Republic v. Parsons*, 10 Hawaii 601. See *Dunn v. State*, 99 Ga. 211, 25 S. E. 448; *Bolen v. People*, 184 Ill. 338, 56 N. E. 408.

*Compare State v. Matlack*, 5 Penne. (Del.) 401, 64 Atl. 259, holding that the court is under no obligation to instruct the witness as to his privilege against disclosing how he voted.

**In England** the practice formerly was for the court to warn the witness. *Macclesfield's Trial*, 16 How. St. Tr. 850; *Lloyd v. Passingham*, 16 Ves. Jr. 59, 33 Eng. Reprint 906.

71. *Colorado*.—*Barr v. People*, 30 Colo. 522, 71 Pac. 392.

*Georgia*.—*Dunn v. State*, 99 Ga. 211, 25 S. E. 448.

*Illinois*.—*Bolen v. People*, 184 Ill. 338, 56 N. E. 408.

*Massachusetts*.—*Com. v. Shaw*, 4 Cush. 594, 50 Am. Dec. 813; *Com. v. Howe*, 13 Gray 26.

*North Dakota*.—*State v. Kent*, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518; *State v. Ekanger*, 8 N. D. 559, 80 N. W. 482.

*South Carolina*.—*State v. Butler*, 47 S. C. 25, 24 S. E. 991.

*South Dakota*.—*State v. Mungeon*, 20 S. D. 612, 108 N. W. 552.

*Compare Lauchheimer & Sons v. Jacobs*, 126 Ga. 261, 55 S. E. 55; *Ivy v. State*, 84 Miss. 264, 36 So. 265.

72. *United States v. Bell*, 81 Fed. 830.



and is not warned, he cannot be prosecuted for perjury for answering falsely.<sup>73</sup>

**Distinguished From Confessions.** — The duty of the court to advise the witness of his privilege in this class of cases must be distinguished from the question whether the testimony of a witness can be subsequently used against him in a criminal proceeding where he was not warned of his rights.<sup>74</sup>

**c. Claim and Waiver.** — (1.) **Right To Claim.** — (A.) **GENERALLY.** The privilege here under discussion was not created for the benefit of a party or third persons but is personal to the witness as such and can be insisted upon, as a matter of right, by him only;<sup>75</sup> nor can the witness claim the privilege of another.<sup>76</sup> An unincorporated association, sued as such, cannot claim the privilege of one of its members.<sup>77</sup>

(B.) **CORPORATION.** — A corporation is not a person within the meaning of the Fifth Amendment to the Constitution of the United States, and similar constitutional and statutory provisions, and an officer or agent of a corporation cannot refuse to testify or produce books or documents on the ground that the corporation would be

**73.** *United States v. Bell*, 81 Fed. 830 ("Can the government take advantage of its own wrong, inveigle or drive or permit the citizen, too ignorant to protect himself, to make an oath which he need not make under any compulsion, and then insist upon the pains and penalties of perjury that he shall tell the truth? Truth-telling may be the highest virtue, but may the fifth amendment be violated to enforce it? We answer no.")

**74.** See article "CONFESSIONS," Vol. III, pp. 325, 331, 341, and *Tuttle v. People*, 33 Colo. 243, 79 Pac. 1035, 7 L. R. A. 33; *United States v. Bell*, 81 Fed. 830.

**75.** *United States. — In re Knickerbocker Steamboat Co.*, 136 Fed. 956.

**Alabama.** — *Beauvoir Club v. State*, 148 Ala. 643, 42 So. 1040; *Southern R. Co. v. Bush*, 122 Ala. 470, 26 So. 168.

**Colorado.** — *Lothrop v. Roberts*, 16 Colo. 250, 27 Pac. 698.

**Florida.** — *Ex parte Senior*, 37 Fla. 1, 19 So. 652, 32 L. R. A. 133.

**Illinois.** — *Bolen v. People*, 184 Ill. 338, 56 N. E. 408; *Eggers v. Fox*, 177 Ill. 185, 52 N. E. 269.

**Indiana.** — *South Bend v. Hardy*, 98 Ind. 577, 49 Am. Rep. 792.

**Louisiana.** — *Horrell v. Parish*, 26 La. Ann. 6.

**Maryland.** — *Chesapeake Club v. State*, 63 Md. 446.

**Michigan.** — *Foster v. People*, 18 Mich. 266.

**Mississippi.** — *White v. State*, 52 Miss. 216.

**New Jersey.** — *Fries v. Brugler*, 12 N. J. L. 79, 21 Am. Dec. 52.

**New York.** — *Cloyes v. Thayer*, 3 Hill 564.

**North Dakota.** — *State v. Pan-coast*, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

**Tennessee.** — *In re Druggist Cases*, 85 Tenn. 449, 3 S. W. 490.

**Texas.** — *Ingersol v. McWillie*, 87 Tex. 647, 30 S. W. 569.

**Vermont.** — *In re Consol. Rendering Co.*, 80 Vt. 55, 66 Atl. 790.

**Wisconsin.** — *State ex rel. Hopkins v. Olin*, 23 Wis. 309.

Where the question asked is not pertinent counsel may object on this ground. *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26.

**76.** *Hale v. Henkel*, 201 U. S. 43; *King of Sicilies v. Wilcox*, 7 State Tr. (N. S.) 1049. Compare *supra*, IX, 1, H, a, (10.), (C.).

**77.** *Morgan v. Halberstadt*, 60 Fed. 592, 9 C. C. A. 147, 20 U. S. App. 417.

thereby incriminated.<sup>78</sup> It has, however, been held to the contrary under a statute protecting any person from questions tending to criminate him.<sup>79</sup>

(2.) **Mode and Effect of Claim.**—(A.) **BY WHOM MADE.**—The privilege being a personal one for the benefit of the witness alone it must be claimed by him personally; neither the court of its own motion,<sup>80</sup> nor a party or his counsel have the right to make the objection that evidence called for violates the privilege of the witness.<sup>81</sup> The objection cannot be made by the state in a criminal

78. *United States v. Armour & Co.*, 142 Fed. 808; *In re Moser*, 138 Mich. 302, 101 N. W. 588. Compare *Consolidated Render. Co. v. Vermont*, 207 U. S. 541; *United States Exp. Co. v. Henderson*, 69 Iowa 40, 28 N. W. 426; *Louisville & N. R. Co. v. Com.*, 106 Ky. 633, 51 S. W. 164, 1012, 90 Am. St. Rep. 236; *Meade v. Southern Tier Masonic Relief Assn.*, 119 App. Div. 761, 104 N. Y. Supp. 523; *State ex rel. Attorney-General v. Simmons Hdw. Co.*, 109 Mo. 118, 18 S. W. 1125, 15 L. R. A. 676; *Ex parte Conrades* (Mo. App.), 85 S. W. 150. But see *Logan v. R. Co.*, 132 Pa. St. 403, 19 Atl. 137; *King of Sicilies v. Wilcox*, 7 State Tr. (N. S.) 1049. And see *supra*, IX, 1, H, a, (10.), (D.).

Where a witness is summoned before a grand jury, which is investigating alleged violations of interstate commerce law by a railroad company, such witness will not be excused from producing documents and papers, if they do not tend to incriminate him, on the ground that they would tend to incriminate the company. *In re Peasley*, 44 Fed. 271.

In *Hale v. Henkel*, 201 U. S. 43, the court said: "The question whether a corporation is a 'person' within the meaning of this amendment (referring to 5th) really does not arise, except perhaps where a corporation is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employees. The amendment is limited to a person who shall be compelled in a criminal case to be a witness against himself, and if he cannot set up the privilege of a third person, he certainly cannot set up

the privilege of a corporation. . . . While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges."

In *New York L. Ins. Co. v. People*, 195 Ill. 430, 63 N. E. 264, affirming 95 Ill. App. 136, the court said: "It is insisted that the trial court erred in requiring the agent to testify, over the appellant's objection, to the facts showing the rebate and discrimination prohibited by the statute and for which the penalty is imposed. It is said that the agent was thereby compelled to criminate himself. If the privilege invoked be applicable to such a case it is a personal one, and inasmuch as the witness did not himself claim the privilege the company cannot do so, and it is the only appellant here."

**Production of Corporate Books.** Right of officer to claim personal privilege. See *supra*, IX, 1, H, a, (10.), (D.).

79. *D'Ivry v. World Newspaper Co.*, 17 Ont. Pr. 387 (holding that while there might be some doubt about the liability of a corporation to prosecution for libel, its manager should nevertheless be allowed to claim privilege on its behalf against giving testimony tending to show it guilty of such offense).

**Privilege of Corporation.**—By Whom Claimed.—See *infra*, IX, 1, H, c, (2.), (A.).

80. *Sodusky v. McGee*, 5 J. J. Marsh. (Ky.) 621; *Ward v. People*, 6 Hill (N. Y.) 144.

81. *England.*—*East v. Chapman*,

prosecution.<sup>82</sup> But it has been said that counsel may warn the witness or request the court to do so.<sup>83</sup> So, also, counsel for a de-

1 M. & M. 46, 2 Car. & P. 570, 12 E. C. L. 268; Reg v. Kinglake, 11 Cox C. C. 499; Marston v. Downes, 1 Ad. & El. 31, 28 E. C. L. 24; Doe v. Date, 3 Ad. v. El. 609, 43 E. C. L. 889.

Canada.—*In re Connolly*, 4 Can. L. T. 301.

United States.—*Morgan v. Halberstadt*, 60 Fed. 592, 9 C. C. A. 147.

Alabama.—*Southern R. Co. v. Bush*, 122 Ala. 470, 26 So. 168.

California.—*Clark v. Reese*, 35 Cal. 89.

Colorado.—*Barr v. People*, 30 Colo. 522, 71 Pac. 392 (cannot object to testimony of accomplice).

Connecticut.—*Treat v. Browning*, 4 Conn. 408, 10 Am. Dec. 156.

Delaware.—*Knopf v. Philadelphia, etc. R. Co.*, 2 Penne. 392, 46 Atl. 747.

Florida.—*Williams v. Dickinson*, 28 Fla. 90, 9 So. 847.

Georgia.—*Taylor v. State*, 83 Ga. 647, 10 S. E. 442.

Illinois.—*Samuel v. People*, 164 Ill. 379, 45 N. E. 728; *New York L. Ins. Co. v. People*, 195 Ill. 430, 63 N. E. 264, *affirming* 95 Ill. App. 136 (suit for penalty for rebating in life insurance business; defendant has no standing to object to question put to agent in regard to his rebating).

Indiana.—*South Bend v. Hardy*, 98 Ind. 577, 49 Am. Rep. 792.

Iowa.—*State v. Cobley*, 103 N. W. 99 (witness indicted jointly with defendant); *State v. Van Winkle*, 80 Iowa 15, 45 N. W. 388.

Kentucky.—*Sodusky v. McGee*, 5 J. J. Marsh. 621.

Louisiana.—*Macarty v. Bond*, 9 La. 351.

Maine.—*State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688.

Maryland.—*Roddy v. Finnegan*, 43 Md. 490.

Massachusetts.—*Com. v. Gould*, 158 Mass. 499, 33 N. E. 656 (prosecution for illegal sales of intoxicating liquors; defendant cannot object to questions asked of purchasers on the ground that they would in-

criminate themselves); *Com. v. Shaw*, 4 Cush. 594, 50 Am. Dec. 813.

Michigan.—*In re Moser*, 138 Mich. 302, 101 N. W. 588; *Foster v. People*, 18 Mich. 266.

Minnesota.—*State v. Bilansky*, 3 Minn. 246.

Mississippi.—*White v. State*, 52 Miss. 216; *Newcomb v. State*, 37 Miss. 383.

Missouri.—*State v. Kennedy*, 154 Mo. 268, 55 S. W. 293.

New Hampshire.—*State v. Foster*, 23 N. H. 348, 55 Am. Dec. 191.

New Jersey.—*Fries v. Brugler*, 12 N. J. L. 79, 21 Am. Dec. 52.

New York.—*Cloyes v. Thayer*, 3 Hill 564; *People v. Bodine*, 1 Denio 281 (neither court nor party can object); *People v. Carroll*, 3 Park. Crim. 73.

North Carolina.—*People v. Teague*, 106 N. C. 576, 11 S. E. 665 (party in *quo warranto* case cannot object to testimony of witness that he voted illegally); *State v. Morgan*, 133 N. C. 743, 45 S. E. 1033.

North Dakota.—*State v. Ekan-ger*, 8 N. D. 559, 80 N. W. 482.

South Carolina.—*State v. Butler*, 47 S. C. 25, 24 S. E. 991.

Tennessee.—*The Druggist Cases*, 85 Tenn. 449, 3 S. W. 490.

Texas.—*Ingersol v. McWillie*, 87 Tex. 647, 30 S. W. 869; *Brown v. State (Tex. Crim.)*, 20 S. W. 924; *San Antonio H. R. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 752; *Duncan v. State*, 40 Tex. Crim. 591, 51 S. W. 372 (testimony of coprincipal).

West Virginia.—*State v. Hill*, 52 W. Va. 296, 43 S. E. 160.

Wisconsin.—*Ingalls v. State*, 48 Wis. 647, 4 N. W. 785 (question tending to degrade witness; conviction of crime).

<sup>82</sup> *Day v. State*, 27 Tex. App. 143, 11 S. W. 36. See *Pleasant v. State*, 13 Ark. 360. But see *People v. Maunsausau*, 60 Mich. 15, 26 N. W. 797.

<sup>83</sup> See *Star v. State (Tex. Crim.)*, 86 S. W. 1023; *Perkins v.*

endant charged with crime may raise the point and request the court to instruct the witness as to his rights.<sup>84</sup> And the witness may if he wishes seek advice from a party's counsel.<sup>85</sup>

Where the Witness Is Also a Party to the action<sup>86</sup> or the defendant in a criminal prosecution<sup>87</sup> some courts hold that he may make his claim of privilege through his counsel; others hold that he cannot.<sup>88</sup>

A Corporation, where entitled to the privilege, may claim it through its officers,<sup>89</sup> though not through its mere servants or employees.<sup>90</sup>

(B.) WHEN MADE. — A person other than the accused in a criminal prosecution on his own trial, who is called as a witness, is not justified in refusing to appear and be sworn, or in refusing to testify at all, on the ground that any testimony he could give would be incriminating, but the claim of privilege should be made when the

North End Bank, 17 Wash. 100, 49 Pac. 241; *State v. Barker*, 43 Wash. 69, 86 Pac. 387. But see *Taylor v. Wood*, 2 Edw. Ch. (N. Y.) 94; *Rex v. Adey*, 1 M. & Rob. (Eng.) 94; *State v. Mungeon*, 20 S. D. 612, 108 N. W. 552.

It is not reversible error for the court to allow counsel to repeatedly request the court to instruct the witness, nor for the court to so instruct the witness that he need not answer incriminating questions unless he desires to do so. *Lauchheimer & Sons v. Jacobs*, 126 Ga. 261, 55 S. E. 55.

84. *State v. Pancoast*, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

85. *Taylor v. Wood*, 2 Edw. Ch. (N. Y.) 94.

86. *Clifton v. Granger*, 86 Iowa 573, 53 N. W. 316, where counsel for plaintiff in an action for seduction was allowed to claim the privilege for her. The court said: "It is not required that she should in person address the court and claim the privilege. It is certainly sufficient if, through her counsel, the court was given to know that the witness did for herself claim the privilege."

87. *People v. Brown*, 72 N. Y. 571, 28 Am. Rep. 183; *State v. Shockley*, 29 Utah 25, 80 Pac. 865 (*distinguishing People v. Larsen*, 10 Utah 143, 37 Pac. 258, and reviewing contrary authorities). *Compare State v. Bond*, 12 Idaho 424, 86 Pac. 43 (this was a preliminary examination of one with whom wit-

ness was under joint indictment. Objection was made in the first instance by counsel for witness who then claimed the privilege).

88. *State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688; *State v. Pancoast*, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518; *State v. Ekanger*, 8 N. D. 559, 80 N. W. 482. See also *Lothrop v. Roberts*, 16 Colo. 250, 27 Pac. 698 (*holding it error to exclude testimony as self-incriminating where objection was made by counsel for defendant, and the witness, though a co-defendant, was interposing no defense*); *Prussing v. Jackson*, 85 Ill. App. 324; *Ammon v. Johnson*, 2 Ohio C. D. 149, 3 Ohio C. C. 263.

Where Interrogatories Are Pro pounded in a bill or an answer thereto they cannot be excepted to by the party through his counsel as incriminating. *In re Knickerbocker Steamboat Co.*, 136 Fed. 956. See also *Hobbs v. Stone*, 5 Allen (Mass.) 109 (*holding that the defendant's statement of his reason for his refusal to answer must be under oath*).

89. *D'Ivry v. World Newspaper Co.*, 17 Ont. Pr. 387, where the privilege was claimed by the manager of the corporation by filing an affidavit on behalf of the company.

90. *United States Exp. Co. v. Henderson*, 69 Iowa 40, 28 N. W. 426. *Compare Louisville & N. R. Co. v. Com.*, 106 Ky. 633, 51 S. W. 164, 1012, 90 Am. St. Rep. 236; and *supra*, IX, 1, H, c, (1.), (B.).

incriminating evidence is called for.<sup>91</sup> Where, however, the question or examination on its face relates solely to matters obnoxious to the privilege, objection may be made to any examination whatever.<sup>92</sup>

**Production of Documents.**—The objection on the ground of self-incrimination must accompany the refusal to produce, unless the evidence is plainly incriminating, and cannot be raised on a habeas corpus proceeding.<sup>93</sup> In a criminal case this rule does not apply to production by the accused since it is error even to call for production by him.<sup>94</sup>

(C.) HOW MADE. — (a.) *Generally.* — A general objection is not sufficient, but it must be expressly based upon the incriminating tendency of the answer.<sup>95</sup> It is not error, however, to sustain an objection deficient in this respect where the question on its face calls for incriminating matter,<sup>96</sup> or where the court itself has previously stated the ground in giving the witness the option of refusing to answer.<sup>97</sup> The witness must ordinarily state under oath that his answer would tend to incriminate him,<sup>98</sup> though this is not

91. *England.* — *Osborn v. London Dock Co.*, 10 Exch. 698, 3 C. L. R. 313, 24 L. J., Ex. 140, 1 Jur. (N. S.) 93; *Boyle v. Wiseman*, 10 Exch. 647, 3 C. L. R. 482, 24 L. J., Ex. 160, 1 Jur. (N. S.) 115.

*United States.* — *In re Scott*, 95 Fed. 815; *United States v. Kimball*, 117 Fed. 156.

*California.* — *Ex parte Stice*, 70 Cal. 51, 11 Pac. 459; *Overend v. Superior Court*, 131 Cal. 280, 63 Pac. 372.

*New Hampshire.* — *Rancour's Petition*, 66 N. H. 172, 20 Atl. 930; *Whitcher v. Davis*, 70 N. H. 237, 46 Atl. 458.

*New York.* — *In re Leich*, 31 Misc. 671, 65 N. Y. Supp. 3; *People ex rel. Taylor v. Seaman*, 8 Misc. 152, 29 N. Y. Supp. 329; *Skinner v. Steele*, 88 Hun 307, 34 N. Y. Supp. 748.

*Pennsylvania.* — *In re Eckstein*, 148 Pa. St. 509, 24 Atl. 63, 30 Wkly. Notes Cas. 59, *affirming* 10 Pa. Co. Ct. 41.

92. *Neale v. Coningham*, 1 Church C. C. 76, 17 Fed. Cas. No. 10,069; *Ex parte Sauls*, 46 Tex. Crim. 209, 78 S. W. 1073; *Trammell v. Thomas*, 1 Har. & M. (Md.) 261. And see *supra*, IX, 1, H, a, (7.).

93. *Ex parte Conrades* (Mo. App.), 85 S. W. 150.

94. See *supra*, IX, 1, H, a, (3.) and (5.).

95. *People v. Seaman*, 8 Misc. 152, 29 N. Y. Supp. 329; *In re Drug-gist Cases*, 85 Tenn. 449, 3 S. W. 490; *Howard v. Com.*, 25 Ky. L. Rep. 2213, 80 S. W. 211; rehearing *denied*, 26 Ky. L. Rep. 363, 81 S. W. 704. *Contra*, *Merluzzi v. Gleeson*, 59 Md. 214.

Declining to testify for "no particular reason" is not a claim of privilege. *Eggers v. Fox*, 177 Ill. 185, 52 N. E. 269.

96. *In re Van Tine*, 12 How. Pr. (N. Y.) 507; *Friess v. New York Cent. & H. R. Co.*, 67 Hun 205, 22 N. Y. Supp. 104 (*disapproving* *New v. Fisher*, 11 Daly (N. Y.) 308), *affirmed* in *Friess v. New York C. & H. R. Co.*, 140 N. Y. 639, 35 N. E. 892 (memo.); *Wallace v. State*, 41 Fla. 547, 26 So. 713. See *Ex parte Conrades* (Mo. App.), 85 S. W. 150.

97. *Merluzzi v. Gleeson*, 59 Md. 214.

98. *England.* — *Lamb v. Munster*, 10 Q. B. Div. 110; *Scott v. Miller*, 5 Jur. (N. S.) 858, 28 L. J., Ch. 584; *Fisher v. Ronalds*, 12 C. B. 762, 74 E. C. L. 761.

*Canada.* — *D'Ivry v. World Newspaper Co.*, 17 Ont. Pr. 387 (corporation may claim its privilege through an affidavit by its manager); *Power v. Ellis*, 20 N. Bruns. 40, 6 Can. Supp. 1.

essential where the question shows on its face that the answer if relevant would have such tendency.<sup>99</sup> But the witness cannot be compelled to specify in what manner his testimony would be incriminating as this might result in destroying the benefit of the privilege.<sup>1</sup>

(b.) *Successive Questions.* — But after the privilege has been claimed by the witness, if similar questions are put and objected to by the opposite counsel, the court may rule them out without submitting each question to the witness for his decision.<sup>2</sup>

(3.) *Determination of Claim.* — (A.) *IN GENERAL.* — The question whether the answer or matter called for may tend to incriminate the witness or subject him to a penalty or forfeiture is one for the court in the first instance;<sup>3</sup> the statement of the witness is not con-

*Illinois.* — *Prussing v. Jackson*, 85 Ill. App. 324.

*Massachusetts.* — *Com. v. Braynard*, Thach. Cr. Cas. 146.

*New York.* — *People v. Seaman*, 8 Misc. 152, 29 N. Y. Supp. 329.

*North Dakota.* — *State v. Pancoast*, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518; *State v. Ekanger*, 8 N. D. 559, 80 N. W. 482.

*South Carolina.* — *Poole v. Perritt*, 1 Speers 128.

The defendant's statement of his reasons for his refusal to answer interrogatories propounded in the bill must be under oath. *Hobbs v. Stone*, 5 Allen (Mass.) 109.

99. *Alston v. State*, 109 Ala. 51, 20 So. 81; *Blun v. State*, 94 Md. 375, 51 Atl. 26, 56 L. R. A. 322; *Merluzzi v. Gleeson*, 59 Md. 214; *Perkins v. North End Bank*, 17 Wash. 100, 49 Pac. 241. See *In re Van Tine*, 12 How. Pr. (N. Y.) 507.

1. *England.* — *Fisher v. Ronalds*, 16 Eng. L. & Eq. 417.

*Alabama.* — *Ex parte Boscowitz*, 84 Ala. 463, 4 So. 279, 5 Am. St. Rep. 384.

*Florida.* — *Ex parte Senior*, 37 Fla. 1, 19 So. 652, 32 L. R. A. 133; *Wallace v. State*, 41 Fla. 547, 26 So. 713.

*Illinois.* — *Smith v. People*, 20 Ill. App. 591.

*Indiana.* — *Ford v. State*, 29 Ind. 541, 95 Am. Dec. 658.

*Kansas.* — *Stevens v. State*, 50 Kan. 712, 32 Pac. 350.

*Maryland.* — *Merluzzi v. Gleeson*, 59 Md. 214.

*Michigan.* — *People v. Brewer*, 27 Mich. 134.

*New Hampshire.* — *Janvrin v. Scammon*, 29 N. H. 280.

*New York.* — *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122.

*North Dakota.* — *State v. Pancoast*, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

*New York.* — *Fries v. New York C. & H. R. R. Co.*, 67 Hun 205, 22 N. Y. Supp. 104, *affirmed*, 140 N. Y. 639, 35 N. E. 892.

2. *State v. Bilansky*, 3 Minn. 246. See also *State v. Marshall*, 36 Mo. 400 (after witness has declined to answer first question others may be ruled out upon objection of attorney).

3. *England.* — *Reg. v. Garbett*, 2 Car. & K. 474, 61 E. C. L. 473; *Fisher v. Ronalds*, 12 C. B. 762, 17 Jur. 373; *Osborn v. London Dock Co.*, 10 Ex. 698, 3 C. L. R. 313, 24 L. J., Ex. 140, 1 Jur. (N. S.) 93; *Sidebottom v. Adkins*, 3 Jur. (N. S.) pt. 1, 631, 5 W. R. 743; *Amey v. Long*, 9 East 473, 6 Esp. 116, 1 Camp. 16, 9 R. R. 589; *Reg. v. Boyes*, 30 L. J., Q. B. 301, 1 Best & S. 311, 7 Jur. (N. S.) 1158, 5 L. T. 147.

*Canada.* — *D'Ivry v. World Newspaper Co.*, 17 Ont. Pr. 387.

*United States.* — *Wyckoff v. Wagner Typewriter Co.*, 99 Fed. 158; *Foot v. Buchanan*, 113 Fed. 156; *United States v. Miller*, 2 Cranch C. C. 247, 26 Fed. Cas. No. 15,772; *Ex parte Irvine*, 74 Fed. 954.

*Alabama.* — *Ex parte Boscowitz*,

clusive on this matter<sup>4</sup> but it must appear that there is reasonable ground to apprehend, or some tangible and substantial probability that the evidence called for may be incriminating.<sup>5</sup> Where, however, the question is such that an answer may or may not be incriminating, depending upon its purport, the witness alone is the judge of whether his answer will incriminate him,<sup>6</sup> unless it is ap-

84 Ala. 463, 4 So. 279, 5 Am. St. Rep. 384.

*Arkansas.*—*Ex parte* Butt, 78 Ark. 262, 93 S. W. 992.

*California.*—*Overend v. Superior Court*, 131 Cal. 280, 63 Pac. 372; *Ex parte* Stice, 70 Cal. 51, 11 Pac. 459; *Bradley v. Clarke*, 133 Cal. 196, 65 Pac. 395.

*Florida.*—*Wallace v. State*, 41 Fla. 547, 26 So. 713.

*Iowa.*—*Richman v. State*, 2 Greene 532; *State v. Duffy*, 15 Iowa 425.

*Kansas.*—*Stevens v. State*, 50 Kan. 712, 32 Pac. 350.

*Maryland.*—*Winder v. Dffen-*  
*derffer*, 2 Bland 166.

*Massachusetts.*—*Bull v. Love-*  
*land*, 10 Pick. 9.

*Michigan.*—*In re Moser*, 138 Mich. 302, 101 N. W. 588.

*Minnesota.*—*State v. Thaden*, 43 Minn. 253, 45 N. W. 447.

*New Hampshire.*—*Janvrin v. Scammon*, 29 N. H. 280.

*New York.*—*In re Taylor*, 8 Misc. 159, 28 N. Y. Supp. 500; *Youngs v. Youngs*, 5 Redf. Sur. 505; *People v. Mather*, 4 Wend. 229.

*North Carolina.*—*LaFontain v. Southern Underwriters Assn.*, 83 N. C. 132.

*Pennsylvania.*—*Com. v. Bell*, 145 Pa. St. 374, 22 Atl. 641.

*Texas.*—*Ex parte Park*, 37 Tex. Crim. 590, 40 S. W. 300, 66 Am. St. Rep. 835.

*Vermont.*—*In re Consol. Render. Co.*, 80 Vt. 55, 66 Atl. 790.

*West Virginia.*—*State v. Hill*, 52 W. Va. 296, 43 S. E. 160.

*Wisconsin.*—*Kirschner v. State*, 9 Wis. 140.

*Wyoming.*—*Miskimmins v. Shaver*, 80 Wyo. 392, 58 Pac. 411, 49 L. R. A. 831.

4. *In re Consolidated Rend. Co.*, 80 Vt. 55, 66 Atl. 791.

"The mere statement of the wit-

ness on oath that he believes that the answer to the question asked will tend to criminate him, will not suffice to protect him from answering, if from all the circumstances surrounding the case the court is satisfied that the answer will have no such effect as that claimed by the witness. It is for the court to decide whether the privilege is well and *bona fide* claimed or not, and therefore it must be able to see, from the surrounding circumstances, and the nature of the evidence sought to be elicited by the answer, whether reasonable ground exists for apprehending danger to the witness from his being compelled to answer." *Chesapeake Club v. State*, 63 Md. 446. See also for good statements of the law, *Reg. v. Boyes*, 1 Best & S. (Eng.) 311; *Ex parte Irvine*, 74 Fed. 954; *In re Moser*, (Mich.) 11 Detroit Leg. N. 593, 101 N. W. 588; *State v. Thaden*, 43 Minn. 253, 45 N. W. 447; *Miskimmins v. Shaver*, 8 Wyo. 392, 58 Pac. 411.

5. *Ex parte Park*, 37 Tex. Crim. 590, 40 S. W. 300, 66 Am. St. Rep. 835.

If the question does not appear to be incriminating witness must make it plain that it is. *In re Rogers*, 129 Cal. 468, 62 Pac. 47.

6. *England.*—*Fisher v. Ronalds*, 12 C. B. 762, 74 E. C. L. 762; *Scott v. Miller*, 5 Jur. (N. S.) 858; *Adams v. Lloyd*, 3 H. & N. 351, 27 L. J., Ex. 499, 4 Jur. (N. S.) 590.

*United States.*—*In re Rosser*, 96 Fed. 305.

*Arkansas.*—*Ex parte* Butt, 78 Ark. 262, 93 S. W. 992.

*Michigan.*—*In re Mark*, 146 Mich. 714, 110 N. W. 61.

*Ohio.*—*Warner v. Lucas*, 10 Ohio 337.

*South Carolina.*—*State v. Edwards*, 2 Nott & McC. 13.

parent that he is not acting in good faith.<sup>7</sup> And when it is evident to the court that the matter called for cannot have any incriminating tendency the witness should be compelled to answer.<sup>8</sup> Where it is doubtful whether facts sought for would show or tend to show a crime the doubt should be resolved in favor of the witness and the claim allowed.<sup>9</sup>

Where Discovery of Privileged Matters is sought, the claim may be made by either demurrer, plea or answer.<sup>10</sup>

(B.) REBUTTAL OF CLAIM. — When a witness claims the privilege, the party desiring his testimony may show, by other testimony, that the facts are such that the answer would not incriminate the witness; and upon such a showing he may be compelled to answer.<sup>11</sup>

(C.) RULINGS AS ERROR ON APPEAL. — As another result of the personal character of the privilege it is generally held that a ruling

7. *Chappell v. Chappell*, 116 App. Div. 573, 101 N. Y. Supp. 846.

8. *United States*. — *United State v. McCarthy*, 18 Fed. 87, 21 Blatchf. 469; *United States v. Miller*, 2 Cranch C. C. 247, 26 Fed. Cas. No. 15,772.

*Arkansas*. — *Furth v. State*, 72 Ark. 161, 78 S. W. 759.

*California*. — *Bradley v. Clarke*, 133 Cal. 196, 65 Pac. 395 ("no conceivable answer which the witness might properly give would or could tend to criminate him or degrade his character").

*Iowa*. — *Mahanke v. Cleland*, 76 Iowa 401, 41 N. W. 53; *Richman v. State*, 2 Greene 532.

*Michigan*. — *In re Moser*, 138 Mich. 302, 101 N. W. 588 (witness refused to produce books of corporation, although he claimed that there was nothing incriminating in them).

*Missouri*. — *Ex parte Gfeller*, 178 Mo. 248, 77 S. W. 552.

*New York*. — *Forbes v. Willard*, 37 How. Pr. 193.

*Rhode Island*. — *Rosendale v. McNulty*, 23 R. I. 465, 50 Atl. 850.

See also *Territory v. Nugent*, 1 Mart. O. S. (La.) 108. But see *State v. Edwards*, 2 Nott & McC. (S. C.) 13, 10 Am. Dec. 557.

9. *D'Ivry v. World Newspaper Co.*, 17 Ont. Pr. 387 (in which a newspaper corporation was allowed to claim privilege against producing its files containing libelous publications, although there was some

doubt whether a corporation could be guilty of criminal libel). See also *Wilson v. Ohio Farmers' Ins. Co.*, 164 Ind. 462, 73 N. E. 892; *Temple v. Com.*, 75 Va. 892; *Ex parte Boscowitz*, 84 Ala. 463, 4 So. 279, 5 Am. St. Rep. 384; *Word v. Sykes*, 61 Miss. 649.

10. *Marshall v. Riley*, 7 Ga. 367; *Higdon v. Heard*, 14 Ga. 255; *Lee v. Read*, 5 Beav. 381, 49 Eng. Reprint 625. See also *United States v. National Lead Co.*, 75 Fed. 94.

*By Demurrer*. — *Paxton v. Douglas*, 19 Ves. Jr. 225, 34 Eng. Reprint 502; *Chauncey v. Tahourden*, 2 Atk. 392, 26 Eng. Reprint 637.

*Massachusetts*. — *Adams v. Porter*, 1 Cush. 173.

*New Hampshire*. — *Noyes v. Thorpe*, 73 N. H. 481, 62 Atl. 787.

*New Jersey*. — *Black v. Black*, 26 N. J. Eq. 431.

*New York*. — *March v. Davison*, 9 Paige 580; *Robinson v. Smith*, 3 Paige 222.

*Virginia*. — *Northwestern Bank v. Nelson*, 1 Gratt. 110.

*By Plea*. — *Hatfield v. Hatfield*, 5 Bro. P. C. (Eng.) 100; *Claridge v. Hoare*, 14 Ves. Jr. 59, 33 Eng. Reprint 443; *Duncalf v. Blake*, 1 Atk. 52, 26 Eng. Reprint 35; *Weaver v. Meath*, 2 Ves. Sr. 108, 28 Eng. Reprint 71; *Brownsword v. Edwards*, 2 Ves. Sr. 243, 28 Eng. Reprint 157; *United States v. McRae*, 37 L. J. Ch. 129, L. R. 3 Ch. 79, 17 L. T. 428.

11. *Ford v. State*, 29 Ind. 541,



compelling its violation cannot be urged on appeal as error,<sup>12</sup> the proper practice apparently being for the witness to put himself in contempt by refusing to answer and to test the matter by habeas corpus proceedings.<sup>13</sup> In some jurisdictions, however, compelling a witness to violate his privilege is an error of which a party may avail himself,<sup>14</sup> especially where the witness is also a party<sup>15</sup> as in the case of a defendant in a criminal prosecution.<sup>16</sup> It is reversible error, however, for the court to refuse to allow an incriminating question to be put to a witness when he makes no claim of privilege,<sup>17</sup> or to sustain such a claim where the facts do not justify it.<sup>18</sup>

(4.) **Waiver of Privilege.**—(A.) IN GENERAL.—A witness may waive his privilege and answer questions which the law would not otherwise compel him to answer. Ordinarily the privilege is

95 Am. Dec. 658; *Stevens v. State*, 50 Kan. 712, 32 Pac. 350 (*dictum*).

When a witness claims privilege, counsel, if he knows the facts, should ask the court to instruct the witness as to the law, showing that the facts do not amount to a crime. *Fellows v. Wilson*, 31 Barb. (N. Y.) 162.

12. *England.*—*Reg. v. Kinglake*, 11 Cox C. C. 499; *Marston v. Downes*, 1 Ad. & El. 31, 28 E. C. L. 24.

*United States.*—*Morgan v. Halberstadt*, 60 Fed. 592, 9 C. C. A. 147, 20 U. S. App. 417; *Taylor v. United States*, 152 Fed. 1, 81 C. C. A. 197, *affirmed*, *United States v. Macdonald*, 207 U. S. 120.

*Alabama.*—*Ham v. State*, 47 So. 126; *Beauvoir Club v. State*, 148 Ala. 643, 42 So. 1040.

*Illinois.*—*Samuel v. People*, 164 Ill. 379, 45 N. E. 728.

*Iowa.*—*State v. Winkle*, 80 Iowa 15, 45 N. W. 388; *State v. Copley*, 128 Iowa 114, 103 N. W. 99.

*Missouri.*—*State v. Douglass*, 1 Mo. 527.

*New Hampshire.*—*State v. Foster*, 23 N. H. 348, 55 Am. Dec. 191.

*New York.*—*People v. Pease*, 27 N. Y. 45, 72 (*per Selden, J.*); *Cloyes v. Thayer*, 3 Hill 564.

*North Carolina.*—*State v. Morgan*, 133 N. C. 743, 45 S. E. 1033.

*Pennsylvania.*—*Ralph v. Brown*, 3 Watts & S. 395, 400; *Phelin v. Kenderline*, 20 Pa. St. 354.

*Texas.*—*Ingersol v. McWillie*, 87 Tex. 647, 30 S. W. 869.

*Compare Sorenson v. Sorenson*, 189 Ill. 179, 59 N. E. 555.

13. *Taylor v. United States*, 152 Fed. 1, judgment *affirmed* in *United States v. Macdonald*, 207 U. S. 120.

14. *Com. v. Kimball*, 24 Pick. (Mass.) 359, 35 Am. Dec. 326; *State v. Olin*, 23 Wis. 309. See also *Com. v. Shaw*, 4 Cush. (Mass.) 594, 50 Am. Dec. 813; *Phelps v. Frew*, 3 El. & Bl. 430, 18 Jur. 249, 2 C. L. R. 1422, 23 L. J., Q. B. 140.

15. Although discovery is made, over protest, of incriminating matters pursuant to the order of the court, it is error not to exclude the answers at the hearing. *Marshall v. Riley*, 7 Ga. 367.

16. *People v. Brown*, 72 N. Y. 571, 28 Am. Rep. 183.

17. *Sodusky v. McGee*, 5 J. J. Marsh. (Ky.) 621; *People v. Arnold*, 40 Mich. 710; *Fries v. Brugler*, 12 N. J. L. 79, 2 Am. Dec. 52.

As to whether the claim may be made by counsel and how it should be made, see *supra*, IX, 1, H, c.

18. *Rex v. Kinglake*, 11 Cox C. C. 500, 22 L. T. 355; *Clark v. Reese*, 35 Cal. 89; *Bradley v. Clark*, 133 Cal. 196, 65 Pac. 395; *Cloyes v. Thayer*, 3 Hill (N. Y.) 564; *Doe v. Date*, 3 Q. B. 609, 621, 6 Jur. 990; *Lathrope v. Roberts*, 16 Colo. 250, 27 Pac. 698. But see *Dickinson v. Talbot*, 14 B. Mon. (Ky.) 49. Before a party can claim that the ruling is erroneous, he must show such facts as would render

waived if it is not claimed,<sup>19</sup> or if a claim is not insisted upon after it is made;<sup>20</sup> though an accused does not waive his privilege by failing to claim it when called against his will by the prosecution.<sup>21</sup>

(B.) AGREEMENT TO WAIVE. — An agreement to waive the privilege in so far as it concerns matter tending to subject the witness to criminal prosecution is not binding and may therefore be repudiated when privileged matter is called for.<sup>22</sup> But as to liability to mere penalties or forfeitures it may be waived.<sup>23</sup>

(C.) WAIVER BY INSTITUTING JUDICIAL PROCEEDINGS. — Upon the question whether a person who voluntarily institutes judicial proceedings necessarily involving his own conduct can claim privilege against revealing the same the cases are not clear.<sup>24</sup>

it clear that an answer to the questions propounded would not incriminate or disgrace the witness. *People v. Priori*, 164 N. Y. 459, 58 N. E. 668.

19. *United States*. — U. S. v. Kimball, 117 Fed. 156.

*Alabama*. — *Southern R. Co. v. Bush*, 122 Ala. 470, 26 So. 168.

*Delaware*. — *Knopf v. Philadelphia, W. & B. R. Co.*, 2 Penne. 392, 46 Atl. 747 (witness, when informed of his privilege, said that he was not afraid to answer).

*Illinois*. — *Eggers v. Fox*, 177 Ill. 185, 52 N. E. 269.

*Indiana*. — *South Bend v. Hardy*, 98 Ind. 577, 49 Am. Rep. 792.

*Iowa*. — *Burk v. Putnam*, 113 Iowa 232, 84 N. W. 1053.

*Massachusetts*. — *Root v. Hamilton*, 105 Mass. 22.

*Michigan*. — *People v. Lauder*, 82 Mich. 109, 46 N. W. 956; *Johnson Harvester Co. v. Miller*, 72 Mich. 265, 40 N. W. 429, 16 Am. St. Rep. 536.

*Missouri*. — *State v. Faulkner*, 175 Mo. 546, 75 S. W. 116.

*Montana*. — *State v. Burrell*, 27 Mont. 282, 70 Pac. 982.

*New Jersey*. — *Fries v. Brugler*, 12 N. J. L. 79, 21 Am. Dec. 52; *Schenck v. Schenck*, 20 N. J. L. 208.

*New York*. — *People v. Hendrickson*, 9 How. Pr. 155; *Southard v. Rexford*, 6 Cow. 254; *People v. Cahill*, 126 App. Div. 391, 110 N. Y. Supp. 728 (except where he is the accused and is called by the prosecution), judgment affirmed in 193 N. Y. 232, 86 N. E. 39.

*Ohio*. — *Hanoff v. State*, 37 Ohio St. 178, 41 Am. Rep. 496; *Steuer v. McConnell*, 6 Ohio N. P. 205, 10 Ohio S. & C. P. Dec. 573.

*Virginia*. — *Litton v. Com.*, 101 Va. 833, 44 S. E. 923.

20. *Taylor v. United States*, 152 Fed. 1, 81 C. C. A. 197, judgment affirmed in *United States v. Macdonald*, 207 U. S. 120. See *supra*, IX, 1, H, c, (3.), (C.). *Contra*, *Marshall v. Riley*, 7 Ga. 367.

21. See *People v. Cahill*, 126 App. Div. 391, 110 N. Y. Supp. 728, judgment affirmed in 193 N. Y. 232, 86 N. E. 39; and *supra*, IX, 1, H, a, (11.).

22. *Lee v. Read*, 5 Beav. 381, 49 Eng. Reprint 625. See *Higdon v. Heard*, 14 Ga. 255. But see *O'Connor v. Tack*, 2 Brewst. (Pa.) 407.

23. *South-Sea Co. v. Bumsted*, 1 Eq. Cas. Abr. 77, 78, 21 Eng. Reprint 890, 899; *East India Co. v. Atkyns*, 1 Comb. 346, 1 Str. 168, 1 Comyns 347; *African Co. v. Parish*, 2 Vern. 244, 23 Eng. Reprint 758; *French v. Macale*, 2 Dr. & W. 269, 1 Con. & L. 459, 4 Ir. Eq. Rep. 568. See *Green v. Weaver*, 1 Sim. 404, 57 Eng. Reprint 630.

24. **By Filing a Voluntary Petition in Bankruptcy** the petitioner waives his privilege against producing his books. *In re Sapiro*, 92 Fed. 340. But it is not a waiver as to his oral testimony tending to show conduct constituting a crime under the bankruptcy act, although it may be taken as an admission of the truth of such charge and justify a denial of discharge. *United States v. Goldstein*, 132 Fed. 789.

(D.) **WAIVER BY TESTIFYING.**—(a.) *Generally.*—Where an ordinary witness voluntarily testifies to facts tending to incriminate himself he thereby waives his privilege and he cannot lawfully refuse to make a full disclosure of all other relevant facts forming part of the same transaction.<sup>25</sup> But if he has not yet given any incriminating evidence he may claim his privilege at any point in his testimony,<sup>26</sup> though it has been held that a witness may be cross-examined fully as to facts testified to by him even though a full

**The Filing of an Action for Libel,** it seems, is a waiver by the plaintiff of his privilege against discovery as to the truth of the alleged defamatory statement. *Macaulay v. Shackell*, (1827) 1 Bligh N. S. P. C. 96, 121, 133, 4 Eng. Reprint 809.

**25. England.**—*Ewing v. Osbaldiston*, 6 Sim. 608, 58 Eng. Reprint 721; *Dixon v. Vale*, 1 Car. & P. 278, 11 E. C. L. 391; *Dandridge v. Corden*, 3 Car. & P. 11, 14 E. C. L. 185; *Dolder v. Huntingfield*, 11 Ves. Jr. 283, 32 Eng. Reprint 1097.

**United States.**—*Brown v. Walker*, 161 U. S. 591.

**California.**—*Clark v. Reese*, 35 Cal. 89; *People v. Freshour*, 55 Cal. 375.

**Florida.**—*Ex parte Senior*, 37 Fla. 1, 19 So. 652.

**Iowa.**—*State v. Fay*, 43 Iowa 651 (witness testified to admission; *held*, he may be compelled to tell who were present).

**Kentucky.**—*Ginn v. Com.*, 5 Litt. 300.

**Maine.**—*Low v. Mitchell*, 18 Me. 372.

**Massachusetts.**—*Brown v. Brown*, 5 Mass. 320; *Evans v. O'Connor*, 174 Mass. 287, 54 N. E. 557; *Foster v. Pierce*, 11 Cush. 437; *Com. v. Pierce*, 10 Gray 472.

**Michigan.**—*Foster v. People*, 18 Mich. 266 (accomplice admitted guilt on the stand, and then refused to answer question as to what defense he had previously sworn that he had; *held*, he should be compelled to answer).

**Minnesota.**—*State v. Nichols*, 29 Minn. 357, 13 N. W. 153 (witness stated that he knew that complainant had had sexual intercourse with another than defendant; *held*, he may be required to state who the other was, although it was himself).

**Nevada.**—*Ex parte Hedden*, 29 Nev. 352, 90 Pac. 737.

**New York.**—*People v. Lohman*, 2 Barb. 216; *Youngs v. Youngs*, 5 Redf. 505.

**Ohio.**—*Este v. Wilshire*, 44 Ohio St. 636, 10 N. E. 677.

**Texas.**—*Ex parte Andrews*, 51 Tex. Crim. 79, 100 S. W. 376; *Ex parte Park*, 37 Tex. Crim. 590, 40 S. W. 300, 66 Am. St. Rep. 835. See *Lockett v. State*, 63 Ala. 5; *Williams v. State*, 98 Ala. 52, 13 So. 333; *Smith v. State*, 79 Ala. 21; *Com. v. Trider*, 143 Mass. 180, 9 N. E. 510. *Contra*, *Rex v. Wilcox*, 1 Sim. (N. S.) 301, 61 Eng. Reprint 116; *Fisher v. Ronalds*, 16 Eng. L. & Eq. 418; *Chesapeake Club v. State*, 63 Md. 446.

When a party testifies that he did not write certain names, he may be compelled to write the same names on a piece of paper in the presence of the jury. *United States v. Mullaney*, 32 Fed. 370. See also *Bradford v. People*, 22 Colo. 157, 43 Pac. 1013.

**Effect of Refusal To Answer.**—If he refuses to answer it is proper to allow the prosecuting officer to comment upon the refusal in his argument and to instruct the jury that they may consider such declination and give it such weight as they think it entitled to on the question of guilt or innocence. *State v. Ober*, 52 N. H. 459.

This rule applies only to the testimony of the witness in the same proceeding. *Samuel v. People*, 164 Ill. 379, 45 N. E. 728. See *infra*, IX, 1, H, c, (4.), (E.).

**26.** *Wallace v. State*, 41 Fla. 547, 26 So. 713; *Foster v. People*, 18 Mich. 268; *Amherst v. Hollis*, 9 N. H. 107. See *Slocum v. Knosby*, 70 Iowa 75, 30 N. W. 18.

disclosure would compel him to incriminate himself.<sup>27</sup> But the fact that a witness has testified as to one criminal act does not waive his privilege against disclosing other independent criminal acts.<sup>28</sup> Where a witness has already voluntarily disclosed by his previous testimony his unlawful act and his further testimony can neither add to nor detract from the force of the evidence already given, he cannot claim privilege.<sup>29</sup> But it has been held that where the further answers of the witness are not necessary to a complete understanding of his previous statements he may claim his privilege.<sup>30</sup>

(b.) *Accomplice*. — An accomplice who consents to testify for the state, that the defendant committed the act for which he is indicted, cannot shield himself from answering any relevant question concerning it, upon cross-examination, under the rule that he shall not be required to criminate himself.<sup>31</sup>

(c.) *Accused*. — As to what extent the voluntary testimony of the accused constitutes a waiver of his privilege the cases are not in harmony, some holding that in such case he may be examined fully as to any relevant matter, others that the cross-examination must be confined to the same limits as in the case of any other witness, and still others that the accused may be cross-examined only about matters concerning which he testified on direct examination.<sup>32</sup>

(E.) EFFECT OF WAIVER IN FORMER PROCEEDING. — The fact that a witness has waived his privilege in one proceeding does not prevent his claiming it in a subsequent proceeding.<sup>33</sup>

27. *State v. K.*, 4 N. H. 526; *Ex parte Park*, 37 Tex. Crim. 590, 40 S. W. 300, 66 Am. St. Rep. 835. But see *State v. Bond*, 12 Idaho 424, 86 Pac. 43, distinguishing the case of such witness from that of an accused who voluntarily takes the stand.

28. *Low v. Mitchell*, 18 Me. 372; *Evans v. O'Connor*, 174 Mass. 287, 54 N. E. 557; *Lombard v. Mayberry*, 24 Neb. 674, 40 N. E. 271, 8 Am. St. Rep. 234; *People v. Loomis*, 76 App. Div. 243, 78 N. Y. Supp. 578. See also *Baehner v. State*, 25 Ind. App. 597, 58 N. E. 741; *Howard v. Com.*, 22 Ky. L. Rep. 1845, 61 S. W. 756; *Saylor v. Com.*, 97 Ky. 184, 36 S. W. 390; *Pitcher v. People*, 16 Mich. 142; *Clapp v. State*, 94 Tenn. 186, 30 S. W. 214; *State v. Shockley*, 29 Utah 25, 80 Pac. 865. But see *Com. v. Pratt*, 126 Mass. 462.

29. *Eggers v. Fox*, 177 Ill. 185, 52 N. E. 269.

30. *Cullinan v. Quinn*, 95 App. Div. 492, 88 N. Y. Supp. 963; *Lombard v. Mayberry*, 24 Neb. 674, 40 N. W. 271, 8 Am. St. Rep. 234; *Amherst v. Hollis*, 9 N. H. 110.

31. *Lockett v. State*, 63 Ala. 5, *per Manning, J.* See also *Com. v. Price*, 10 Gray (Mass.) 472, 71 Am. Dec. 668; *Pitcher v. People*, 16 Mich. 142; *Jones v. State*, 65 Miss. 179, 3 So. 379; *State v. Condry*, 5 N. C. (1 Murph.) 420. But see *State v. Bond*, 12 Idaho 424, 86 Pac. 43.

**Reasons.** — "It is a rule of law that no witness shall be required to answer any question that may tend to criminate himself, yet the accomplice, when he enters the witness box with a view of escaping punishment himself, by a betrayal of his co-workers in crime, yields up and leaves that privilege behind him. He contracts to make a full statement, to keep back nothing, although in doing so he may but confirm his own guilt and infamy." *Alderman v. People*, 4 Mich. 414.

32. See fully articles "CROSS-EXAMINATION," Vol. III; "IMPEACHMENT OF WITNESSES," Vol. VII.

33. *Lumpkin, J.*, in *Georgia R. & R. Co. v. Lybrend*, 99 Ga. 421, 27 S. E. 794, said: "He may, on one occasion, have had reasons for

(F.) PROSECUTION FOR PERJURY. — When a witness waives his privilege he must answer the questions truthfully, and may be prosecuted for perjury if he does not.<sup>34</sup>

d. *Inference from Claim of Privilege.* — (1.) *Generally.* — Where a witness claims his privilege no inference should be drawn therefrom unfavorable to a party to either a civil action<sup>35</sup> or criminal prosecution.<sup>36</sup> Nor should such claim be permitted to affect the weight to be given to the witness' testimony.<sup>37</sup> The latter rule,

speaking<sup>38</sup> out which were entirely satisfactory to himself; and on the next, he may have been influenced to keep silent by other reasons which were, in his opinion, equally cogent. These were matters for himself alone to determine. The privilege is in the highest degree personal, and is a sacred one which the courts should jealously guard." See also *Overend v. Superior Court*, 131 Cal. 280, 63 Pac. 372 (waiver at preliminary examination); *State v. Burrell*, 27 Mont. 282, 70 Pac. 982 (waiver by testifying at insolvency hearing); *Cullen v. Com.*, 24 Gratt. (Va.) 624 (testimony before coroner); *Emery v. State*, 101 Wis. 627, 78 N. W. 145.

The fact that the witness testified at an *ex parte* hearing to facts resulting in the arrest of another for perjury is not a waiver of his privilege against self-incrimination when called as a witness at the preliminary examination. *In re Mark*, 146 Mich. 714, 110 N. W. 61.

**Waiver Before Grand Jury** not a waiver at trial. *Temple v. Com.*, 75 Va. 892. *Contra*, *State v. Van Winkle*, 80 Iowa 15, 45 N. W. 388. *Compare* *People v. Sebring*, 14 Misc. 31, 35 N. Y. Supp. 237 (defendant voluntarily surrendered note to be used by grand jury; *held*, he waived right not to have it produced in court).

The fact that a witness has previously made an affidavit, indorsed on the back of the information filed by the district attorney, stating that the matters and things set out in the information are true, does not constitute a waiver at the trial. *Samuel v. People*, 164 Ill. 379, 45 N. E. 728; *United States v. Goldstein*, 132 Fed. 789.

The mere statement by a witness

to the grand jury that an answer would not incriminate him is not a waiver; and therefore he should be allowed to claim his privilege when brought before the court to show cause why he should not be punished for contempt in refusing to answer the question before the grand jury. *Ex parte Wilson*, 39 Tex. Crim. 630, 47 S. W. 996.

34. *United States v. Bell*, 81 Fed. 830. See also *Cullen v. Com.*, 24 Gratt. (Va.) 624; *Mackin v. People*, 115 Ill. 312, 3 N. E. 222.

If the waiver is not made understandingly and willingly there can be no prosecution for perjury. *United States v. Bell*, 81 Fed. 830.

35. *Friess v. New York Cent. & H. R. Co.*, 67 Hun 205, 22 N. Y. Supp. 104; *Phelin v. Kenderline*, 20 Pa. St. 354; *Andrews v. Frye*, 104 Mass. 234.

36. *Beach v. United States*, 46 Fed. 754; *People v. Brewer*, 27 Mich. 134; *Harrison v. Powers*, 76 Ga. 218; *Carne v. Litchfield*, 2 Mich. 340.

It is improper to allow the prosecuting officer to argue that the real object of the refusal was to benefit the accused. *Beach v. United States*, 46 Fed. 754.

37. *England.* — *Rose v. Blake-more, Ry. & M.* 382, 21 E. C. L. 465; *Rex v. Watson*, 2 Stark. 116; *Lloyd v. Passingham*, 16 Ves. 59, 33 Eng. Reprint 906.

*Michigan.* — *Carne v. Litchfield*, 2 Mich. 340; *Foster v. People*, 18 Mich. 266; *People v. Naunsaus*, 60 Mich. 15, 26 N. W. 797.

*Mississippi.* — *Newcomb v. State*, 37 Miss. 383.

*New York.* — *Friess v. New York Cent. & H. R. Co.*, 67 Hun 205, 22 N. Y. Supp. 104.

See *Carter v. Beals*, 44 N. H. 408;

however, has no application where the witness was not legally entitled to the privilege,<sup>38</sup> nor where the testimony sought would merely tend to disgrace the witness,<sup>39</sup> nor does it apply to the case of a party who voluntarily testifies in his own behalf,<sup>40</sup> or refuses to answer interrogatories filed by his adversary.<sup>41</sup> A witness' claim of privilege cannot be proved against him in his subsequent trial for the offense.<sup>42</sup>

(2.) **Against Accused.** — It is the almost universal rule, usually by statute, that the exercise by the accused of his privilege against giving evidence against himself shall not create any inference against him,<sup>43</sup> though it has been held that in the absence of a statutory provision the jury may draw the natural inference arising

*Ex parte Symes*, 11 Ves. Jr. 521, 32 Eng. Reprint 1191.

38. *People v. Gallagher*, 75 Mich. 512, 42 N. W. 1063 (where the claim was not made till cross-examination as to matter gone into on direct examination, and until suggested by counsel).

39. *State v. Garrett*, 44 N. C. (Busb. L.) 357 (even conceding that witness might lawfully refuse to answer such a question).

40. *In re DeCottardi*, 114 Fed. 328; *Andrews v. Frye*, 104 Mass. 234; *Morgan v. Kendall*, 124 Ind. 454, 24 N. E. 143, 9 L. R. A. 445. See also *Lloyd v. Passingham*, 16 Ves. Jr. 59, 33 Eng. Reprint 906.

A Petitioner in Voluntary Bankruptcy proceedings can refuse to testify to incriminating matters, but such refusal may be regarded as an admission and justify refusal of discharge. *United States v. Goldstein*, 132 Fed. 789. Compare *supra*, IX, 1, H, a, (10.), (E.).

41. **Comment on Refusal To Answer Interrogatories.** — The failure or refusal of defendant to answer interrogatories filed by plaintiff may be commented on by the latter in argument. *Morris v. McClellan*, 154 Ala. 639, 45 So. 641.

42. *State v. Bailey*, 54 Iowa 414, 6 N. W. 589.

43. *United States v. Snyder*, 14 Fed. 554; *Wilson v. United States*, 149 U. S. 60; *United States v. Pendergast*, 32 Fed. 198.

*Alabama.* — *Baker v. State*, 122 Ala. 1, 26 So. 194.

*California.* — *People v. Brown*, 53 Cal. 66; *People v. Tyler*, 36 Cal. 522.

*Florida.* — *Gray v. State*, 42 Fla. 174, 28 So. 53.

*Illinois.* — *Jackson v. People*, 18 Ill. App. 508; *Austin v. People*, 102 Ill. 261; *Gilmore v. People*, 87 Ill. App. 128.

*Indiana.* — *Long v. State*, 56 Ind. 182, 26 Am. Rep. 19; *Showalter v. State*, 84 Ind. 562.

*Iowa.* — *State v. Graham*, 62 Iowa 108, 17 N. W. 192; *State v. Baldoser*, 88 Iowa 55, 55 N. W. 97; *State v. Trauger*, 77 N. W. 336; *State v. Snider*, 119 Iowa 15, 91 N. W. 762.

*Kansas.* — *State v. Balch*, 31 Kan. 465, 2 Pac. 609; *State v. Tennon*, 42 Kan. 330, 22 Pac. 429; *Topeka v. Myers*, 34 Kan. 500, 8 Pac. 726; *State v. Deves*, 9 Kan. App. 886, 61 Pac. 511; *State v. Shelton*, 6 Kan. App. 662, 49 Pac. 702; *State v. Boyd*, 5 Kan. App. 802, 48 Pac. 998.

*Kentucky.* — *Parrott v. Com.*, 20 Ky. L. Rep. 761, 47 S. W. 452.

*Maine.* — *State v. Banks*, 78 Me. 490, 7 Atl. 269. But see *State v. Bartlett*, 55 Me. 200.

*Massachusetts.* — *Com. v. Scott*, 123 Mass. 239, 25 Am. Rep. 87; *Com. v. Harlow*, 110 Mass. 411; *Com. v. Nichols*, 114 Mass. 285; *Com. v. Hanley*, 140 Mass. 457, 5 N. E. 468.

*Minnesota.* — *State v. Holmes*, 65 Minn. 230, 68 N. W. 11.

*Mississippi.* — *Eubanks v. State*, 7 So. 462; *Yarbrough v. State*, 70 Miss. 593, 12 So. 551.

*Missouri.* — *State v. Martin*, 74 Mo. 547; *State v. Graves*, 95 Mo. 510, 8 S. W. 739; *State v. Moxley*, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556; *State v. Weaver*, 165 Mo. 1, 65 S. W.

from such conduct.<sup>44</sup> But a statutory provision that no reference shall be made to the failure of the accused to testify does not prevent the court from instructing the jury that such is the law.<sup>45</sup>

e. *Violation of Privilege.* — (1.) *Evidence Obtained By.* — Evidence which has been obtained from a witness by violating his privilege cannot subsequently be used against him in a criminal prosecution.<sup>46</sup>

(2.) *Indictment Obtained By.* — Where an accused has been compelled to appear before the grand jury and testify in violation of his privilege the resulting indictment will be quashed on motion.<sup>47</sup> But the mere fact that the accused was called before the grand jury and testified voluntarily does not entitle him to have the indictment quashed,<sup>48</sup> especially if he gave no incriminating testimony<sup>49</sup> or if there was other sufficient evidence on which to base the indictment.<sup>50</sup>

f. *Effect of Immunity From Punishment.* — (1.) *Generally.* If for any reason the witness be immune from punishment for the

308, 88 Am. St. Rep. 406; *State v. Brownfield*, 15 Mo. App. 593.

*New Hampshire.* — *State v. Ober*, 52 N. H. 459.

*New York.* — *People v. Doyle*, 58 Hun 535, 12 N. Y. Supp. 836.

*Tennessee.* — *Staples v. State*, 89 Tenn. 231, 14 S. W. 603.

*Texas.* — *Hunt v. State*, 28 Tex. App. 149, 12 S. W. 737, 19 Am. St. Rep. 815; *McPherson v. State* (Tex. App.), 15 S. W. 174; *Johnson v. State*, 31 Tex. Crim. 464, 20 S. W. 980; *Brazell v. State*, 33 Tex. Crim. 333, 26 S. W. 723; *Dawson v. State* (Tex. Crim.), 24 S. W. 414; *Jordan v. State*, 29 Tex. App. 595, 16 S. W. 543; *Reed v. State*, 29 Tex. App. 449, 16 S. W. 99.

*Vermont.* — *State v. Cameron*, 40 Vt. 555.

*Virginia.* — *Price v. Com.* 77 Va. 393.

The prosecuting attorney cannot comment upon the fact that the accused failed to testify at a former trial. *Richardson v. State*, 33 Tex. Crim. 518, 27 S. W. 139.

The fact that defendant has not testified cannot be considered by the court in determining whether the evidence is sufficient. *People v. Page*, 116 Cal. 386, 48 Pac. 326.

See "ENCYC. OF EV." Vol. V, p. 971.

44. *Parker v. State*, 61 N. J. L. 308, 39 Atl. 651, affirmed in 62 N. J. L. 801, 45 Atl. 1092.

45. *Tate v. State*, 76 Ohio St. 537, 81 N. E. 973.

46. *Horstman v. Kaufman*, 97 Pa. St. 147, 39 Am. Rep. 802; *Reg. v. Garbett*, 2 C. & K. 474, 61 E. C. L. 474.

*Compare supra*, IX, 1, H, a, (1.), (B.), (b.); IX, 1, H, a, (11.), (D.), (a.).

Answers extorted over protest in discovery proceedings should be excluded at the hearing, nor can their contents be proven by others. *Marshall v. Riley*, 7 Ga. 367.

47. *State v. Gardner*, 88 Minn. 130, 92 N. W. 529; *State v. Froisith*, 16 Minn. 296; *Boone v. People*, 148 Ill. 440, 36 N. E. 99. See *State v. Donelon*, 45 La. Ann. 744, 12 So. 922. But see *People v. Lauder*, 82 Mich. 109, 46 N. W. 956. *Compare* *Sandwich v. State*, 137 Ala. 85, 34 So. 620.

48. *State v. Donelon*, 45 La. Ann. 744, 12 So. 922 (after caution); *People v. Lauder*, 82 Mich. 109, 46 N. W. 956; *People v. King*, 28 Cal. 265; *United States v. Brown*, 1 Sawy. 531, 24 Fed. Cas. No. 14,671; *Lindsey v. State*, 69 Ohio St. 215, 69 N. E. 126; *State v. Duncan*, 78 Vt. 364, 63 Atl. 225, 4 L. R. A. (N. S.) 1144. See *United States v. Kimball*, 117 Fed. 156. *Contra*, *State v. Gardner*, 88 Minn. 130, 92 N. W. 529.

49. *State v. Firmatura*, 121 La. 676, 46 So. 691.

50. See *People v. Lauder*, 82 Mich. 109, 46 N. W. 956; *Lindsey v. State*, 69 Ohio St. 215, 69 N. E. 126. *Compare* *Hammond Lumb. Co. v. Sailors' Union*, 149 Fed. 577.

illegal act which his testimony may disclose his privilege ceases.<sup>51</sup>

(2.) **Acquittal or Pardon.** — When the witness has been acquitted of<sup>52</sup> or pardoned for<sup>53</sup> the only crime for which he could be prosecuted as a result of his testimony, there is no further privilege upon this ground.

(3.) **Statute of Limitations.** — If the prosecution of the charge is barred by the statute of limitations, the reason of the privilege ceases, and the witness should be compelled to answer unless some other ground of privilege exists.<sup>54</sup> It must affirmatively appear not

51. "If the act of which inquiry is made do not constitute a crime, or if made a crime, it have no punishment prescribed for its violation, or be no longer punishable, or if the act be barred by the statute of limitations, with no action pending, or the law have been repealed, or if the witness have been tried for the offense and acquitted, or convicted and satisfied the sentence imposed by the law, he can claim no exemption from answering questions relating thereto." *State v. Jack*, 69 Kan. 387, 76 Pac. 911, 1 L. R. A. (N. S.) 167, affirmed in 199 U. S. 372. See also *Ex parte Cohen*, 104 Cal. 524, 38 Pac. 364, 43 Am. St. Rep. 127, 26 L. R. A. 423; *Brown v. Walker*, 161 U. S. 591.

52. *Lothrop v. Roberts*, 16 Colo. 250, 27 Pac. 698.

53. *Reg. v. Boyles*, 1 B. & S. 327, 101 E. C. L. 321; *Reg. v. Kinglake*, 11 Cox. C. C. (Eng.) 499; *Brown v. Walker*, 161 U. S. 591. See *People v. Cahill*, 126 App. Div. 391, 110 N. Y. Supp. 728; *State v. Bowman*, 145 N. C. 452, 59 S. E. 74. But see *Moloney v. Dows*, 2 Hilt. (N. Y.) 247.

54. *England.* — *Roberts v. Allatt*, M. & M. 192, 22 E. C. L. 288; *Davis v. Reid*, 5 Sim. 443, 58 Eng. Reprint 403; *Williams v. Farrington*, 3 Bro. C. C. 38, 2 Cox 202; *Parkhurst v. Lowten*, 1 Meriv. 391, 35 Eng. Reprint 718.

*United States.* — *Brown v. Walker*, 161 U. S. 591.

*Alabama.* — *Ex parte Boscowitz*, 84 Ala. 463, 4 So. 279, 5 Am. St. Rep. 384; *Calhoun v. Thompson*, 56 Ala. 166, 28 Am. Rep. 754.

*Illinois.* — *Weldon v. Burch*, 12 Ill. 374.

*Iowa.* — *Mahanke v. Cleland*, 76 Iowa 401, 41 N. W. 53.

*Maine.* — *Dwinae v. Smith*, 25 Me. 379.

*Nevada.* — *Ex parte Hedden*, 29 Nev. 352, 90 Pac. 737.

*New Hampshire.* — *Manchester & L. R. R. v. Concord R. R.*, 65 N. H. 100, 20 Atl. 383, 49 Am. St. Rep. 582, 9 L. R. A. 689.

*New York.* — *Wolfe v. Goulard*, 15 Abb. Pr. 336; *McCreery v. Ghormley*, 9 App. Div. 221, 41 N. Y. Supp. 167; *Close v. Olney*, 1 Denio 319.

*Tennessee.* — *In re Druggist Cases*, 85 Tenn. 449, 3 S. W. 490.

*Texas.* — *Floyd v. State*, 7 Tex. 215.

*Vermont.* — *Childs v. Merrill*, 66 Vt. 302, 29 Atl. 532.

See, however, *M'Fadden v. Reynolds (Pa.)*, 11 Atl. 638, where the court said: "We are not prepared to hold that, where a witness is asked upon the stand to say whether he has committed a crime, he shall be compelled to do so simply because he may, if a prosecution for that crime is subsequently instituted against him, plead the statute of limitations in defense. It seems to us he is protected against criminating himself in such a manner as to subject himself even to a prosecution. Were he compelled to answer the question as a witness, his answer would be sufficient, when testified to by others who heard it, to lay before a magistrate, who could commit him to prison to answer the charge, in default of bail. It would be also sufficient to place before a grand jury, who could find an indictment against him upon mere proof of his extorted answer. He could thereupon be compelled to appear in a criminal court to answer the charge,



only that the time for prosecuting has elapsed but that no prosecution has been commenced within the period of limitation, or if commenced, that it has been discontinued.<sup>55</sup> But where the bar of the statute comes into operation at any time before the final determination of the privilege the witness will be compelled to answer.<sup>56</sup>

(4.) **Waiver of Penalty.**—Where all the persons entitled to the penalty waive the same the privilege cannot be claimed.<sup>57</sup>

(5.) **Statutory Immunity.**—(A.) **GENERALLY.**—When a statute grants absolute immunity from prosecution for crime disclosed by witnesses, the privilege ceases, and answers may be compelled by the court.<sup>58</sup> This is subject to the limitation in some jurisdictions

and would be obliged to employ counsel to defend him. He would necessarily undergo all the expense and trouble, besides suffering the shame, perhaps the ignominy, of defending himself against a criminal accusation made by his own mouth against himself, because he was coerced to do so by the peremptory order of a court clothed with power to commit him indefinitely to prison for contempt in case of disobedience. At least, he would be obliged to plead the statute of limitations, and, if the crime were infamous, an acquittal on such a plea would be scarcely better than a conviction."

A similar argument was answered by Mr. Justice Brown in *Brown v. Walker*, 161 U. S. 591, in regard to the necessity of pleading the immunity as follows: "This is a detriment which the law does not recognize. There is a possibility that any citizen, however innocent, may be subjected to a civil or criminal prosecution, and put to the expense of defending himself; but unless such prosecution be malicious, he is remediless, except so far as a recovery of costs may partially indemnify him."

In *United States v. Smith*, 4 Day 121, 27 Fed. Cas. No. 16,332 a question arose as to whether the offense was barred by the statute, the contention being that it was not because the party had been out of the jurisdiction. The witness was called in a criminal case. The court held that the offense was *prima facie* barred and that the witness should be compelled to answer; but that the district attorney "will not be allowed

to say now that the prosecution is barred, and thus obtain his testimony, and afterward bring forward a prosecution, and say that it is not barred."

The court may permit the witness to be examined for the purpose of ascertaining whether the offense is barred. *Close v. Olney*, 1 Denio (N. Y.) 319.

**Discovery** of incriminating matters may be compelled under such circumstances. *Skinner v. Judson*, 8 Conn. 528, 533; *Williams v. Farrington*, 3 Bro. C. C. 38, 2 Cox 202; *Parkhurst v. Lowten*, 1 Meriv. 391, 35 Eng. Reprint 718; *Talbot v. Smith*, 1 Ridgw. L. & S. 360; *Anonymous*, 1 Vern. 23 Eng. Reprint 310; *Trinity House Corp. v. Burge*, 2 Sim. 411, 7 L. J. Ch. 44, 57 Eng. Reprint 842.

<sup>55.</sup> *Lamson v. Boyden*, 160 Ill. 613, 43 N. E. 781; *Salina Bank v. Henry*, 2 Denio (N. Y.) 156, 3 Denio 593; *Southern R. News Co. v. Russell*, 91 Ga. 808, 18 S. E. 40.

<sup>56.</sup> *Trinity House Corp. v. Burge*, 2 Sim. 411, 7 L. J. Ch. 44; *Williamson v. Farrington*, 3 Bro. C. C. 38, 2 Cox. 202.

<sup>57.</sup> *Skinner v. Judson*, 8 Conn. 528, 21 Am. Dec. 691; *Atwill v. Ferrer*, 2 Blatchf. 39, 2 Fed. Cas. No. 640; *Finch v. Rikeman*, 2 Blatchf. 301, 9 Fed. Cas. No. 4,788; *Uxbridge v. Staveland*, 1 Ves. Sr. 56, 27 Eng. Reprint 888; *Boteler v. Allington*, 3 Atk. 453, 26 Eng. Reprint 1061.

<sup>58.</sup> *United States.*—*Brown v. Walker*, 161 U. S. 591 ("no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testi-

that the witness may refuse to answer questions not pertinent to the issue involved in the case when his reply will disgrace and degrade him.<sup>59</sup> A witness is not excused from testifying, where the statute grants immunity therefor, merely because he may not be able, if subsequently indicted, to procure the necessary evidence to

fy, or produce evidence, documentary or otherwise, before said commissioner, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding," Act of Feb. 11, 1893, c. 83, 27 Stat. 443; Interstate Commerce Com. v. Baird, 194 U. S. 25, reversing 123 Fed. 969; *In re Pooling Freights*, 115 Fed. 588 (statute same as in *Brown v. Walker*, *supra*); *United States v. McCarthy*, 18 Fed. 87, 21 Blatchf. 469.

*Arkansas*.—*Ex parte Butt*, 78 Ark. 262, 93 S. W. 992.

*California*.—*Ex parte Cohen*, 104 Cal. 524, 38 Pac. 364, 43 Am. St. Rep. 127, 26 L. R. A. 423. (statute provided that witness should not thereafter be liable to indictment, information or prosecution for the offense with reference to which the testimony was given); *Bradley v. Clarke*, 133 Cal. 196, 65 Pac. 395.

*Illinois*.—*People v. Butler* St. Foundry & Iron Co., 201 Ill. 236, 66 N. E. 349 (no one "shall be subject to any criminal prosecution by reason of anything truthfully disclosed").

*Indiana*.—*Frazee v. State*, 58 Ind. 8.

*Kansas*.—*State v. Jack*, 69 Kan. 387, 76 Pac. 911, *affirmed sub nom. Jack v. Kansas*, 199 U. S. 372.

*Nebraska*.—*Cooney v. State*, 61 Neb. 342, 85 N. W. 281.

*Nevada*.—*Ex parte Hedden*, 29 Nev. 352, 90 Pac. 737.

*New Hampshire*.—*State v. Nowell*, 58 N. H. 314.

*New York*.—*People v. Cahill*, 126 App. Div. 391, 110 N. Y. Supp. 728, *affirmed* in 193 N. Y. 232, 86 N. E. 39; *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851 (not liable to indictment, prosecution or punishment); *People v. Lewis*, 14 Misc. 264, 35 N. Y. Supp. 664.

*North Carolina*.—*State v. Morgan*,

133 N. C. 743, 45 S. E. 1033 (persons testifying in regard to gaming protected); *In re Briggs*, 135 N. C. 118, 47 S. E. 403 ("he shall be altogether pardoned of the offense so done or participated in by him").

*North Dakota*.—*In re Beer*, 115 N. W. 672.

*Pennsylvania*.—*In re Kelly*, 200 Pa. St. 430, 50 Atl. 248, 86 Am. St. Rep. 719.

*Tennessee*.—*Hirsch v. State*, 8 Baxt. 89 (gaming). But see *State v. Warner*, 13 Lea 52, where it was intimated that even such a statute will not justify the court in compelling an answer.

*Texas*.—*Floyd v. State*, 7 Tex. 215.

*Virginia*.—*Kendrick v. Com.*, 78 Va. 490.

*Wisconsin*.—*Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909.

As to the extent of the protection under different statutes, see *United States v. Price*, 96 Fed. 960; *Leonard v. State*, 2 Head (Tenn.) 455.

*Contra*.—In *United States v. James*, 60 Fed. 257, 26 L. R. A. 418, where the statute granted complete immunity, the court held the statute unconstitutional (1) because the purpose of the fifth amendment was "to make the secrets of memory, so far as they brought one's former acts within the definitions of crime, inviolate as against judicial probe or disclosure," and (2) because no person is compelled to accept the legislative or executive grace.

**Discovery** may be compelled where the statute extends sufficient immunity for crimes disclosed thereby. *Philadelphia v. Keyser*, 10 Phila. (Pa.) 50; *Rose v. Savings Fund*, 6 Phila. (Pa.) 10; *Perrine v. Striker*, 7 Paige (N. Y.) 598; *Siffkin v. Manning*, 4 Edw. Ch. (N. Y.) 37.

<sup>59</sup>. *People v. Lohman*, 2 Barb. (N. Y.) 216; *Clark v. Reese*, 35 Cal.

maintain his plea,<sup>60</sup> or because the statute does not protect him from the infamy and disgrace of disclosing his criminal conduct,<sup>61</sup> or from liability for perjury.<sup>62</sup>

(B.) TO JOINT PARTICIPANT IN CRIME. — A statute providing that one who is jointly concerned with others in the commission of a crime may be compelled to testify concerning the same but cannot be prosecuted for any participation therein, is valid.<sup>63</sup> It has no application, however, where the witness alone could have been guilty of the crime if one were committed.<sup>64</sup>

(C.) EXTENT AND EFFECT. — (a.) *Generally.* — The immunity granted by the statute may or may not be broader than the constitutional privilege.<sup>65</sup> It applies only in those proceedings to which it is extended by statute.<sup>66</sup>

(b.) *Must Be Absolute.* — A statutory enactment requiring a witness to give incriminating evidence, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.<sup>67</sup> Therefore it is held that statutes which de-

89; *Knowles v. Knowles*, 2 *Houst. (Del.)* 133; *State v. Staples*, 47 *N. H.* 113, 90 *Am. Dec.* 565; *In re Doran*, 2 *Pars. Eq. Cas. (Pa.)* 467; *Conway v. Clinton*, 1 *Utah* 215.

60. *Hale v. Henkel*, 201 *U. S.* 43.

61. The Bankruptcy Act providing that "no testimony given by him shall be offered in evidence against him in any criminal proceeding," does not furnish the absolute immunity necessary to suspend the bankrupt's privilege. *Burrell v. Montana*, 194 *U. S.* 572; *In re Scott*, 95 *Fed.* 815; *In re Rosser*, 96 *Fed.* 305; *In re Feldstein*, 103 *Fed.* 269; *In re Walsh*, 104 *Fed.* 518; *In re Smith*, 112 *Fed.* 509; *In re Nachman*, 114 *Fed.* 995; *In re Shera*, 114 *Fed.* 207; *Brown v. Walker*, 161 *U. S.* 591; *In re Kanter*, 117 *Fed.* 336. *Contra*, *Mackel v. Rochester*, 102 *Fed.* 314, 42 *C. C. A.* 427, 4 *Am. Bankr. R.* 1. See also *In re Franklin Syndicate*, 114 *Fed.* 205 (holding however that the bankrupt need not give the whereabouts of incriminating documents). *Compare supra*, IX, 1, C.

62. *Brown v. Walker*, 161 *U. S.* 591.

63. *Ex parte Butt*, 78 *Ark.* 262, 93 *S. W.* 992.

64. *Ex parte Butt*, 78 *Ark.* 262, 93 *S. W.* 992.

65. *United States v. Armour & Co.*, 142 *Fed.* 808; *State v. Murphy*, 128 *Wis.* 201, 107 *N. W.* 470 (see

several opinions therein rendered); *Rudolph v. State*, 128 *Wis.* 222, 107 *N. W.* 466.

66. A statute granting immunity to persons examined before a justice of the peace does not extend to examinations before a grand jury. *Ex parte Andrews*, 51 *Tex. Crim.* 79, 100 *S. W.* 376. So a statute protecting those who testify in regard to gaming does not apply to lotteries. *Temple v. Com.*, 75 *Va.* 892.

The examination of a witness before a grand jury investigating an alleged violation of the anti-trust act is a "proceeding" within the meaning of the general appropriation act granting immunity to any one testifying in any proceeding under the anti-trust act. *Hale v. Henkel*, 201 *U. S.* 43.

67. *United States*. — *Counselman v. Hitchcock*, 142 *U. S.* 547, *reversing* 44 *Fed.* 268; *Ex parte Irvine*, 74 *Fed.* 954; *United States v. Bell*, 81 *Fed.* 830; *Wyckoff v. Wayne Type-writer Co.*, 99 *Fed.* 158; *Foot v. Buchanan*, 113 *Fed.* 156.

*Arkansas*. — *State v. Bach Liquor Co.*, 67 *Ark.* 163, 55 *S. W.* 854.

*California*. — *Ex parte Clarke*, 103 *Cal.* 352, 37 *Pac.* 230; *Ex parte Cohen*, 104 *Cal.* 524, 38 *Pac.* 364, 43 *Am. St. Rep.* 127, 26 *L. R. A.* 423.

*Illinois*. — *Lamson v. Boyden*, 160 *Ill.* 613, 43 *N. E.* 781.

clare that no evidence obtained from a witness by means of a judicial proceeding shall be given against him or his property or estate, in any court, in any criminal proceeding, or for the enforcement of any penalty or forfeiture, are not a sufficient protection to warrant a court in compelling an incriminating answer.<sup>68</sup> There

*Massachusetts.*—Emery's Case 107 Mass. 172, 9 Am. Rep. 22.

*Missouri.*—State *ex rel.* Attorney-General v. Simmons Hdw. Co., 109 Mo. 118, 18 S. W. 1125, 15 L. R. A. 676; *Ex parte* Carter, 166 Mo. 604, 66 S. W. 540, 57 L. R. A. 654.

*New Hampshire.*—State v. Nowell, 58 N. H. 314.

*New York.*—Matter of Peck, 167 N. Y. 391, 60 N. E. 775, 53 L. R. A. 888; Hill v. Muller, 2 Sandf. 684; Thomas v. Harrop, 7 How. Pr. 57; Matter of Tappan, 9 How. Pr. 394; People v. Lewis, 14 Misc. 264, 35 N. Y. Supp. 664; People *ex rel.* v. Nussbaum, 55 App. Div. 245, 67 N. Y. Supp. 492; Matter of Cullinan, 40 Misc. 423, 82 N. Y. Supp. 337; People v. Cahill, 126 App. Div. 391, 110 N. Y. Supp. 728, judgment affirmed in 193 N. Y. 232, 86 N. E. 39; Chappell v. Chappell, 116 App. Div. 573, 101 N. Y. Supp. 846.

*North Dakota.*—*In re* Beer, 115 N. W. 672.

*Pennsylvania.*—Hamburger v. Freedman, 20 Pa. Co. Ct. 1; Samler v. Meyers, 20 Pa. Co. Ct. 521; Millers v. Brown, 22 Pa. Co. Ct. 109; Mayer v. Mayer, 16 Lanc. L. Rev. 49.

*Texas.*—*Ex parte* Park, 37 Tex. Crim. 590, 40 S. W. 300.

*Virginia.*—Cullen v. Com., 24 Gratt. 624; Temple v. Com., 75 Va. 892.

Where a witness has committed a number of offenses and the statute protects him from but one, he may refuse to answer if his answer will connect him with the other offenses. *Ex parte* Park, 37 Tex. Crim. 590, 40 S. W. 300.

**Anti-Trust Law.**—An anti-trust act providing for a preliminary investigation into alleged violations, which relieves the witness of any criminal liability for any violation of the act about which he may testify and provides that the evidence given by him shall not be used against him in any criminal proceeding, grants

complete immunity. State v. Jack, 69 Kan. 387, 76 Pac. 911, 1 L. R. A. (N. S.) 167, affirmed, *sub nom.* Jack v. Kansas, 199 U. S. 372. See also Brown v. Walker, 161 U. S. 591. The federal anti-trust act is sufficient though it does not protect in the state courts. Nelson v. United States, 201 U. S. 92. See *supra*, IX, 1, H, a. (6.), (A.).

**Construction of Immunity Statutes.**—“Immunity statutes must be given a reasonable construction—not a strained and artificial one—and when it is apparent to the court that a person is fully protected from the effect of his testimony he should be required to testify.” State v. Jack, 69 Kan. 387, 76 Pac. 911, 1 L. R. A. (N. S.) 167.

In Brown v. Walker, 161 U. S. 591, Brown, J., says the immunity “clause should be construed, as it was doubtless designed, to effect a practical and beneficent purpose—not necessarily to protect witnesses against every possible detriment which might happen to them from their testimony, nor to unduly impede, hinder or obstruct the administration of criminal justice. that the statute should be upheld if it can be construed in harmony with the fundamental law, will be admitted. Instead of seeking for excuses for holding acts of the legislative power to be void by reason of their conflict with the constitution, or with certain supposed fundamental principles of civil liberty, the effort should be to reconcile them if possible, and not to hold the law invalid unless . . . ‘the opposition between the constitution and the law be such that the judge feels a clear and strong conviction of their incompatibility with each other.’”

**68. United States.**—Counselman v. Hitchcock, 142 U. S. 547; *Ex parte* Irvine, 74 Fed. 954; *In re* Rosser, 96 Fed. 305; *In re* Hess, 134 Fed. 109; United States v. Goldstein, 132 Fed.

are, however, numerous cases to the contrary.<sup>69</sup> A statute which grants amnesty conditional upon making restitution is not sufficient.<sup>70</sup>

(c.) *Compulsion Necessary.* — To be entitled to subsequent immunity the witness need not resist answering questions until he is com-

789; *Foot v. Buchanan*, 113 Fed. 156. But see *Brown v. Walker*, 161 U. S. 591.

*Massachusetts.* — *In re Emery*, 107 Mass. 172, 9 Am. Rep. 22.

*Missouri.* — *Ex parte Carter*, 166 Mo. 604, 66 S. W. 540.

*New Hampshire.* — *State v. Nowell*, 58 N. H. 314, 31 Misc. 671.

*New York.* — *In re Leich*, 65 N. Y. Supp. 3; *People v. Wyatt*, 81 App. Div. 51, 80 N. Y. Supp. 816 (*reversing* 39 Misc. 456, 80 N. Y. Supp. 198) *affirmed, sub nom. People v. O'Brien*, 176 N. Y. 253, 68 N. E. 353 ("such testimony cannot be used against him in any criminal investigation or proceeding"); *People v. Court of General Sessions*, 96 App. Div. 201, 89 N. Y. Supp. 364, *affirmed* in 179 N. Y. 594, 72 N. E. 1148 (same). But see *Contra, People v. Kelly*, 24 N. Y. 74, 24 How. Pr. 369.

*Pennsylvania.* — *Mayer v. Mayer*, 16 Lanc. Law Rev. 49; *Samler v. Myers*, 20 Pa. Co. Ct. 521; *Miller v. Brown*, 22 Pa. Co. Ct. 109.

*Virginia.* — *Cullen v. Com.*, 24 Gratt. 624.

Such a provision "could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted. *Counselman v. Hitchcock*, 142 U. S. 547. See also *In re Beer* (N. D.), 115 N. W. 672; *Chappell v. Chappell*, 116 App. Div. 573, 101 N. Y. Supp. 846. But see *State v. Jack*, 69 Kan. 387, 76 Pac. 911, 1 L. R. A. (N. S.) 167; *Brown v. Walker*, 161 U. S. 591.

<sup>69.</sup> *United States.* — *Mackel v.*

*Rochester*, 102 Fed. 314, 42 C. C. A. 427 (where the court failed to note the distinction and reached its decision apparently overlooking the cases cited above); *In re Phillips*, 19 Fed. Cas. No. 11,097; *In re Strouse*, 1 Sawy. 605, 23 Fed. Cas. No. 13,548; *United States v. Brown*, 1 Sawy. 531, 24 Fed. Cas. No. 14,671; *United States v. Williams*, 28 Fed. Cas. No. 16,717 (cannot "be given in evidence, or in any manner used against such party or witness"); *United States v. Hughes*, 12 Blatchf. 553, 26 Fed. Cas. No. 15,417; *United States v. McCarthy*, 18 Fed. 87, 21 Blatchf. 469; *United States v. Three Tons of Coal*, 6 Biss. 379, 28 Fed. Cas. No. 16,515; *United States v. Distillery No. 28*, 6 Biss. 483, 25 Fed. Cas. No. 14,966; *Stanwood v. Green*, 2 Abb. 184, 22 Fed. Cas. No. 13,301.

*Arkansas.* — *State v. Quarles*, 13 Ark. 307; *Cossart v. State*, 14 Ark. 539.

*California.* — *Ex parte Rowe*, 7 Cal. 184.

*Georgia.* — *Henderson v. State*, 95 Ga. 326, 22 S. E. 537; *Kneeland v. State*, 62 Ga. 395; *Higdon v. Heard*, 14 Ga. 255.

*Indiana.* — *Wilkins v. Malone*, 14 Ind. 153; *Bedgood v. State*, 115 Ind. 275, 17 N. E. 621; *Frazee v. State*, 58 Ind. 8.

*Missouri.* — *Ex parte Buskett*, 106 Mo. 602, 17 S. W. 753, 27 Am. St. Rep. 378, 14 L. R. A. 407.

*New York.* — *Gilpin v. Daly*, 59 Hun 413, 13 N. Y. Supp. 390.

*North Carolina.* — *La Fontaine v. Southern Underwriters Ass'n.*, 83 N. C. 132; *In re Briggs*, 135 N. C. 118, 47 S. E. 403.

*Pennsylvania.* — *In re Kelly*, 200 Pa. St. 430, 50 Atl. 248.

<sup>70.</sup> *Lamson v. Boyden*, 160 Ill. 613, 43 N. E. 781 ("upon the discovery and repayment of the moneys or other things to be discovered and repaid, the person who shall discover and repay the same; as afore-

pelled to answer, but he may rely upon the statutory promise.<sup>71</sup> He cannot, however, secure immunity by volunteering evidence without any demand, but there must be some real legal compulsion.<sup>72</sup> As to what constitutes compulsion, however, the courts are not agreed, some holding that the witness must actually claim privilege by objecting,<sup>73</sup> others that subpoena, oath and question are alone sufficient;<sup>74</sup> and it has been held that the witness cannot be subsequently prosecuted for the offense disclosed by his testimony although he appeared without subpoena and testified without an oath.<sup>75</sup>

(d.) *Violation of Immunity.*—(AA.) **GENERALLY.**—Evidence which the witness is compelled to furnish under the statutory guaranty of immunity cannot subsequently be used against him in a criminal proceeding.<sup>76</sup> The fact that the witness' testimony does not tend to criminate him,<sup>77</sup> or that there is other sufficient independent evidence<sup>78</sup> does not deprive him of immunity where the statute grants immunity if he testifies at all concerning a matter on account of which prosecution is attempted. Nor is the immunity destroyed because the witness testifies falsely.<sup>79</sup> But the mere fact that a witness has previously testified to a fact which must be proved before a crime is established or a conviction justified does not entitle him to subsequent immunity where the fact testified to constituted no

said, shall be acquitted, indemnified and discharged, from any other or further punishment," etc.).

71. *State v. Murphy*, 128 Wis. 201, 107 N. W. 466.

72. *State v. Murphy*, 128 Wis. 201, 107 N. W. 466.

73. *Reg. v. Madden*, 14 Can. L. T. 505; *Reg. v. Williams*, 28 Ont. Rep. 583.

74. *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851; *Barber v. People*, 17 Hun 366; *State v. Murphy*, 128 Wis. 201, 107 N. W. 466; *Queen v. Hammond*, 29 Ont. Rep. 211; *Reg. v. Hendershott*, 26 Ont. 678. But see *Reg. v. Williams*, 28 Ont. Rep. 583. Compare *United States v. Kimball*, 117 Fed. 156.

75. *United States v. Armour & Co.*, 142 Fed. 808.

76. *Reg. v. Madden*, 14 Can. L. T. 505; *Com. v. House*, 28 Pittsb. Leg. J. N. S. (Pa.) 210; *Grundy v. Com.*, 8 Ky. L. Rep. 876. But see *Rex v. Leatham*, 3 Ell. & Bl. 658, 30 L. J. Q. B. 205, 7 Jur. (N. S.) 674, 3 L. T. 777.

But the fact that the petition in

a contempt proceeding shows that some of the facts alleged were obtained from the defendant's testimony given in another case under a guaranty of immunity, does not require that the petition be quashed where it does not appear that it may not be sustained by other evidence. *Hammond Lumb. Co. v. Sailors' Union*, 149 Fed. 577.

77. *State v. Murphy*, 128 Wis. 201, 107 N. W. 466; *State v. Bowman*, 145 N. C. 452, 59 S. E. 74 (holding that a general amnesty act was no violation of the constitutional provision giving to the governor the pardoning power).

78. **Where the Statute Protects the Witness Against Indictment** for any offense concerning which he testifies he cannot be indicted for an offense concerning which he was compelled to testify before the grand jury, although previous to his testimony evidence had been produced sufficient to warrant his indictment. *Sandwich v. State*, 137 Ala. 85, 34 So. 620.

79. *State v. Murphy*, 128 Wis. 201, 107 N. W. 470.

part of the criminal conduct forming the basis of the prosecution.<sup>80</sup> So a mere denial of the existence of any transactions of a certain kind does not constitute testimony concerning a particular transaction of that class for which the witness is afterwards prosecuted,<sup>81</sup> though it seems that a denial of that particular transaction would be.<sup>82</sup>

(BB.) PROSECUTION FOR PERJURY. — The immunity given a witness does not protect him from a prosecution for perjury in testifying,<sup>83</sup> even where it is provided without qualification that the testimony given shall not be offered in evidence against the witness in any criminal proceeding.<sup>84</sup>

(6.) Immunity From Prosecution Under Another Sovereignty. — A federal statute may grant complete immunity from prosecutions, under both federal and state laws. Hence, when a federal statute grants immunity, it is no answer to a refusal of privilege that the answer may lead to a prosecution in the state courts.<sup>85</sup> But although one sovereignty cannot grant immunity from prosecution for crime committed against the laws of another sovereignty; a bare possibility that, by his disclosure, a witness may be subjected to the criminal laws of some other sovereignty is not a real and probable danger from which he is entitled to be protected.<sup>86</sup>

80. Thus on a prosecution of an alderman for receiving bribes, his testimony before the grand jury that he was an alderman during the period in question does not entitle him to the statutory immunity because it is not an incriminating fact although a matter essential to be proved on the prosecution. *Rudolph v. State*, 128 Wis. 222, 107 N. W. 466.

81. Thus a negative answer by an alderman, testifying before a grand jury, to a question whether he had received any money for his vote on special privileges of several enumerated general classes does not constitute testimony concerning an alleged solicitation and receipt by him of a bribe for his vote on a particular special privilege. *State v. Murphy*, 128 Wis. 201, 107 N. W. 470. See also *Rudolph v. State*, 128 Wis. 222, 107 N. W. 466.

82. *State v. Murphy*, 128 Wis. 201, 107 N. W. 470.

83. *People v. Cahill*, 126 App. Div. 391, 110 N. Y. Supp. 728; *State v. Murphy*, 128 Wis. 201, 215, 107 N. W. 470. *Contra*, *United States v. Bell*, 81 Fed. 830.

84. *Edelstein v. United States*, 149

Fed. 636, 79 C. C. A. 328, holding that such provision in the bankruptcy act related merely to criminal proceedings arising out of the conduct of the bankrupt's business or the disposition of his property. *Contra*, *United States v. Simon*, 146 Fed. 89 (interpreting the same section of the bankruptcy act).

The Statute granting immunity sometimes excepts subsequent prosecutions for perjury. See *Reg. v. Hendershott*, 26 Ont. Rep. 678.

85. *Brown v. Walker*, 161 U. S. 591; *Nelson v. United States*, 201 U. S. 92.

86. *People v. Butler St. Foundry & Iron Co.*, 201 Ill. 236, 66 N. E. 349 (violation of state anti-trust law; witness need not state matters which occurred in other states; therefore danger of prosecution in other jurisdictions is too remote); *State v. Jack*, 69 Kan. 387, 76 Pac. 911 (possibility that answers as to violation of state anti-trust law might render him liable under federal anti-trust law is too remote), affirmed in *Jack v. Kansas*, 199 U. S. 372, 4 Am. Cas. 689. See also *Queen v. Boyes*, 1 Best & S. (Eng.) 311, and IX, 1, H,

(7.) Assurance from Court or Prosecuting Officer. — A witness cannot be compelled to waive his constitutional privilege because of an assurance from the court or prosecuting officers that he will not be prosecuted.<sup>87</sup>

2. Against Service of Process. — The privilege of a witness against the service of process is discussed elsewhere in this work.<sup>88</sup>

## X. CREDIBILITY, IMPEACHMENT, CONTRADICTION AND CORROBORATION.

These matters are treated under corresponding articles and in other articles dealing with particular classes of witnesses.<sup>89</sup>

a, (6.), (A.). But see *Nye v. Daniels*, 75 Vt. 81, 53 Atl. 150.

87. *Foot v. Buchanan*, 113 Fed. 156; *Ex parte Irvine*, 74 Fed. 954; *Muller v. State*, 11 Lea (Tenn.) 18; *Temple v. Com.*, 75 Va. 892. See *Rex v. England*, 2 Leach C. C. (Eng.) 767; *Stanford v. State*, 42 Tex. Crim. 343, 60 S. W. 253. But see *In re Taylor*, 8 Misc. 159, 28 N. Y. Supp. 500; *Ex parte Park*, 37

Tex. Crim. 590, 40 S. W. 300, 66 Am. St. Rep. 835.

88. See "ENCYC. OF EV.," Vol. II, p. 127 *et seq.*

89. See articles "CREDIBILITY," Vol. III; "CONTRADICTION OF WITNESSES," Vol. III; "IMPEACHMENT OF WITNESSES," Vol. VII; also Index of this work under corresponding titles.

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### CROSS-REFERENCES:

Abbreviations; Admissions; Affidavits; Alteration of Instruments;  
Ancient Documents;

Best and Secondary Evidence; Books of Account;  
 Certificates; Copies;  
 Deeds; Documentary Evidence; Dying Declarations;  
 Entries in Regular Course of Business;  
 Mortgages;  
 Order of Proof;  
 Parol Evidence; Payment;  
 Records; Refreshing Memory;  
 Spoliation; Stamp Acts;  
 Weight and Effect of Evidence.

### SCOPE NOTE.

**Written Instruments.** — Various matters pertaining to particular branches of the subject of written instruments and private and public documents will be found thoroughly treated elsewhere in this work as is indicated by the cross-references attached to this article. It is intended to treat here only the general rules pertaining to the admissibility of private written instruments and their mode of authentication.

### I. ADMISSIBILITY AND RELEVANCY.

**1. In General.** — All writings explanatory of the testimony of witnesses,<sup>1</sup> or which are themselves, independently, competent,<sup>2</sup> material<sup>3</sup> and relevant<sup>4</sup> are admissible<sup>5</sup> as evidence in a case,

1. *Tonopah Lumb. Co. v. Riley* (Nev.), 95 Pac. 1001.

2. *Davies v. Kentucky Horse Breeders' Assn.*, 50 Ill. App. 81; *McRae's Admr. v. McDonald*, 57 Ala. 423.

**Competency for One Purpose** sufficient ground for admission of writing though it is incompetent for other purposes. *Carpenter v. Tucker*, 98 N. C. 316, 3 S. E. 831.

3. *Melcher v. Merryman*, 41 Me. 601.

4. *Alabama Iron Co. v. Smith*, 155 Ala. 287, 46 So. 475; *White v. Mastin*, 38 Ala. 147; *Apfel v. Crane*, 83 Ala. 312, 3 So. 863; *Hazard Powder Co. v. Volger*, 58 Fed. 152, 7 C. C. A. 130 (deed executed subsequent to time property was injured, irrelevant); *Ward v. Forrester*, 35 Tex. Civ. App. 319, 80 S. W. 127.

5. See article "DOCUMENTARY EVIDENCE," Vol. IV, under IV, 2.

"Any written agreement that constitutes part of the bargain by which title has been acquired may properly be put in evidence where the purchase is to be shown." *Mitchell v. Chambers*, 43 Mich. 150, 5 N. W. 57, 38 Am. Rep. 167.

**Note Written by Deceased** giving directions as to his burial, is admissible upon the issue of suicide. *Clemens v. Royal Neighbors*, 14 N. D. 116, 103 N. W. 402.

**Diploma** admissible to prove that a doctor received a degree from a medical college. *Holmes v. Halde*, 74 Me. 28, 43 Am. Rep. 567. But see *Crenshaw v. Bowman*, 11 Ky. L. Rep. 442 (inadmissible in action for slander to show that plaintiff had a diploma from a chartered institution as required by law, where the college was located in another state).

**Due-Bill** is *prima facie* evidence of the existence and amount of a debt.

but only after proper proof has been made of their due execution.<sup>6</sup>

**2. Res Gestae.** — Written instruments are often admissible as a part of the *res gestae* of the transaction involved.<sup>7</sup>

**3. As Admissions.** — Private writings may be used against a party when they contain his admissions.<sup>8</sup>

**4. For Impeachment.** — They are also admitted to serve as impeaching evidence.<sup>9</sup>

**5. Best and Secondary Evidence.** — Where the issue is as to the terms or contents of a written agreement the writing itself is not only admissible but it is the best evidence of the agreement and must be produced or its absence explained before resort can be had to other evidence.<sup>10</sup>

**6. Form of Instrument.** — A. PHYSICAL FORM. — An instrument need not be written on paper, with ink, to be admissible in evidence; but it is sufficient if it is in any permanent form.<sup>11</sup>

B. MUTILATED WRITING. — A mutilated instrument is admissible in evidence, where the mutilation appears to have been made

*Squires v. Brown*, 22 How. Pr. (N. Y.) 35.

**Voluntary Rescission.** — Upon the issue of the voluntary rescission of a contract a later contract inconsistent with the first, and a receipt for the repayment of the money paid upon the first contract, are relevant *Pedrick v. Post*, 85 Ind. 255.

**Mortgage**, which is security for promissory note, inadmissible as evidence that the note is due or unpaid. *Pickle v. Smalley*, 21 Wash. 473, 58 Pac. 581.

**Letters and Telegrams.** — See *infra*, I, 28, L, a.

**6. Clayton v. Ingram.** (Tex. Civ. App.), 107 S. W. 880. And see *infra*, IV, 1.

**7. Olvey v. Jackson**, 106 Ind. 286, 4 N. E. 149; *Myers v. Cherry*, 53 N. C. (8 Jones' L.) 144. And see *infra*, I, 28, L, c, (letters and telegrams as *res gestae*).

Bills of sale for personal property purchased by one person for another and delivered when the purchase price was paid, and receipts for payment thereon, each reciting the name of such third person as the purchaser and signed by the seller, are competent evidence as part of the *res gestae* tending to show the person for whom the purchases were made and the money paid, there being other independent evidence of the sale of the property

and the payment of the money. *Brooks v. Duggan*, 149 Mass. 304, 21 N. E. 381.

**8.** See article "ADMISSIONS," Vol. I, p. 390. And see *infra*, I, 28, L, d (letters as admissions).

**Recitals as Admissions.** — See *infra*, I, 12, B.

**9.** See article "IMPEACHMENT OF WITNESSES," Vol. VII, p. 137. And see *infra*, I, 28, f (letters as impeaching evidence).

**10.** *Costa v. Musumando*, 34 Pa. Super. 496; *Myers v. Cherry*, 53 N. C. (8 Jones' L.) 144.

For a full discussion of the subject "Best and Secondary Evidence," see article of that title in Vol. II. See also article "COPIES," Vol. III.

**11.** *Kendall v. Field*, 14 Me. 30, 30 Am. Dec. 728 (writing on wood).

In *Nagle v. Fulmer*, 98 Iowa 585, 67 N. W. 369, where the issue was whether there had been a settlement between the parties, a piece of wood having on it figures indicating that the defendant was indebted to the plaintiff in the sum claimed was introduced in evidence over the defendant's objection. The plaintiff had testified that the defendant had made the figures at the time of settlement. It was held that although the defendant denied having made them, his mere denial was not sufficient to render the exhibit incom-



accidentally and the contents of the missing part are proved, or are shown to be immaterial.<sup>12</sup>

**C. AMBIGUITIES.** — A written instrument is not rendered inadmissible merely because it contains abbreviations or ambiguities, where its meaning is not thereby rendered entirely uncertain or can be ascertained by extrinsic evidence.<sup>13</sup>

**D. ABSENCE OF DATE.** — The mere fact that a writing is without date does not necessarily render it inadmissible,<sup>14</sup> nor does the fact that the date used was erroneous.<sup>15</sup>

**7. Unstamped Instrument.** — Although an instrument is one required by law to be stamped, failure to have a stamp affixed does not prevent the use of the instrument in evidence,<sup>16</sup> except in the federal courts.<sup>17</sup>

petent; that with plaintiff's identification it was properly in evidence; the weight to be given to it, in view of the defendant's denial, being for the jury.

**Printed Votes Are Written Votes,** within the meaning of the Massachusetts constitution. *Henshaw v. Foster*, 9 Pick. (Mass.) 312 (containing full and interesting discussion of this question). And see *Deep River National Bank's Appeal*, 73 Conn. 341, 47 Atl. 675 (type-writing is a substitute for and equivalent of writing).

**12.** *Waring v. Fidelity & G. Co.*, 24 App. Cas. (D. C.) 119. See *Ryle v. Davidson* (Tex. Civ. App.), 116 S. W. 823. And see article "SPOILIATION," Vol. XI.

In *Crane v. Brewer* (N. J. Eq.), 68 Atl. 78, a mutilated pass-book was admitted in evidence, but its effect was to greatly discredit the person producing it.

Where the writer of a letter refuses to say whether the contents of a portion of the letter which had been cut off were connected with the contents of what remained, the portion remaining was held admissible against him. *VanVechten v. VanVechten*, 65 Hun 215, 20 N. Y. Supp. 140.

**Instrument Consisting of Fragments Pasted Together,** admissible. *Sharp v. Stephens*, 1 La. 116.

**13.** *Harrington v. Fish*, 10 Mich. 415.

Although, in a paper offered in evidence, some words may be spelled that, taken by themselves,

their meaning would be uncertain, still, if by taking the whole writing together, the meaning is obvious, the paper will not be rejected. *Gilson v. Gilson*, 16 Vt. 464.

"January 21, 1823, sent Robert P. Peniston fifty-six dollars; I say received by me. Robert P. Peniston," held admissible, in connection with oral testimony. *Peniston v. Wall's Admr.*, 3 J. J. Marsh. (Ky.) 37.

**In New Jersey** an early statute requiring physicians to make out their accounts in plain English words, and it was held that an account containing contractions, initials, and symbols, was inadmissible. *Hedges v. Boyle*, 7 N. J. L. 68.

**14.** *James v. Stonebanks*, 1 N. J. L. 227; *Carpenter v. Featherston*, 15 La. Ann. 235; *Barfield v. Hewlett*, 6 Mart. N. S. (La.) 78.

**15. Date of Acknowledgement** prevails over date of the deed, and the fact that the deed bears a date subsequent to the date of its acknowledgment does not render it inadmissible. *Buck v. Gage*, 27 Neb. 306, 43 N. W. 110; *Munroe v. Eastman*, 31 Mich. 283.

**16.** *Phillips v. Hazen*, 132 Iowa 628, 109 N. W. 1096 (contract of sale of land); *State v. Glucose Co.*, 117 Iowa 524, 91 N. W. 794; *Garland v. Gaines*, 73 Conn. 662, 49 Atl. 19, 84 Am. St. Rep. 182; *Green v. Holway*, 101 Mass. 243, 3 Am. Rep. 339; *Cassidy v. St. Germain*, 22 R. I. 53, 46 Atl. 35. And see article "STAMP ACTS," Vol. XI.

**17.** See article "STAMP ACTS," Vol. XI, p. 985.

**8. Documents Admissible Because Related to Those in Evidence.**

Written instruments are sometimes admissible merely because of their connection with other instruments introduced by the adverse party which they tend to illustrate and explain.<sup>18</sup>

**9. Instruments in Foreign Language.**—No instrument is admissible in evidence which is written in a foreign language, unless it has been translated and is accompanied with the translation.<sup>19</sup>

**10. Foreign Instruments.**—Instruments executed in another state or country are admissible if properly authenticated.<sup>20</sup>

**11. Instruments Merged in Decree.**—The fact that certain instruments can no longer form the basis of an original action because they have become merged in a decree, does not prevent their being competent evidence as to any material matter as to which they are relevant.<sup>21</sup>

**12. Recitals.**—A. IN GENERAL.—Recitals in an instrument are not evidence as against strangers to the instrument,<sup>22</sup> but the pres-

**Intentional Omission of Stamp.**

Where in order to test the constitutionality of the stamp law the stamp has been intentionally omitted, the instrument is inadmissible since this constitutes proof of an "intent to evade" within the meaning of the statute. *Byington v. Oaks*, 32 Iowa 488.

**18. Alabama.**—*Curtis v. Parker*, 136 Ala. 217, 33 So. 935.

**California.**—*Hobart v. Tyrrell*, 68 Cal. 12, 8 Pac. 525.

**Connecticut.**—*Hoggson & Pettis Mfg. Co. v. Sears*, 77 Conn. 587, 60 Atl. 133.

**Maryland.**—*Barney v. Smith*, 4 Har. & J. 485, 7 Am. Dec. 679.

**Michigan.**—*Vanderpool v. Richardson*, 52 Mich. 336, 17 N. W. 936.

**Missouri.**—*Baker v. Pulitzer Pub. Co.*, 103 Mo. App. 54, 77 S. W. 585.

**Montana.**—*McConnell v. Combination Min. & Mill Co.*, 31 Mont. 563, 79 Pac. 248, *affirming* 30 Mont. 239, 76 Pac. 194.

**Texas.**—*Aetna Ins. Co. v. Fitze*, 34 Tex. Civ. App. 214, 78 S. W. 370; *Pope v. Davenport*, 52 Tex. 206.

**Virginia.**—*Grubb v. Burford*, 98 Va. 553, 37 S. E. 4.

**Detached Writings** explanatory of other evidence are in some states made admissible by express code provisions. *Tustin Fruit Assn. v. Earl Fruit Co.* (Cal.), 53 Pac. 693; *DuVivier v. Phillips*, 18 Mont. 370, 45 Pac. 554. And see *infra*, I, 28, L,

m (letters part of general correspondence) and V, 4. (introduction of part of document).

**19. Brummer v. VanCleve Co.**, 55 Misc. 227, 105 N. Y. Supp. 3 (Spanish instruments); *Squadrielle v. Ciervo*, 101 N. Y. Supp. 661 (French instruments. Cause "should have been tried altogether in the English language"); *Meyer v. Witter*, 25 Mo. 83; *Sartor v. Bolinger*, 59 Tex. 411.

**20. Turner v. Poston**, 63 S. C. 244, 41 S. E. 296; *Wilson v. Phoenix Powder Mfg. Co.*, 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890; *Sandford v. DeCamp*, 8 Watts (Pa.) 542; *Woods v. Bonner*, 89 Tenn. 411, 18 S. W. 67; *McIntire v. Funk*, Litt. Sel. Cas. 1 (Ky.) 425; *Rochester v. Toler*, 4 Bibb (Ky.) 106.

**21. Brown v. Schintz**, 203 Ill. 136, 67 N. E. 767 (note secured by trust deed admissible in action of ejection although decree had been entered in an action on the trust deed); *Harrison v. Remington Paper Co.*, 140 Fed. 385, 72 C. C. A. 405 (note spoken of as best evidence of an indebtedness prior to rendering of a judgment and the judgment as best evidence of the debt subsequent thereto, but both competent).

**22. United States.**—*Merriman v. The May Queen*, Newb. 464, 17 Fed. Cas. No. 9,481.

**Alabama.**—*Chipman v. Glennon*,

ence of incompetent recitals will not prevent the admission of the instrument in evidence if it is generally competent.<sup>23</sup>

**B. AS ADMISSIONS.** — They may, however, be competent as admissions of the party executing the instrument.<sup>24</sup>

**C. TO IDENTIFY PROPERTY.** — It has also been held that recitals

98 Ala. 263, 13 So. 822; *Nolen v. Gwyn*, 16 Ala. 725; *Oliver v. Ellzy*, 11 Ala. 632; *Guice v. Thornton*, 76 Ala. 466.

*California.* — *Somona County Water Co. v. Lynch*, 50 Cal. 503.

*Georgia.* — *Doggett v. Simms*, 79 Ga. 253, 4 S. E. 909; *Howard v. Snelling*, 32 Ga. 195.

*Kentucky.* — *Dennis Bros. v. Strunk*, 32 Ky. L. Rep. 1230, 108 S. W. 957.

*Minnesota.* — *King v. Pillsbury*, 50 Minn. 48, 52 N. W. 131.

*Nevada.* — *Tonopah Lumb. Co. v. Riley*, 95 Pac. 1001 (contract).

*New York.* — *Foster v. Beals*, 21 N. Y. 247; *Hunt v. Michigan S. & M. I. R. Co.*, 37 N. Y. 162, 35 How. Pr. 287; *Platt v. Picton*, 3 Robt. 64.

*Pennsylvania.* — *Green v. Brenne-sholtz*, 73 Pa. St. 423; *Gilmore v. Wilson*, 53 Pa. St. 194.

*Texas.* — *Ward v. Forrester*, 35 Tex. Civ. App. 319, 80 S. W. 127.

*Virginia.* — *William & Mary College v. Powell*, 12 Gratt. 372.

*West Virginia.* — *Warren v. Syme*, 7 W. Va. 474; *Hagan v. Holderby*, 62 W. Va. 106, 57 S. E. 289.

*Wisconsin.* — *Seefeld v. Chicago*, etc. R. Co., 67 Wis. 96, 29 N. W. 904.

In *Mitchell v. Willard*, 21 Ill. App. 500, an action to recover the price of machinery wherein the defense was that there was a breach of warranty of condition; it was held error to permit the plaintiff to introduce in evidence the shipping bills of the carrier for the purpose of showing that the machinery was in good order and condition when shipped; that "the statements in these bills of lading were the statements of the agents of the railway company and not the statements of (defendant) or of any one authorized to speak for him. These state-

ments might have been proper testimony if the litigation had been against such company, but they were not competent evidence against" defendant.

**A Statement in a Chattel Mortgage** that all of the property covered thereby is in possession of the mortgagor and free from all incumbrances is not substantive proof as against a stranger to the mortgage of the facts recited. *Syck v. Bossingham*, 120 Iowa 363, 94 N. W. 920.

**Recitals in Deeds**, see article "DEEDS," Vol. IV.

23. *Warshauer v. Jones*, 117 Mass. 345; *Siltzell v. Michael*, 3 Watts & S. (Pa.) 329.

24. *Louisiana.* — *St. Maxent v. Puche*, 4 Mart. (O. S.) 193.

*Massachusetts.* — *Warner v. Brooks*, 14 Gray 107.

*Missouri.* — *Wolff v. Famous Mut. Sav. Assn.*, 67 Mo. App. 678.

*New York.* — *Lefevre v. Silo*, 112 App. Div. 464, 98 N. Y. Supp. 321.

*North Carolina.* — *City of Hickory v. So. R. Co.*, 137 N. C. 189, 49 S. E. 202.

*Pennsylvania.* — *Stoever v. Whitman*, 6 Binn. 416.

*Tennessee.* — *Dunn v. Eaton*, 92 Tenn. 743, 23 S. W. 163.

*Texas.* — *Box v. Lawrence*, 14 Tex. 545.

*Vermont.* — *Peck v. Barney*, 12 Vt. 72.

**Declarations Against Interest** may be contained in a recital in a deed and are admissible in behalf of a stranger to the deed. *Peters v. Nolan Coal Co.*, 61 W. Va. 392, 56 S. E. 735; *Noble v. Worthy*, 1 Ind. Ter. 458, 45 S. W. 137.

**Parties Having Joint Interest** are all bound by recitals which amount to declarations against interest. *Peters v. Nolan Coal Co.*, 61 W. Va. 392, 56 S. E. 735.

of general description are admissible to aid in identifying property conveyed by deed.<sup>25</sup>

**13. Illegible Instrument.**—An illegible instrument is inadmissible.<sup>26</sup>

**14. Altered Instrument.**—An instrument which bears evidence of alteration upon its face is nevertheless admissible,<sup>27</sup> at least if the alteration be an immaterial one,<sup>28</sup> it being for the jury to determine the fact of alteration and whether it was made before or after the execution of the instrument.

**15. Collateral Instruments.**—A writing, although merely collateral to the issue, may, when expressly referred to and made part of another writing already in evidence, be received to explain the latter writing.<sup>29</sup>

**16. Effect as Bearing Upon Admissibility.**—The effect that an instrument will have if allowed in evidence is never to be considered in passing upon its admissibility.<sup>30</sup>

**17. Latent Ambiguity.**—The presence of a latent ambiguity in an instrument does not render it inadmissible, since the evidence subsequently received may remove the ambiguity, though if it does

**25.** *Hitchler v. Scanlan*, 15 Tex. Civ. App. 40, 39 S. W. 633 (in action of trespass to try title, descriptive recitals in defendant's deed while not binding on plaintiff are admissible to identify the property).

**26.** Where the question is whether there is a variance between the instrument as declared upon, and that offered in evidence, the burden of proof is upon the party alleging the variance, and if the writing is so illegible that the court cannot be satisfied itself of the variance the writing should go to the jury. *Jefferson Co. v. Savory*, 2 G. Gr. (Iowa) 238.

**27.** *Little v. Herndon*, 10 Wall. (U. S.) 26; *Comstock v. Smith*, 26 Mich. 306; *Parker's Admr. v. Moore*, 29 Mo. 218; *Kimball v. Lamson*, 2 Vt. 138. Compare *Schwalm v. McIntyre*, 17 Wis. 232; *Walker v. Walker*, 6 Coldw. (Tenn.) 571. And see article "ALTERATION OF INSTRUMENTS," Vol. I, under II, 1.

**Alteration of Wills.** see article "WILLS."

**Time for Objecting.**—Objection to the admission of an instrument which bears marks of alteration must be made when it is offered in

evidence. *Manuel v. Flynn*, 5 Cal. App. 319, 90 Pac. 463.

**28. Rule Limited to Immaterial Alterations** by § 800 B. & C. Comp. of Oregon statutes. *Hornefus v. Wilkinson* (Or.), 93 Pac. 474; § 1982 California Code Civ. Proc.; *Manuel v. Flynn*, 5 Cal. App. 319, 90 Pac. 463; *Patterson v. Fagan*, 38 Mo. 70.

**Suspicious Nature** of the alteration has been held to require an explanation before the instrument is even admissible. *Barber v. Geer*, 23 Tex. Civ. App. 531, 57 S. W. 58.

**29.** *Satterlee v. Bliss*, 36 Cal. 489; *Clark v. Houghton*, 12 Gray (Mass.) 38.

A conveyed land to B, who conveyed to C by deed which recited that the premises were the same as conveyed to B by A. *Held*, that the deed to C was admissible to prove the acceptance by B of the deed from A. *Locke v. Homer*, 131 Mass. 93, 41 Am. Rep. 199.

**30.** *Dent v. Bird*, 67 Cal. 652, 8 Pac. 504 (deed not intended to include entire premises in dispute); *Platt v. Brown*, 30 Conn. 336 (deed not releasing wife's dower right); *Longstreet v. Ketcham*, 1 N. J. L. 170 (immaterial that instrument is conditional).

not the instruments may properly be stricken out upon motion.<sup>81</sup>

**18. Void Instruments.**—An instrument void upon its face<sup>82</sup> is inadmissible as evidence of any fact which would necessarily involve a holding as to the legality of the instrument,<sup>83</sup> but it is nevertheless admissible as evidence of any collateral fact which may exist irrespective of the validity of the instrument itself<sup>84</sup> or as a written admission.<sup>85</sup>

**31.** *Hanna v. Renfro*, 32 Miss. 125; *Hitchler v. Scanlan*, 15 Tex. Civ. App. 40, 39 S. W. 633; *Norfleet v. Russell*, 64 Mo. 176. And see *Leverett v. Bullard*, 121 Ga. 534, 49 S. E. 591, and cases cited *infra*, I, 19.

**32.** Where the matter rendering an instrument void does not appear upon its face, it is admissible. *Myers v. Irwin*, 2 Serg. & R. (Pa.) 368; *Foye v. Patch*, 132 Mass. 105.

**Valid as to Some Persons.**—If a chattel mortgage is valid as between the parties but alleged to be invalid as to creditors, it is admissible where it does not appear that the party objecting to its admission is a creditor. *Vette v. Leonori*, 42 Mo. App. 217.

**33.** *Foster v. Rutherford*, 20 Ga. 676; *Westerman v. Foster*, 57 Ind. 408; *Tarpey v. Deseret Salt Co.*, 5 Utah 205, 14 Pac. 338; *Merriam v. Dovey*, 25 Neb. 618, 41 N. W. 550; *Darby v. Hunt*, Tread. Const. (S. C.) 740.

**34. Alabama.**—*Crawford v. Jones*, 54 Ala. 459 (lease void under statute of frauds admissible to show character of occupation); *Buchanan v. Larkin*, 116 Ala. 431, 22 So. 543.

**Connecticut.**—*Rogers v. Hillhouse*, 3 Conn. 398 (character of possession shown by unacknowledged deed).

**District of Columbia.**—*Thompson v. Shepherd*, 1 Mack. 385 (as acknowledgment of existing indebtedness).

**Kentucky.**—*Gilpin v. Davis*, 2 Bibb 416, 5 Am. Dec. 622.

**Maine.**—*Ross v. Gould*, 5 Greenl. 204 (void deed admissible to show extent of claim of title); *Robison v. Swett*, 3 Greenl. 316.

**New Jersey.**—*Ortley v. Chadwick*, 30 N. J. L. 35.

**North Carolina.**—*Hussey v.*

*Weathersby*, 51 N. C. (6 Jones' L.) 384 (invalid bill of sale may evidence a warranty—the sale itself being proven by intrinsic evidence).

**South Dakota.**—*Price v. Madison*, 17 S. D. 247, 94 N. W. 933 (void conveyance evidence of license).

**Texas.**—*Grimes v. Bastrop Corp.*, 26 Tex. 310; *Huffman v. Cartwright*, 44 Tex. 296; *Williams v. Wilson*, 76 Tex. 69, 13 S. W. 69; *McCartney v. McCartney*, 93 Tex. 359, 55 S. W. 310 (void deed as evidence of what the party intended by a prior deed).

**Vermont.**—*Olinger v. Shepherd*, 12 Gratt. 462 (void deed evidence of bounds and extent of possession); *Smith v. Perry*, 26 Vt. 279.

A bill of sale duly acknowledged and recorded, although void for uncertainty in the description of the property transferred, may be received in evidence of its own execution. *Singer v. Sheldon*, 56 Iowa 354, 9 N. W. 298.

**Void Deed Evidence of Common Source of Title.**—*Hughey v. Mosby*, 31 Tex. Civ. App. 76, 71 S. W. 395; *Garner v. Lasker*, 71 Tex. 431, 9 S. W. 332; *Burns v. Goff*, 79 Tex. 236, 14 S. W. 1009. See *McCelvey v. Cryer*, 8 Tex. Civ. App. 437, 28 S. W. 691 (properly authenticated copies also admissible).

**Void Deed Corroborative Evidence of Extent of Prior Deed.**—*Williamson v. Work*, 33 Tex. Civ. App. 369, 77 S. W. 266. And see *Fordtran v. Perry* (Tex. Civ. App.), 60 S. W. 1000.

**Existence and Terms of Parol Contract** may be evidenced by a defectively executed writing. *Simpson v. Kimberlin*, 12 Kan. 579.

**35.** *Ramsey v. Loomis*, 6 Or. 367; *Simpson v. Kimberlin*, 12 Kan. 579; *Richard v. Bird*, 4 La. 305;

**19. Certainty of Description Required.**—An instrument is not inadmissible for uncertainty if the language used, though somewhat indefinite, is sufficient to form a basis for other evidence by which the meaning intended is ascertainable,<sup>36</sup> for it is only when the language used is so vague, indefinite and uncertain as to render the description nugatory and the instrument void upon its face, that it is inadmissible in evidence.<sup>37</sup>

**20. Mistakes and Omissions.**—Slight mistakes in the descriptions used in written instruments,<sup>38</sup> or in signatures attached to them,<sup>39</sup> will not render such instruments inadmissible where other evidence

*Lea v. Hopkins*, 7 Pa. St. 492. And see article "ADMISSIONS," Vol. I, p. 391.

Where a written instrument, intended to be a contract, is so fatally uncertain as to be void as such, the party desiring to use it may nevertheless, with proper allegations in his pleading, rely upon the parol contract actually made and intended to be embodied in the writing, except where the law requires the contract to be in writing, and may introduce the instrument in evidence as a written admission in part proof of the parol contract. *Simpson v. Kimberlin*, 12 Kan. 579.

**36. California.**—*Bunting v. Salz*, 22 Pac. 1132 (bill of sale of "4 horse Concord wagon").

*Georgia.*—*Collinsville Granite Co. v. Phillips*, 123 Ga. 830, 51 S. E. 666.

*Missouri.*—*Norfleet v. Russell*, 64 Mo. 176 (county omitted from description in deed); *Howe v. Williams*, 51 Mo. 252.

*North Carolina.*—*Bell v. Couch*, 132 N. C. 346, 43 S. E. 911.

*Pennsylvania.*—*Brotherton v. Livingston*, 3 Watts & S. 334; *Urket v. Coryell*, 5 Watts & S. 60.

*Texas.*—*Dunn v. Taylor* (Tex. Civ. App.), 107 S. W. 952 (description in deed); *Oppermann v. McGown* (Tex. Civ. App.), 50 S. W. 1078; *Echols v. Jacobs Merc. Co.*, 38 Tex. Civ. App. 65, 84 S. W. 1082.

Will devising lands as "wild lands" was held properly admitted, in an action for trespass, where the title to the lands came in question and other evidence was offered to identify the lands in controversy with that devised. *Fuller v. Cole*, 33 Pa. Super. 563.

**Bill of Sale** of notes and mortgages contains a sufficient description where the parties to the sale are named, and their place of residence given, and the county in which the mortgages are recorded is stated, the bill of sale being in the possession of the grantee. *Persons v. Smith*, 12 N. D. 403, 97 N. W. 551.

**Power of Attorney** authorizing a person to sell all of the grantor's land in the state is not inadmissible because it fails to state in what county or district the lands lie. *Lanier, Hamilton & Co. v. Hebard*, 123 Ga. 626, 51 S. E. 632.

**Location by Surveyor.**—If this is possible from the description used, the deed is admissible. *Hoodless v. Jernigan*, 46 Fla. 213, 35 So. 656; *Walker v. Lee*, 51 Fla. 360, 40 So. 881.

**37. Walker v. Lee**, 51 Fla. 360, 40 So. 881; *Ragsdale v. Robinson*, 48 Tex. 379; *Buchanan v. Larkin*, 116 Ala. 431, 22 So. 543. And see cases cited in preceding section.

**38. Bedell's Admr. v. Smith**, 37 Ala. 619; *Crooks v. Whitford*, 47 Mich. 283, 11 N. W. 159; *Armstrong v. Colby*, 47 Vt. 359; *Clark v. Houghton*, 12 Gray (Mass.) 38; *Silliman v. Whitmer*, 11 Pa. Super. 243, affirmed, 196 Pa. St. 363, 46 Atl. 489 (name of county erroneous); *Oppermann v. McGown* (Tex. Civ. App.), 50 S. W. 1078; *Echols v. Jacobs Merc. Co.*, 38 Tex. Civ. App. 65, 84 S. W. 1082.

**39. Miller v. Holt**, 47 W. Va. 7, 34 S. E. 956; *Bennett v. Green*, 74 Cal. 425, 16 Pac. 231; *Hill v. Banks*, 61 Conn. 25, 23 Atl. 712; *Endsley v. Strock*, 50 Mo. 508.

is offered to show the identity of the property or persons so described.<sup>40</sup>

**Omissions**, apparent on the face of the instrument, which do not have the effect of making it incomplete, do not prevent its reception in evidence and use, in so far as its contents will allow.<sup>41</sup>

**Mistake Conceded.**—A party may introduce a written instrument in evidence in which he alleges that a mistake exists, and may thereupon show the mistake.<sup>42</sup>

**21. Instrument Part Only of Transaction.**—A. IN GENERAL. The fact that an instrument does not evidence the entire transaction between the parties does not render it inadmissible for what it is worth.<sup>43</sup>

B. CONNECTED INSTRUMENTS.—Even where a writing is directly connected with another writing it will ordinarily<sup>44</sup> be admitted without reference to the latter<sup>45</sup> as this is a question which, at best, deals only with the order of proof.<sup>46</sup>

**22. Instrument Insufficient by Itself.**—An instrument is not necessarily inadmissible<sup>47</sup> because standing by itself it is unintelli-

40. Where a devisee conveys his interest in property devised to him but uses a name differing from that contained in the will, his identity with the person named in the will must be shown before the conveyance is admissible. *Drake v. Curtis*, 88 Mo. 644.

**Deed Correcting Mistaken Description in Prior Deed**, both instruments are admissible. *Arn v. Matthews*, 39 Kan. 272, 18 Pac. 65.

41. *Kelly v. Crawford*, 72 U. S. 785 (agreement referring to exhibit which was not attached); *Potts v. Coleman*, 86 Ala. 94, 5 So. 780 (deed containing only part of lands authorized to be conveyed by power of attorney); *Weis v. Mainhaut*, 4 La. 121, paper referring to unproduced plat admissible).

42. *Hopkins v. Salkeld*, 7 Mart. O. S. (La.) 505 (mistake in release as to date of mortgage involved).

43. Where the time for delivery of goods, specified in an agreement under seal, was extended by parol, the whole agreement becomes parol, but the sealed contract is admissible in evidence. *Carrier v. Dilworth*, 59 Pa. St. 406.

**Written Assignment of chattel mortgage** competent though it does not show the transfer of the notes secured. *Olson v. Martin*, 38 Iowa 346.

44. Where the proffered instrument recites that it is made subject to a certain other instrument, it is admissible without the latter. *Chapman v. Crooks*, 41 Mich. 595, 2 N. W. 924.

A deed which refers to another deed for a description of the property conveyed is not admissible unless the deed to which it refers is produced. *Hammon v. Norris*, 2 Har. & J. (Md.) 130.

**45. Mortgage Admissible Without Note Secured.**—*Louden v. Vinton*, 108 Mich. 313, 66 N. W. 222; *Fuller v. Rounceville*, 31 N. H. 512; *Smith v. Johns*, 3 Gray (Mass.) 517; *Powers v. Patten*, 71 Me. 583.

**Coupons** admissible without the bonds from which they were detached. *Welsh v. First Div. etc. R. Co.*, 25 Minn. 314.

**Bond Coupons** admissible without the mortgage given to secure them. *Conshohocken Tube Co. v. Iron Car Co.*, 161 Pa. St. 391, 28 Atl. 1119.

46. *Louden v. Vinton*, 108 Mich. 313, 66 N. W. 222.

47. "It is not necessarily a fatal objection to the admission of a writing that considered by itself, and without explanation from extrinsic matters, it is wholly unintelligible. If such extrinsic matters interpret its meaning and show its bearing upon the con-

gible or insufficient,<sup>48</sup> if it forms one link in the chain of evidence on which the parties' case rests.<sup>49</sup>

**23. Unexecuted Writings Evidencing Parol Contracts.**—A writing which is ineffective as a contract may nevertheless be admitted in evidence as explanatory of the testimony given and illustrative of the various steps in the transaction,<sup>50</sup> to prove the parol contract

troversy it may not only be competent and relevant but absolutely decisive of the case." *Walters v. Van Derveer*, 17 Kan. 425.

**48.** *Hitchler v. Boyles*, 21 Tex. Civ. App. 230, 51 S. W. 648 (deed admissible although extrinsic evidence necessary to identify the property conveyed); *Howe v. Williams*, 51 Mo. 252.

"A party is not required to locate on the ground the calls of a deed before the deed is admitted in evidence." *Hogans v. Carruth*, 18 Fla. 587, quoting from *Cutter v. Caruthers*, 48 Cal. 178.

In *Potts v. Coleman*, 86 Ala. 94, 5 So. 780, a power of attorney authorizing the conveyance of certain described lands had after the description of the lands the word "also" followed by a blank. It was offered in evidence but was objected to because of the blank space and because it showed on its face that it was not complete when signed and did not describe or include all the lands intended to be contained in it; but it was held that this was no objection to the admissibility of the document since it related to a part of the land in controversy and that its relevancy was not destroyed or impaired by the fact that it did not embrace the entire tract.

**49.** *Edwards v. Roark*, 19 Tex. 184; *McHenry v. McCall*, 10 Watts (Pa.) 456.

"Distinct matters forming separate links in a connected chain of title often cannot conveniently be given in evidence together. It is no answer to evidence, that it does not prove plaintiff's whole case; if it is a link in the chain of the evidence afterwards to be given, it is admissible." *Haughey v. Strickler*, 2 Watts & S. (Pa.) 411.

Although a paper containing a contract for employment contains no

stipulation binding the employe to accept the appointment therein, or to perform its duties, if he does accept it and perform the duties, he will be entitled to the promised compensation. Such contract may be proved by progressive steps and a paper writing not containing full evidence of the contract and its acceptance and performance is admissible in evidence as part of the chain of proof. *Equitable End. Assn. v. Fisher*, 71 Md. 430, 18 Atl. 808.

**50.** *Equitable End. Assn. v. Fisher*, 71 Md. 430, 18 Atl. 808; *Lathrop v. Bramhall*, 64 N. Y. 365; *Tonopah Lumb. Co. v. Riley* (Nev.), 95 Pac. 1001; *Morgans v. Tims*, 44 Tex. Civ. App. 308, 97 S. W. 832 (draft of contract which was never signed, admissible). But see *Dick v. Maxwell*, 6 Mart. N. S. (La.) 396; *Mumford v. Whitney*, 15 Wend. (N. Y.) 380, 30 Am. Dec. 60; *Curtis v. Harrison*, 36 Ill. App. 287. And see article "CONTRACTS," Vol. III, p. 521.

In *Allen v. Sowerby*, 37 Md. 410, an action of assumpsit to recover for services rendered, the plaintiff had offered in evidence as constituting the contract a letter written to him by the defendant, but which did not of itself constitute a full and final contract. It appeared that the defendant after writing the letter had prepared and read to the plaintiff a contract in writing embodying the agreement between them and that the plaintiff had assented thereto as correct but had refused to sign it; and it was held that the defendant might properly introduce the written agreement in evidence against the plaintiff.

In *Cook v. Anderson*, 20 Ind. 15, an action to recover damages for breach of a verbal agreement, it was held that a written memorandum of the agreement signed by the plaintiff but not by the defendant was com-



relied upon and as evidence of the agreement made by the parties.<sup>51</sup>

**24. Acknowledged and Recorded Instruments.**—A. NECESSITY FOR ACKNOWLEDGMENT.—Acknowledgment of an instrument is not necessary to justify its admission in evidence if it is otherwise proved,<sup>52</sup> unless specifically required by statute.<sup>53</sup>

B. NECESSITY FOR RECORDING.—An unrecorded instrument is admissible in evidence if duly proved,<sup>54</sup> unless it is otherwise de-

petent evidence to establish the terms of the agreement if accompanied with other evidence or proof of circumstances tending to show assent thereto by the defendant.

In *Bartlett v. Mayo*, 33 Me. 518, an action for wages, plaintiff offered in evidence a paper in the form of a note payable to himself in the handwriting of the defendant, but which had no signature, and it was held proper to admit in evidence the paper.

But the draft of an unexecuted contract, drawn up in accordance with what the person drawing it supposed to be the agreement between the parties, but not containing their language, is not admissible to show an agreement between the parties. *Flood v. Mitchell*, 4 Hun 813, *reversed*, 68 N. Y. 507.

**Writing Drawn up After a Contract Is Concluded** by parol which is meant merely as a memorandum of the transaction, and which does not amount to a contract, may be given in evidence concurrently with oral proof of the additional facts and circumstances necessary to constitute a contract and give effect to the transaction. *Mobile Marine D. & M. Ins. Co. v. McMillan*, 31 Ala. 711.

51. In *Tomlinson v. Briles*, 101 Ind. 538, 1 N. E. 63, where a written contract was admitted in evidence, complaint was made that the contract was subsequently modified by parol and that the writing was no longer evidence of the contract; but the court held that while it is true that the contract became a verbal one by the changes made in its terms, still the writing was competent evidence just as a letter, a written admission or the like would be competent in the case of a contract not evidenced in whole or in part by a written instrument.

**Admissible as Illustrating the Understanding of the Parties.**

*Parr v. Gibbons*, 1 Cushm. (Miss.) 92; *Purington v. Akhurst*, 74 Ill. 490.

52. *Alabama*.—*Louisville & N. R. Co. v. Price*, 48 So. 814 (receipt).

*California*.—*Colton, L. & W. Co. v. Swartz*, 99 Cal. 278, 33 Pac. 878.

*Colorado*.—*Owers v. Olathe Min. Co.*, 6 Colo. App. 1, 39 Pac. 980.

*Florida*.—*Marsh v. Bennett*, 49 Fla. 186, 38 So. 237.

*Illinois*.—*Chicago & A. R. Co. v. Keegan*, 31 N. E. 505 (deed of state land by governor under seal of state).

*Massachusetts*.—*Pond v. Wetherbee*, 4 Pick. 312.

*Nebraska*.—*Linton v. Cooper*, 53 Neb. 400, 73 N. W. 731; *Kittle v. St. John*, 10 Neb. 605, 7 N. W. 271.

*New Hampshire*.—*Brown v. Manter*, 22 N. H. 468.

*New York*.—*Biglow v. Biglow*, 39 App. Div. 103, 56 N. Y. Supp. 794.

*Texas*.—*Kimmarle v. Houston & T. C. R. Co.*, 76 Tex. 686, 12 S. W. 608.

*Vermont*.—*Stevens v. Griffiths*, 3 Vt. 448.

53. *Ferbrache v. Martin*, 3 Idaho 573, 32 Pac. 252 (bill of sale; Act. Feb. 7, 1889, 15 Session Laws, p. 49); *Pendleton v. Button*, 3 Conn. 406; *Rogers v. Hillhouse*, 3 Conn. 398.

**Privy Acknowledgment by Married Women** essential. *Parker v. Chancellor*, 73 Tex. 475, 11 S. W. 503.

54. *Kittle v. St. John*, 10 Neb. 605, 7 N. W. 271 (lease for years); *Fowler v. Lee*, 4 Munf. (Va.) 373 (bill of sale); *Valentine v. Piper*, 22 Pick. (Mass.) 85, 33 Am. Dec. 715.

**Deeds.**—*Alabama*.—*Robertson v. Kennedy*, 1 Stew. 245.

clared by statute<sup>55</sup> as most commonly occurs where an instrument conveying land is offered against bona fide purchasers.<sup>56</sup>

C. EFFECT OF ACKNOWLEDGMENT. — The effect of statutes dispensing with proof of the execution of such instruments is in no way to enlarge their competency and admissibility.<sup>57</sup>

D. DEFECTIVE ACKNOWLEDGMENT. — A defect in the acknowledgment of a recorded instrument does not render the instrument inadmissible,<sup>58</sup> although its proper execution must be first established,<sup>59</sup> except in those instances in which a valid acknowledgment and recordation is expressly required by statute.

E. RECORD WITHOUT ACKNOWLEDGMENT. — In cases in which acknowledgment and record of an instrument are necessary to render the instrument admissible, the record of the instrument without a proper acknowledgment is insufficient.<sup>60</sup>

F. REPEATED RECORDATION. — The fact that a deed has been proved and registered more than once does not render it incompe-

*Arkansas.* — *Anderson v. Dunn*, 19 Ark. 650.

*Illinois.* — *Ross v. Hole*, 27 Ill. 104.

*Massachusetts.* — *Pond v. Wetherbee*, 4 Pick. 312.

*Missouri.* — *Shumate v. Reavis*, 49 Mo. 333.

*North Carolina.* — *Hunter v. Kelly*, 92 N. C. 285.

*Pennsylvania.* — *Keichline v. Keichline*, 54 Pa. St. 75.

*Tennessee.* — *Cox v. Bowman*, 2 Yerg. 108.

*Texas.* — *Boykin v. Rosenfield*, 69 Tex. 115, 9 S. W. 318; *Fletcher v. Ellison*, 1 Posey Unrep. Cas. 661.

*Virginia.* — *Hassler v. King*, 9 Gratt. 115.

55. *Mundell v. Perry*, 2 Gill & J. (Md.) 193; *Ferbrache v. Martin*, 3 Idaho 573, 32 Pac. 252 (bill of sale); *Pendleton v. Button*, 3 Conn. 406; *Jackson ex dem. Yates v. How*, 19 Johns. 80; *Bellas v. McCarty*, 10 Watts (Pa.) 13; *Warner El. Mfg. Co. v. Houston* (Tex. Civ. App.), 28 S. W. 405 (contract securing mechanic's lien).

56. *Brosnahan v. Turner*, 16 La. 433 (Civil Code arts. 2242-2417); *Hargrove v. Adcock*, 111 N. C. 166, 16 S. E. 16.

Temporary Admission. — It would seem that where the question of purchaser for value without notice is in issue, an unrecorded deed is admissible in the first instance, though it will eventually be disre-

garded if the proof shows a bona fide purchase. *Wiggins v. Holley*, 11 Ind. 2.

57. *Ferris v. Boxell*, 34 Minn. 262, 25 N. W. 592.

58. *Gould v. Woodward*, 4 G. Gr. (Iowa) 82; *Banbury v. Sherin*, 4 S. D. 88, 55 N. W. 723; *Gillespie v. Reed*, 3 McLean 377, 10 Fed. Cas. No. 5,436; *Griesler v. McKennon*, 44 Ark. 517; *Lydiard v. Chute*, 45 Minn. 277, 47 N. W. 967; *Virginia & T. Coal & I. Co. v. Fields*, 94 Va. 102, 26 S. E. 426. And see article "MORTGAGES," Vol. VIII, p. 790.

Absence of Seal from acknowledgment does not render it inadmissible. *Fellows v. Pedrick*, 4 Wash. C. C. 477, 8 Fed. Cas. No. 4,724; *Rullman v. Barr*, 54 Kan. 643, 39 Pac. 179; *Hastings v. Vaughn*, 5 Cal. 315. Compare *Meskimen v. Day*, 35 Kan. 46, 10 Pac. 14; *Pitts v. Seavey*, 88 Iowa 336, 55 N. W. 480.

59. *Gillespie v. Reed*, 3 McLean 377, 10 Fed. Cas. No. 5,436 (applying law of Illinois); *Lydiard v. Chute*, 45 Minn. 277, 47 N. W. 967.

60. *Raines v. Walker*, 77 Va. 92; *Norwood v. Green*, 5 Mart. N. S. (La.) 175; *Jackson v. Shepard*, 2 Johns. (N. Y.) 77; *Brinton v. Seevers*, 12 Iowa 389.

In *Texas*, Sayles Ann. Civ. Stat. 1897, as amended by Act April 23, 1907 (Gen. Laws, p. 308, c. 165) expressly authorizes the admission of an instrument which has been actually

tent evidence, as in such a case the deed is not to be considered as consisting of several distinct instruments.<sup>61</sup>

**G. TIME WHEN ACKNOWLEDGED.**—A deed or other instrument of which an acknowledgment is required is admissible in evidence though acknowledged only after the action in which it is offered was commenced, as an acknowledgment is mere matter of proof and does not affect the validity of the instrument.<sup>62</sup>

**H. TIME WHEN RECORDED.**—*a. In General.*—Where a deed is required by statute to be recorded, it must be recorded within the time specified by the statute,<sup>63</sup> and where exceptions to this rule are provided by statute the existence of the facts bringing an instrument within the exception is a preliminary matter to be established by proof.<sup>64</sup> It is sufficient, however, although the instrument is recorded only after the suit is brought.<sup>65</sup>

*b. Registered Power of Attorney.*—A power of attorney for the sale of lands which has been recorded is admissible in connection with the conveyance issued under its authority, and that whether the power was registered before or after the execution of the conveyance.<sup>66</sup>

**25. Execution Subsequent to Suit.**—A writing to be admissible in evidence must have been executed prior to the institution of the

recorded for ten years, whether properly acknowledged or not. *Millwee v. Phelps* (Tex. Civ. App.), 115 S. W. 891.

61. *Bell v. Couch*, 132 N. C. 346, 43 S. E. 911.

62. *United States*.—*Lanning v. Dolph*, 4 Wash. C. C. 624, 14 Fed. Cas. No. 8,073.

*Illinois*.—*Riggs v. Henneberry*, 58 Ill. 134.

*New York*.—*Shelden v. Stryker*, 27 How. Pr. 387; *Wetterer v. Soubirous*, 22 Misc. 739, 49 N. Y. Supp. 1043.

*North Carolina*.—*Johnson v. Eversole Lumb Co.*, 144 N. C. 717, 57 S. E. 518.

*Pennsylvania*.—*Jones v. Porter*, 3 Pen. & W. 132; *Kelly v. Dunlap*, 3 Pen. & W. 136.

*Vermont*.—*Pierce v. Brown*, 24 Vt. 165; *Pitkin v. Leavitt*, 13 Vt. 379.

"The objection is not good. The acknowledgment is mere matter of proof. The deed is valid without it. It takes effect from the time of its delivery, and this in the absence of any showing to the contrary is presumed to have been on the day of

its date." *Babbitt v. Johnson*, 15 Kan. 522.

**Deed by Married Woman** not being effectual to pass her title until duly acknowledged is inadmissible if acknowledged after suit brought. *Hollingsworth v. Flint*, 101 U. S. 591; *Corn v. Haisley*, 22 Fla. 317; *Perry v. Calhoun*, 8 Humph. (Tenn.) 551.

63. *Bryan's Lessee v. Harvey*, 18 Md. 113. And see *Hog v. Perry*, 1 Litt. (Ky.) 172; *Lyne v. Bank of Kentucky*, 5 J. J. Marsh (Ky.) 545.

64. *Bryan's Lessee v. Harvey*, 18 Md. 113 (notice of purchasers or possession taken under the deed).

65. *People's Bank v. Calhoun*, 102 U. S. 256; *Betts v. Dick*, 1 Penne. (Del.) 268, 40 Atl. 185; *Saenze v. Mumme Co.* (Tex. Civ. App.), 85 S. W. 59; *Russell v. Sweezy*, 22 Mich. 235. See *Hudson v. Jordan*, 108 N. C. 10, 12 S. E. 1029; *Block v. Carpenter*, 3 Baxt. (Tenn.) 350; *Abbott v. Pratt*, 16 Vt. 626; *Wise v. Postlewait*, 3 W. Va. 452.

**Recording Subsequent to Death of Grantor**, instrument admissible. *Persons v. Persons*, 105 Fed. 39, 44 C. C. A. 348.

66. *Flint River Co. v. Smith*, 122

action<sup>67</sup> unless it is, in effect, an admission of liability by one of the parties,<sup>68</sup> or is evidence of a fact occurring after the commencement of the action which for some reason has become relevant.<sup>69</sup>

**26. Undelivered Instrument.** — An undelivered instrument is lacking in an essential element of execution and is therefore not evidence of any fact involving its legality,<sup>70</sup> though it may still be evidence of any collateral fact.<sup>71</sup> It is, however, necessarily admissible in evidence, where the trial is by jury, or where a *prima facie* case is made by presumptive or other evidence, though its delivery must be first established before the jury is authorized to give any effect to it.<sup>72</sup>

**27. Instruments Obtained by Illegal Search.** — Written instruments which are obtained as the result of an illegal search are nevertheless admissible if otherwise competent.<sup>73</sup>

Ga. 5, 49 S. E. 745, 106 Am. St. Rep. 85; *Rosenthal v. Ruffin*, 60 Md. 324; *Mix v. Hotchkiss*, 14 Conn. 32.

**67.** *Byington v. Oaks*, 32 Iowa 488 (deed executed for the purposes of the action inadmissible).

"No person can sally forth into the world and have evidence manufactured to aid him in pending litigation." *Doggett v. Simms*, 79 Ga. 253, 4 S. E. 909.

**Person Executing Instrument** subsequent to suit brought should be called as a witness and offered for cross-examination. *Baines v. Higgins*, 2 La. 220; *Davis v. Shreve*, 3 Litt. (Ky.) 260, 14 Am. Dec. 66.

**68.** *Stowe v. Sewall*, 3 Stew. & P. (Ala.) 67 (account stated subsequent to suit); *Sinamon v. Melbourn*, 4 G. Gr. (Iowa) 309 (receipt given by plaintiff to defendant).

Deeds made after the commencement of a suit confirming and ratifying deed made before its commencement, are admissible. *Crockett v. Campbell*, 2 Humph. (Tenn.) 411.

**69.** *Bircher v. Parker*, 43 Mo. 443 (deed admissible as evidence of conversion of property during pendency of injunction proceedings).

**70.** *Stiles v. Brown*, 16 Vt. 563; *Humphry v. Hartford Ins. Co.*, 15 Blatchf. 35, 12 Fed. Cas. No. 6,874; *Bynum v. Hewlett*, 137 Ala. 333, 34 So. 391; *Jackson v. Sheldon*, 22 Me. 569. And see *Persons v. Persons*, 105 Fed. 39, 44 C. C. A. 348.

**Mode of Proving Delivery.** — See article "DELIVERY," Vol. IV.

**71.** *McCartney v. McCartney*, 93 Tex. 359, 55 S. W. 310; *Jelks v. Barrett*, 52 Miss. 315; *City of Philadelphia v. Riddle*, 25 Pa. St. 259.

**72.** "The mode of trial sometimes changes the mode of proof. If the issue in this case had been tried by a jury, and this testimony in relation to the delivery of the papers was to have been passed upon by the jury, perhaps the only way would have been to have admitted the deed and contract, and let them go to the jury together to be disposed of under the charge of the court, as they should find the other facts. But when the issue is tried by the court, and the facts are found by the court, instead of the jury, this necessity does not exist." *Stiles v. Brown*, 16 Vt. 563.

In *Kusler v. Crofoot*, 78 Ind. 597, an action to foreclose a mortgage wherein the defendants admitted the signing of the mortgage but denied its delivery, it was held that the plaintiff having possession of the instrument, and its signature being admitted, had the right to introduce the mortgage as evidence and then make his proof as to the delivery.

**73.** *United States v. Bacon v. United States*, 97 Fed. 35, 38 C. C. A. 37; *Adams v. New York*, 192 U. S. 585.

*Idaho.* — *State v. Bond*, 12 Idaho 424, 86 Pac. 43.

*Illinois.* — *Siebert v. People*, 143 Ill. 571, 583, 32 N. E. 431; *Trask v. People*, 151 Ill. 523, 38 N. E. 248.

**28. Particular Instruments.** — A. BOOKS OF CORPORATION. — The purposes for which the books of a corporation are admissible in evidence, and the persons in whose behalf and against whom they may be used will be found discussed elsewhere.<sup>74</sup>

B. BILLS OF LADING. — The bill of lading furnished by a carrier is admissible to prove the nature of the contract,<sup>75</sup> the parties to it,<sup>76</sup> the condition of the goods when received<sup>77</sup> or any other relevant fact.<sup>78</sup>

C. CERTIFICATES. — The certificates of private individuals are inadmissible in the absence of statute.<sup>79</sup>

D. COMMERCIAL RATINGS. — The ratings of commercial agencies are inadmissible as evidence of the financial condition of a person,<sup>80</sup> or to prove the membership of a partnership.<sup>81</sup>

E. NEWSPAPERS. — Items published in newspapers are generally inadmissible.<sup>82</sup>

**Market Reports**, as contained in newspapers, are, however, admissible in some cases.<sup>83</sup>

F. RECORDS OF ASSOCIATIONS. — The records of the transactions of associations at their regular meetings are admissible.<sup>84</sup>

*Iowa.* — State v. Van Tassel, 103 Iowa 6, 72 N. W. 497.

*Louisiana.* — State v. Renard, 50 La. Ann. 662, 23 So. 894.

*Massachusetts.* — Com. v. Ryan, 157 Mass. 403, 32 N. E. 349; Com. v. Tibbetts, 157 Mass. 519, 32 N. E. 910.

*Missouri.* — State v. Pomeroy, 130 Mo. 489, 32 S. W. 1002.

*New Hampshire.* — State v. Sawtelle, 66 N. H. 488, 32 Atl. 831.

*New York.* — People v. Adams, 176 N. Y. 351, 68 N. E. 636, 98 Am. St. Rep. 675.

*Oregon.* — State v. McDaniel, 39 Or. 161, 65 Pac. 520.

*South Carolina.* — State v. Atkinson, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 877.

*Vermont.* — State v. Mathers, 64 Vt. 101, 23 Atl. 590, 33 Am. St. Rep. 921; Barrett v. Fish, 72 Vt. 18, 47 Atl. 174, 82 Am. St. Rep. 914. And see article "COMPETENCY," Vol. III.

74. See article "CORPORATIONS," Vol. III. And see Sigua Iron Co. v. Brown, 171 N. Y. 488, 64 N. E. 194.

75. Ogdensburg & L. C. R. Co. v. Pratt, 22 Wall. (U. S.) 123.

76. Short Mountain Coal Co. v. Hardy, 114 Mass. 197.

77. Weide v. Davidson, 15 Minn. 327.

78. See article "CARRIERS," Vol. II, under I. C. And see Adams v. O'Connor, 100 Mass. 515, 1 Am. Rep. 137.

79. See article "CERTIFICATES," Vol. II, under I. And see Oakes v. Hill, 14 Pick. (Mass.) 442; Tessman v. Supreme Commandery, 103 Mich. 185, 61 N. W. 261; Berry v. Hull, 6 N. M. 643, 30 Pac. 936; Crockett v. Brower, 6 Fed. Cas. No. 3,401; Prew v. Donahue, 118 Mass. 438; Carr v. Stanley, 52 N. C. (7 Jones L.) 131; Runk v. Ten Eyck, 24 N. J. L. 756.

80. Richardson v. Stringfellow, 100 Ala. 416, 14 So. 283; Cook v. Penryhn Co., 36 Ohio St. 135, 38 Am. Rep. 568; Baker v. Ashe, 80 Tex. 356, 16 S. W. 36; Henderson v. Miller, 36 Ill. App. 232.

81. Frank v. Brown Hdw. Co., 10 Tex. Civ. App. 430, 31 S. W. 64.

82. See article "BOOKS," Vol. II, p. 586.

83. See articles "BOOKS," Vol. II, p. 586; "VALUE," Vol. XIII, p. 517.

84. Rayburn v. Elrod, 43 Ala. 700 (quarterly conference of M. E. church); Nason v. First Church, 66 Me. 100 (same); Leach v. Dodson, 64 Tex. 185 (records of secret society admissible to prove adoption of deed). And see Shortz v. Unangst, 3 Watts & S. (Pa.) 45.

G. PRIVATE RECORDS. — Mere unofficial records are inadmissible unless they fall within some exception to the hearsay rule.<sup>85</sup> The

**Unincorporated Religious Society.** Records admissible to show due organization and a vote taken to purchase the land in question. *First Baptist Church v. Harper*, 191 Mass. 196, 77 N. E. 778.

**Lodge By-Laws.** — See article "Books," Vol. II, p. 586.

85. See articles "ENTRIES IN REGULAR COURSE OF BUSINESS," Vol. V; "BOOKS OF ACCOUNT," Vol. II; "REFRESHING MEMORY," Vol. XI.

**Interchange Records** of carrier showing time a car was delivered to a connecting carrier, inadmissible. *Wooten v. Mobile & O. R. Co.*, 89 Miss. 322, 42 So. 131.

**Engine Inspection,** record inadmissible. *Taylor v. Chicago, M. & St. P. R. Co.*, 80 Iowa 431, 46 N. W. 64; *Hoffman v. Chicago, M. & St. P. R. Co.*, 40 Minn. 60, 41 N. W. 301.

**School Register,** entry in incompetent to prove age of pupil, but admissible in corroboration of a witness. *Falls v. Gamble*, 66 N. C. 455.

**Catalogue of Students at an Academy,** inadmissible. *State v. Daniels*, 44 N. H. 383.

**Hospital Records.** — A hospital record is ordinarily inadmissible as evidence of the truth of the facts stated, though it may properly be used to refresh the writer's memory. *Baird v. Reilly*, 92 Fed. 884, 35 C. C. A. 78; *Connor v. Ins. Co.*, 78 Mo. App. (even of city hospital); *Cashin v. New York, etc. R. Co.*, 185 Mass. 543, 70 N. E. 930; *Kemp v. Metropolitan St. R. Co.*, 94 App. Div. 322, 88 N. Y. Supp. 1; *Briebe! v. Brooklyn Hts. R. Co.*, 95 App. Div. 214, 88 N. Y. Supp. 767, *affirmed*, 184 N. Y. 528, 76 N. E. 1096. And see article "RECORDS," Vol. X, under I, 31; "ENTRIES IN REGULAR COURSE OF BUSINESS," Vol. V, under IV, 10.

**Church and Parish Records** are sometimes made admissible by statute. *Sandberg v. State*, 113 Wis. 578, 89 N. W. 504. In general, however, they are also admissible either as public records or as entries in regular course of business. Supreme

*Assembly v. McDonald*, 59 N. J. L. 248, 35 Atl. 1061; *Hancock v. Benevolent Legion*, 67 N. J. L. 614, 52 Atl. 301; *McGuirk v. Mutual Ben. L. Co.*, 66 Hun 628, 20 N. Y. Supp. 908 (evidence of fact of baptism and not of its date); *Drosdowski v. Order of Chosen Friends*, 114 Mich. 178, 72 N. W. 169; *Hickey v. Morrissey (N. J. Eq.)*, 50 Atl. 183; *Kennedy v. Doyle*, 10 Allen (Mass.) 161. And see article "RECORDS," Vol. X, under I, 30; "ENTRIES IN REGULAR COURSE OF BUSINESS," Vol. V, under IV, 8.

**Log Book** is not admissible in favor of the party making it, unless authorized by statute. *Worrall v. Davis C. & C. Co.*, 113 Fed. 549. See *Jones v. The Phoenix*, 1 Pet. Adm. 201, 13 Fed. Cas. No. 7,489; *The City of Carlisle*, 39 Fed. 807, 5 L. R. A. 52; *United States v. Mitchell*, 3 Wash. C. C. 95, 26 Fed. Cas. No. 15,792. *Compare* *Smallwood v. Mitchell*, 3 N. C. 318.

**Hotel Registers** inadmissible to prove extent of business unless properly authenticated. *Wittenberg v. Mollyneaux*, 55 Neb. 429, 75 N. W. 835. And see "Entries in Regular Course," IV, 11.

**Train Sheets** of dispatcher, admissible. *Hitchner Wall Paper Co. v. Pennsylvania R. Co.*, 158 Fed. 1011. And see article "ENTRIES IN REGULAR COURSE OF BUSINESS," Vol. V.

**Engineer's Record** as to when electric lights were turned on and off, admitted. *Edwards v. City of Cedar Rapids*, 138 Iowa 421, 116 N. W. 323.

**Diaries** of deceased attorney inadmissible to show what services were rendered. *Burke v. Baker*, 111 App. Div. 422, 97 N. Y. Supp. 768, *affirmed*, 188 N. Y. 561, 80 N. E. 1033. And see *Elliott v. Sheppard*, 179 Mo. 382, 78 S. W. 627.

**Auctioneer's Book** sometimes admitted. See *Oxnard v. Locke*, 13 La. 447; *Keroes v. Weaver*, 27 App. Cas. (D. C.) 384.

**Private Surveyor's Notes** are generally admitted. See "Records," I, 25; "Entries in Regular Course,"

question of what are private records and what are public records is elsewhere discussed.<sup>86</sup>

**H. MUNIMENTS OF TITLE OR OWNERSHIP.**—An instrument which is the basis of a person's claim of title or ownership is admissible as evidence upon this issue, whether it be a deed,<sup>87</sup> a will,<sup>88</sup> a bill of sale of personal property<sup>89</sup> or other instrument.<sup>90</sup>

**I. CHECKS.**—A check is not evidence of a loan by the drawee to the drawer,<sup>91</sup> nor by the drawer to the payee.<sup>92</sup>

**J. RULES OF PUBLIC SERVICE CORPORATIONS.**—The rules and regulations of public service corporations governing the actions of its employes,<sup>93</sup> or of individuals whom it serves,<sup>94</sup> are admissible.

IV, 22. *Compare* *Stumpe v. Kopp*, 201 Mo. 412, 99 S. W. 1073.

**Pedigree of Animals** may be shown by private registers. *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317, 45 S. W. 790, 66 Am. St. Rep. 754; *Pittsburgh, C. C. & St. L. R. Co. v. Sheppard*, 56 Ohio St. 68, 46 N. E. 61, 60 Am. St. Rep. 732 (register kept by trotting association); *Kuhns v. Chicago, M. & St. P. R. Co.*, 65 Iowa 528, 22 N. W. 661. See *Crawford v. Williams*, 48 Iowa 247; *Austin & N. W. R. Co. v. Saunders* (Tex. Civ. App.), 26 S. W. 128. And see article "PEDIGREE," Vol. IX.

86. See article "RECORDS," under I.

87. *Gayoso de Lemos v. Garcia*, 1 Mart. N. S. (La.) 324; *Jackson ex dem. Yates v. How*, 19 Johns. (N. Y.) 80; *Wilhelm v. Burleyson*, 106 N. C. 381, 11 S. E. 590; *Henderson v. Dickey*, 50 Mo. 161 (deed by town expressly authorized by statute to convey land).

**Prior Conveyance by Grantor** to another party does not render a deed inadmissible. *Peck v. Vandenburg*, 30 Cal. 11.

**Change of Venue** from county in which land is located does not render deed inadmissible. *Holbrook v. Nichol*, 36 Ill. 161.

**Deed Defective as to Part of Land Covered** is nevertheless admissible as evidence of ownership of that part properly covered by it. *Silliman v. Whitmer*, 11 Pa. Super. 243, *affirmed*, 196 Pa. St. 363, 46 Atl. 489.

**Sufficiency.**—A deed is insufficient as evidence of title unless further proof is made that title at the time of its execution was in the grantor.

*Farmers & Mechanics' Bank v. Bronson*, 14 Mich. 361.

**Quitclaim Deed** admissible as a link in a chain of title though of little weight unless the title of the releasor is shown. *Greist v. Amrhy*, 80 Conn. 280, 68 Atl. 521.

88. *Trittip v. Morgan*, 99 Ind. 269; *Cogswell v. Burtis*, 1 Hoff. Ch. (N. Y.) 198; *Sharp's Lessee v. Petit*, 4 Yeates (Pa.) 413; *Massey v. Massey*, 4 Har. & J. (Md.) 141.

**Unprobated Will Inadmissible.** See article "WILLS," Vol. XIII.

89. *Rodoni v. Lytle*, 13 Mont. 123, 32 Pac. 491; *Persons v. Smith*, 12 N. D. 403, 97 N. W. 551.

**Identity** between property mentioned in bill of sale and that sued for may be shown by extrinsic evidence. *Sadler v. Anderson*, 17 Tex. 245.

90. *Obermeir & Co. v. Core*, 25 Ark. 562; *Coates v. Cleaves*, 92 Cal. 427, 28 Pac. 580 (bond for deed); *Strong v. Baird*, 16 Lea (Tenn.) 600 (assignment in bankruptcy).

91. *Fletcher v. Manning*, 12 Mees. & W. (Eng.) 571; *In re New Brunswick Carpet Co.*, 4 Fed. 514; *Lancaster Bank v. Woodward*, 18 Pa. St. 357, 57 Am. Dec. 618.

92. *Reddington v. Gilman*, 1 Bosw. (14 N. Y. Super.) 235; *Bunting v. Allen*, 18 N. J. L. 299.

93. *O'Brien v. Boston & W. R. Co.*, 15 Gray (Mass.) 20, 77 Am. Dec. 347 (as to conductor ejecting passenger who refuses to pay); *O'Laughlin v. Boston & M. R.*, 164 Mass. 139, 41 N. E. 121 (as to conductor ejecting intoxicated passenger); *Dixon v. New England R. Co.*, 179 Mass. 242, 60 N. E. 581.

94. *Wills v. Lynn & Boston R.*

K. RECEIPTS. — a. *In General*. — A receipt often contains in addition to an acknowledgment of the payment of money or the acquirement of property, the terms under which the transaction is made and a recital of the rights of the parties, and in such case it is competent evidence of all that appears upon its face,<sup>95</sup> being in the nature of a written admission.<sup>96</sup>

b. *As to Person Preparing Them*. — When a person prepares receipts which are to be signed by other persons and retained by himself, recitals in such receipts are competent as admissions to prove any fact as to which they are relevant and whether or not they are signed by the persons intended.<sup>97</sup>

c. *As Evidence of Payment*. — The admissibility and effect of a receipt as evidence of payment is elsewhere discussed.<sup>98</sup>

L. LETTERS AND TELEGRAMS. — a. *In General*. — Letters or telegrams are admissible in evidence<sup>99</sup> the same as other private

Co., 129 Mass. 351 (as to passenger riding on platform).

95. *House v. Beak*, 43 Ill. App. 615 (recitals as to value of goods received); *Leach v. Hannibal & St. J. R. Co.*, 86 Mo. 27, 56 Am. Rep. 408 (competent evidence of relation sustained between parties); *Orr Water Ditch Co. v. Reno Water Co.*, 19 Nev. 60, 6 Pac. 72 (evidence that corporation was doing business); *Farnsworth v. Nevada Co.*, 102 Fed. 578, 42 C. C. A. 509; *State v. Oliver*, 78 Miss. 5, 27 So. 988; *Rea v. Trotter*, 26 Gratt. (Va.) 585.

Attorney's receipt for securities which he is to collect is *prima facie* evidence of their genuineness. *Hair v. Glover*, 14 Ala. 500.

Conclusiveness of Receipt. — See article "PAROL EVIDENCE," Vol. IX.

96. See *Hair v. Glover*, 14 Ala. 500; *Haynie v. Miller*, 61 Ala. 62; *D'Apremont v. Berry*, 6 La. Ann. 464.

97. *Rand v. Dodge*, 17 N. H. 343. And see *Myers v. Cherry*, 53 N. C. (8 Jones' L.) 144.

98. See article "PAYMENT," Vol. IX.

99. *Alabama*. — *Strong v. Catlin's Admr.*, 37 Ala. 706; *Southern R. Co. v. Howell*, 135 Ala. 639, 34 So. 6.

*Illinois*. — *Larminie v. Carley*, 114 Ill. 196, 29 N. E. 382.

*Maryland*. — *Prudential Ins. Co. v. Devoe*, 98 Md. 584, 56 Atl. 809 (letters from insurance company denying liability).

*Massachusetts*. — *McKinney v. Wilson*, 133 Mass. 131.

*Michigan*. — *Parrish v. Bradley*, 73 Mich. 610, 41 N. W. 818.

*Pennsylvania*. — *Wallace v. Dorris*, 218 Pa. St. 534; 67 Atl. 858.

*Texas*. — *Ward v. Cameron* (Tex. Civ. App.) 76 S. W. 240.

*Washington*. — *Stern v. Daniel*, 47 Wash. 96, 91 Pac. 552.

A letter written by vendees acknowledging the presentation of the vendor's draft, is evidence of an acknowledgment of an order for goods, the receipt of the goods, and their liability to pay for them, in the absence of evidence of other transactions between the parties. *Glauber Mfg. Co. v. Voter*, 70 N. H. 332, 47 Atl. 612.

In *Meinert v. Snow*, 3 Idaho 112, 27 Pac. 677, an action to recover for services rendered under an alleged contract of employment between the plaintiff and the defendant's intestate, it was held that a telegram from such intestate to the plaintiff after the alleged contract of employment, notifying the plaintiff that the defendant's intestate was coming to the mine where the plaintiff was employed, was admissible on behalf of the plaintiff as tending to show that the relation of employer and employe existed at the date of the telegram.

As Evidence of Ratification.

*Waterson v. Rogers*, 21 Kan. 529.

Refusal To Rescind, proved by



writings in all cases in which they are competent and relevant.<sup>1</sup>

b. *Correspondence*.—The correspondence which passed between the parties to a transaction is admissible to establish the contract entered into or to explain the relations of the parties.<sup>2</sup>

letters. *Swann v. West*, 41 Miss. 104.

**Must Be Competent.**—“The letter complained of was a part of the correspondence had between the plaintiff and the defendants concerning the goods in question, and was clearly competent testimony. It was a part of, and explanatory of, the transaction between the parties, and stood practically on the footing of a conversation between them.” *Frame v. Oregon Liquor Co.*, 48 Or. 272, 85 Pac. 1009, 86 Pac. 791.

**Must Be Material.**—*Hall v. Grace*, 179 Mass. 400, 60 N. E. 932; *Scheibeck v. Van Derbeck*, 122 Mich. 29, 80 N. W. 880 (letters merely tending to prove admitted facts of little importance); *Thomas v. Gage*, 141 N. Y. 506, 36 N. E. 385; *Kocher v. Palmetier*, 112 Iowa 84, 83 N. W. 816.

**Must Be Relevant.**—See *Lyon v. Hires*, 91 Md. 411, 46 Atl. 985; *Braney v. Millbury*, 167 Mass. 16, 44 N. E. 1060; *Rider v. Culp*, 68 Mo. App. 527; *Hannan v. Greenfield*, 36 Or. 97, 58 Pac. 888; *Dr. Blair Medical Co. v. United States F. & G. Co. (Iowa)*, 89 N. W. 20; *Coleman v. Colgate*, 69 Tex. 88, 6 S. W. 553; *State v. E. Espinozei*, 20 Nev. 209, 19 Pac. 677.

In *Brownfield v. Phoenix Ins. Co.*, 35 Mo. App. 54, an action on a fire insurance policy, it was held that telegrams sent by the defendant to its agent after the fire touching the cancellation of the policy in suit were not admissible on behalf of the defendant.

In *Com. v. Burton*, 183 Mass. 461, 67 N. E. 419, a prosecution for obtaining money under false pretenses from a railroad company in settlement of a claim for damages for personal injuries, it was held proper to exclude certain telegrams sent to the company's claim agent by other employes relating to the person and his alleged claim; that

“what was said by one employe of the railroad to another about other persons to the injuries suffered by them is not evidence on the issues” in the case on trial.

In *Mobile & M. R. Co. v. Jay*, 65 Ala. 113, a letter offered by the plaintiff purporting to have been written by the defendant's president, addressed to the plaintiff's attorney and referring to the plaintiff's account, but bearing no date, and there being no evidence as to when it was received or what were the contents of the letter to which it purported to have been a reply, was held to have been improperly admitted in evidence. The court said: “It bears no date. It does not appear when it was written nor when received. No evidence was offered to prove the contents of the letter of Burnett to which it was a reply, nor was it proposed to make it relevant by any such extraneous evidence. Without the light of other facts we are left in the dark as to whether or not it related to the subject matter of this particular suit. *Prima facie*, therefore, the letter was irrelevant and the objection to its admission should have been sustained.”

1. *United States v. Babcock*, 3 Dill. 571, 24 Fed. Cas. No. 14,485; *Southern R. Co. v. Howell*, 135 Ala. 639, 34 So. 6; *Com. v. Burton*, 183 Mass. 461, 67 N. E. 419; *People v. Hammond*, 132 Mich. 422, 93 N. W. 1084; *Saveland v. Green*, 40 Wis. 431; *Percy v. Bibber*, 134 Mass. 404; *Coleman v. Colgate*, 69 Tex. 88, 6 S. W. 553. And see *supra*, I, 1.

2. *United States*.—*J. S. Toppan Co. v. McLaughlin*, 120 Fed. 705.

*Alabama*.—*Wefel v. Stillman*, 151 Ala. 249, 44 So. 203, as evidence of consistency of past conduct with present claims).

*Connecticut*.—*Garland v. Gaines*, 73 Conn. 662, 49 Atl. 19, 84 Am. St. Rep. 182.

*Indiana*.—*Thames L. & T. Co. v.*

c. *As Res Gestae*.—A letter or telegram is also admissible where it is part of the *res gestae* of the transaction.<sup>3</sup>

d. *As Admissions*.—A letter or telegram may be admissible as an admission of the sender.<sup>4</sup>

Beville, 100 Ind. 309 (as evidence of contract).

*Maryland*.—Stoddert v. Tuck, 5 Md. 18.

*Massachusetts*.—Merrifield v. Robbins, 8 Gray 150.

*Michigan*.—Shaw v. Davis, 7 Mich. 317.

*Missouri*.—Taylor v. Campbell, 20 Mo. 254; Hammond v. Beeson, 15 S. W. 1000.

*Nebraska*.—Helwig v. Aulabaugh, 120 N. W. 162 (as evidence of contract).

*New York*.—Whitaker v. White, 69 Hun 258, 23 N. Y. Supp. 487.

*Pennsylvania*.—Bickel v. Philadelphia Pav. Co., 2 Walk. 150.

*Texas*.—Tinsley v. Dowell (Tex. Civ. App.), 24 S. W. 928.

*Vermont*.—Durkee v. Vermont Cent. R. Co., 29 Vt. 127.

*Wisconsin*.—Saveland v. Green, 40 Wis. 431.

All telegrams exchanged between the parties in reference to the contract in suit may be received in evidence or order that the jury may consider them in determining the terms and conditions of the contract. Hammond v. Beeson, 112 Mo. 190, 20 S. W. 474.

3. Bank of Monroe v. Culver, 2 Hill (N. Y.) 531; Crane v. Malony, 39 Iowa 39; Crary v. Pollard, 14 Allen (Mass.) 284; Sweetzer v. Mead, 5 Mich. 107; Merrill v. Downs, 41 N. H. 72.

Telegrams between the parties and from the defendant to a third person relating to the transactions resulting in the plaintiff's arrest are admissible in an action for false imprisonment as part of the *res gestae*, for the purpose of connecting the defendant with the arrest. Chrisman v. Carney, 33 Ark. 316.

4. *Alabama*.—Lewis v. Post, 1 Ala. 65; Burton v. State, 107 Ala. 108, 18 So. 284.

*California*.—Ryland v. Heney, 130 Cal. 426, 62 Pac. 616.

*Georgia*.—Rumph v. State, 91 Ga.

20, 16 S. E. 104; Austin v. Long, 1 Ga. App. 258, 57 S. E. 964.

*Illinois*.—Simons v. People, 150 Ill. 66, 36 N. E. 1019; Dick v. Zimmerman, 207 Ill. 636, 69 N. E. 754.

*Massachusetts*.—Com. v. Hayden, 163 Mass. 453, 40 N. E. 846, 28 L. R. A. 318; Buffum v. York Mfg. Co., 175 Mass. 471, 56 N. E. 599.

*Michigan*.—Mead v. Randall, 111 Mich. 268, 69 N. W. 506.

*New York*.—White v. McNulty, 164 N. Y. 582, 50 N. E. 1094; Dainese v. Allen, 45 How. Pr. 430.

*Oregon*.—Lee v. Cooley, 13 Or. 433, 11 Pac. 70.

*Pennsylvania*.—Holler v. Weiner, 15 Pa. St. 242.

*Wisconsin*.—Monteith v. State, 114 Wis. 165, 89 N. W. 828.

Written instruments as admissions, in general, see *supra*, I, 3.

In Beecher v. Pettee, 40 Mich. 181, an action by the plaintiff, who had been employed by the defendant as manager for a hotel, to recover damages for preventing the performance of the contract of employment by the defendant's interference, it was held that a letter from the defendant to a newspaper admitting the discharge of certain of the hotel employes was competent evidence for the plaintiff.

"No rule of evidence is better settled than that letters written by a party to the action containing self-serving admissions are competent evidence against him." Cooper v. Perry, 16 Colo. 436, 27 Pac. 946.

**Letter Written After Controversy Arose**.—Buffum v. York Mfg. Co., 175 Mass. 471, 56 N. E. 599.

**As Reply to Charges Made**.—A letter is admissible where it is a reply to a charge made against the writer. Winter v. Sass, 19 Kan. 556 (admissible "although it were simply a torrent of abuse, and with no direct reference to the charge").

**Receipt of Telegram Need Not Be Shown**.—In Com. v. Jeffries, 7 Allen (Mass.) 548, 83 Am. Dec. 712, the

e. *As Corroborative Evidence.* — Letters which are corroborative of other evidence are admissible.<sup>5</sup>

f. *As Impeaching Evidence.* — Letters are admissible to impeach witnesses by showing their written statements inconsistent with their testimony.<sup>6</sup>

g. *Telegram as Privileged Communication.* — Telegraphic dispatches are not privileged communications, but may be called for and given in evidence, whenever, in the opinion of the court, they are regarded as proper or competent testimony.<sup>7</sup>

h. *Contents Reflecting on Writer.* — The mere fact that the letters offered reflect upon the business or character of the writer is no reason for excluding them if otherwise relevant.<sup>8</sup>

i. *In Behalf of Writer.* — (1.) *In General.* — While a letter or telegram which is a mere narrative of past transactions is generally inadmissible in behalf of the writer<sup>9</sup>—being in effect merely a

court in speaking of telegrams, said: "Inasmuch as these papers were entirely competent as admissions by the defendant, it is difficult to see how it was material to show that their contents were made known to the persons to whom they were sent, or in what way the rights of the defendant could have been prejudiced at the trial by the fact that the jury were left to infer that the messages actually reached their destination."

5. *Wallace v. Dorris*, 218 Pa. St. 534, 67 Atl. 858; *Mutual L. Ins. Co. v. Hillmon*, 145 U. S. 285; *Hardesty v. Harris*, 19 Md. 317.

6. *Buffum v. York Mfg. Co.*, 175 Mass. 471, 56 N. E. 599 (letters written after controversy arose).

7. See article "PRIVILEGED COMMUNICATIONS," Vol. X, p. 357.

"We are not prepared to approve the doctrine that has been advanced that telegraphic communications are privileged from disclosure, when a court shall have decided that they are proper testimony to promote the ends of justice. They are not necessarily confidential in their character, and if they were, they would not merely, for that reason, be protected. Letters passing through the mails are protected by act of Congress from being seized and opened for the purpose of furnishing testimony. They are protected for reasons of high public policy. But no such legislative enactment, State or national, shields the communications

by the telegraph; the adoption of the principle would limit the field of inquiry after truth, in the investigation of human affairs, and would be introducing a new class of privileged communications unknown to the common law. When the legislative power can be so easily invoked, if reasons of sufficient moment can be made to appear for the purpose, it may be wiser and better for the courts to refrain from such a line of decision." *National Bank v. National Bank*, 7 W. Va. 544.

8. *Stern v. Daniel*, 47 Wash. 96, 91 Pac. 552.

9. *Connecticut.* — *Beach v. Travelers' Ins. Co.*, 73 Conn. 118, 46 Atl. 867.

*Georgia.* — *Newton v. Price*, 41 Ga. 186.

*Illinois.* — *Cheney v. Roodhouse*, 135 Ill. 257, 25 N. E. 1019.

*Massachusetts.* — *Percy v. Bibber*, 134 Mass. 404; *Snow v. Warner*, 10 Met. 132.

*Minnesota.* — *Houde v. Tolman*, 42 Minn. 522, 44 N. W. 879.

*Missouri.* — *Hammond v. Beeson*, 112 Mo. 190, 20 S. W. 474.

*New York.* — *Thomas v. Gage*, 141 N. Y. 506, 36 N. E. 385.

*North Carolina.* — *Higgins v. North Carolina R. Co.*, 52 N. C. (7 Jones' L.) 470.

*Oregon.* — *Hannan v. Greenfield*, 36 Or. 97, 58 Pac. 888.

*South Carolina.* — *Leesville Mfg.*

self-serving declaration<sup>10</sup>—it may nevertheless be competent evidence and admissible to show intention,<sup>11</sup> notice,<sup>12</sup> a demand,<sup>13</sup> good faith of the parties,<sup>14</sup> nature of possession and ownership claimed<sup>15</sup> as an inducement for the allowance of punitive damages,<sup>16</sup> or as

Co. v. Morgan Wood & Iron Wks., 75 S. C. 342, 55 S. E. 768.

A letter written by the plaintiff to the defendant, which is in effect a mere statement that the defendant is indebted to the plaintiff for work and materials furnished, and a recitation by the writer of his version of what had theretofore occurred in relation to the alleged indebtedness, is not admissible in behalf of the plaintiff. *Clarkson v. Kerber*, 84 Ill. App. 658.

In *Percy v. Bibber*, 134 Mass. 404, an action of tort for fraudulent representations in the sale of a business, it was held that letters from the plaintiff to the defendant suggesting charges of false representations and attempting to obtain a settlement were not admissible in evidence on behalf of the plaintiff.

In *Hodgkins v. Chappell*, 128 Mass. 197, where the issue was whether or not an agreement made by the plaintiff with one of the defendants acting for the defendant firm was an agreement of sale, or of consignment for sale, it was held that a letter written by the defendant in question to his co-defendant, in which, after the contract was made, he informed the co-defendant of the terms of the contract, was not admissible on behalf of the defendants. "It was simply the declaration of one of the defendants to his co-defendant, in the absence of the plaintiff, and without the plaintiff's knowledge."

10. *Clarkson v. Kerber*, 84 Ill. App. 658; *Smith v. Phipps*, 65 Conn. 302, 32 Atl. 367; *Largent v. Beard* (Tex. Civ. App.), 53 S. W. 90.

11. *Scott v. Berkshire Co. Sav. Bank*, 140 Mass. 157, 2 N. E. 925 (whether gift of savings bank account taken out in another's name was intended); *Mutual L. Ins. Co. v. Hillmon*, 145 U. S. 285.

12. *Prudential Ins. Co. v. Devoe*, 98 Md. 584, 56 Atl. 809 (notice of death of insured); *Illinois Roofing*

Co. v. Advertising Co., 142 Mich. 698, 106 N. W. 274 (notice of intention to sue).

In *Swann v. West*, 41 Miss. 104, it was held that extracts from letters of the plaintiff to the defendant showing his refusal to rescind a contract of sale, and containing a notice to the defendant that the property in question was held at the risk and expense of the defendant, were admissible on behalf of the plaintiff.

**Communication of Repudiation of Agreement** may be shown by a letter the contents of which are inadmissible as self-serving declarations. *Largent v. Beard* (Tex. Civ. App.), 53 S. W. 90.

13. *Scottish Union & N. Ins. Co. v. Stubbs*, 98 Ga. 754, 27 S. E. 180; *Learned v. Tillotson*, 97 N. Y. 1, 49 Am. Rep. 508; *Merrill v. Downs*, 41 N. H. 72; *Higgins v. North Carolina R. Co.*, 52 N. C. (7 Jones' L.) 470.

14. *Scottish Union & N. Ins. Co. v. Stubbs*, 98 Ga. 754, 27 S. E. 180.

15. *Hubbard v. Cheney*, 76 Kan. 222, 91 Pac. 793.

16. In *Morehouse v. Terrill*, 111 Ill. App. 460, the parties had entered into a contract for the exchange of lands, one of the parties agreeing to obtain a guarantee policy covering his land. A letter subsequently written by him, informing the other party that he had obtained the policy and was ready to complete the transaction, was held admissible, the court saying: "It was admissible because it was a declaration of one party to a transaction *in fieri*, to the other concerning the progress of the transactions, because it showed notice to appellant of appellee's willingness and ability to perform his part of the contract, and because it bore on the subject of punitive damages as proving appellant's knowledge of appellee's belief that it was the intention of both parties to consummate their contract and as proving appellant's willingness to let appellee continue

evidenc of any other fact which does not involve the truth of the statements in it.<sup>17</sup>

(2.) **Reply Letter.**—A letter which is written in reply to one received, but which is itself unanswered, is to be treated as though it were the first letter passing between the parties, and is inadmissible in behalf of the writer.<sup>18</sup>

(3.) **Effect of Answer.**—Where a letter which would otherwise be inadmissible in behalf of the writer, is answered by the addressee who denies part but not all of the statements made, it itself becomes admissible in connection with the answering letter.<sup>19</sup>

(4.) **Failure To Answer.**—The fact that the addressee fails to answer a letter does not make the letter admissible as containing admissions by silence.<sup>20</sup>

j. **Letters Written to Third Persons.**—A letter, though written to a third person by one of the parties to the action, which relates directly to the claim in issue,<sup>21</sup> or is relevant to some particular fact in issue,<sup>22</sup> is admissible against the writer.

k. **Letters Written to Party by Third Persons.**—Letters written

to entertain that belief, although appellant had on the day of the date of the letter conveyed the farm to Dooley.”

17. *Struthers v. Drexel*, 122 U. S. 487 (to show exercise of option).

Letter stating that an inventory was enclosed was admitted as tending to show that it was in fact so enclosed. *Scottish Union & N. Ins. Co. v. Stubbs*, 98 Ga. 754, 27 S. E. 180.

18. *Fearing v. Kimball*, 4 Allen (Mass.) 125, 81 Am. Dec. 690. And see *Louisville & N. R. Co. v. Britton*, 145 Ala. 654, 39 So. 585.

In *Houde v. Tolman*, 42 Minn. 522, 44 N. W. 879, the issue was whether a certain judgment owned by the plaintiff had been assigned by him as he alleges, to the defendant, in satisfaction of another judgment against him controlled by the defendant, or merely as collateral security therefor. The defendant offered in evidence a letter written by himself, more than a year after the agreement referred to, tending to show that he then made the same claim, which letter was ruled out by the court. It purported to be in reply to a letter of plaintiff to defendant requesting a certificate of satisfaction of the judgment against himself, which was also put in evi-

dence by the latter. It was held that he was not entitled to introduce his own subsequent declarations, verbal or written, in evidence, unless the door was first opened for such evidence by the plaintiff. The latter not having introduced any part of the correspondence, the defendant could not make his part of it material by introducing the plaintiff's letter.

19. *Beach v. Travelers' Ins. Co.*, 73 Conn. 118, 46 Atl. 867.

**Mere Formal Acknowledgment of Receipt** of such a letter does not authorize its reception in evidence. *Janin v. Cheney Bros.*, 44 App. Div. 110, 60 N. Y. Supp. 645.

20. *Com. v. Eastman*, 1 Cush. (Mass.) 189.

“There is no rule of law which requires a person to enter into correspondence with another in reference to a matter in dispute between them, or which holds that silence should be regarded as an admission against the party to whom the letter is addressed.” *Learned v. Tillotson*, 97 N. Y. 1, 12, 49 Am. Rep. 508.

21. *Ryland v. Heney*, 130 Cal. 426, 62 Pac. 616. And see *Wefel v. Stillman*, 151 Ala. 249, 44 So. 203.

22. *Gulliford v. McQuillen*, 75 Kan. 454, 89 Pac. 927; *McCall v.*

to a party to the action which were never answered or acted upon,<sup>23</sup> or which are mere hearsay declarations,<sup>24</sup> or with which the other party is not shown to have had any connection,<sup>25</sup> are inadmissible; but letters written by a third person to a party which have a bearing upon the issues are admissible.<sup>26</sup>

1. *Letters Between Third Persons.* — Letters or telegrams passing between third persons are incompetent,<sup>27</sup> unless it appears that they were authorized and approved by the party against whom they are to be used.<sup>28</sup>

m. *Letters Forming Part Only of General Correspondence.*

(1.) *In General.* — All the letters constituting the correspondence of the parties relating to the matter in question are admissible<sup>29</sup> and it has been held that individual letters constituting a part of the general correspondence between the parties as to a particular

Moschowitz, 10 N. Y. Civ. Proc. 107; Beecher v. Pettee, 40 Mich. 181.

23. Lewis v. Van Campen, 3 Thomp. & C. (N. Y.) 799; Com. v. Eastman, 1 Cush. (Mass.) 189. And see Redden v. Spruance, 4 Har. (Del.) 217.

In Benford v. Sanner, 40 Pa. St. 9, 80 Am. Dec. 545, it was held that a telegram from the wife of one of the defendants to her husband was not admissible in evidence against the defendants, since it was neither written nor sent by either of them, and the declaration of the wife could not affect even her husband.

24. Rothchild v. Schwartz, 28 Misc. 521, 59 N. Y. Supp. 527.

25. Gambriel v. Schooley, 95 Md. 260, 52 Atl. 500, 63 L. R. A. 427.

26. Sweetzer v. Mead, 5 Mich. 107 (letter from mortgagor to mortgagee, who is plaintiff in the action, which tends to show that mortgage was executed bona fide).

In Kocher v. Palmetier, 112 Iowa 84, 83 N. W. 816, a controversy regarding the ownership of certain property, plaintiff claimed to have borrowed the money from friends in another state with which to purchase it, and in support of that claim offered in evidence certain letters received from the friends in question showing that they had sent the money as requested. It was held that the letters were properly admitted.

27. Hall v. Grace, 179 Mass. 400, 60 N. E. 932 (*res inter alios*).

28. Farnsworth v. Nevada Co., 102 Fed. 578, 42 C. C. A. 509.

29. Georgia. — Moore v. Hawks, 56 Ga. 557.

Indiana. — Stringer v. Breen, 7 Ind. App. 557, 34 N. E. 1015.

Iowa. — Brayley v. Ross, 33 Iowa 505.

Michigan. — Turner v. Phoenix Ins. Co., 55 Mich. 236, 21 N. W. 326; Gage v. Meyers, 59 Mich. 300, 26 N. W. 522; Pinkham v. Cockell, 77 Mich. 265, 43 N. W. 921.

Minnesota. — Sanborn v. Nockin, 20 Minn. 178.

Nebraska. — Gosnell v. Webster, 70 Neb. 705, 97 N. W. 1060.

New York. — Townsend v. Felthousen, 90 Hun 89, 35 N. Y. Supp. 538, *affirmed*, 156 N. Y. 618, 51 N. E. 279; Darling v. Klock, 33 App. Div. 270, 53 N. Y. Supp. 593, *affirmed*, 165 N. Y. 623, 59 N. E. 1121; Buedingen Mfg. Co. v. Royal Trust Co., 90 App. Div. 267, 85 N. Y. Supp. 621, *affirmed*, 181 N. Y. 563, 74 N. E. 1115; Raymond v. Howland, 17 Wend. 389; Harris v. Pryor, 18 N. Y. Supp. 128, 44 N. Y. St. 495; Lindheim v. Duys, 11 Misc. 16, 31 N. Y. Supp. 870; Lewis v. Newcombe, 1 App. Div. 59, 37 N. Y. Supp. 8.

In Moore v. Hawks, 56 Ga. 557, where the defendant for the purpose of showing that the plaintiff was not the owner of the note sued on, but that it still belonged to the original payees, introduced letters written by such payees to their agent to whom the note had been sent for collection after the time of the alleged transfer, in which language was used tending to estab-

matter are inadmissible, unless the entire series is offered,<sup>30</sup> though the better practice is to allow a party to introduce such letters as he desires and to allow the other party to introduce the residue of the correspondence in connection with his cross-examination of the witness.<sup>31</sup>

(2.) **Letters Inducing Answering Letters.**—Letters which result in the receipt of answering letters which are themselves admissible for any purpose are competent in so far as they tend to qualify, explain or aid in the construction of the other letters,<sup>32</sup> but they need not necessarily be produced if the answering letter is fairly self-explanatory,<sup>33</sup> and does not contain ambiguous matters, though

lish the position contended for, it was held error to exclude two other letters, a portion of the same correspondence offered by the plaintiff for the purpose of rebutting or explaining those already in evidence.

30. *Norris v. Hartford F. Ins. Co.*, 57 S. C. 358, 35 S. E. 572; *Heatherington v. Richter*, 31 W. Va. 858, 8 S. E. 609; *Houde v. Tolman*, 42 Minn. 522, 44 N. W. 879. But compare the cases cited in note 33.

31. *North Berwick Co. v. New England, F. & M. Ins. Co.*, 52 Me. 336.

Where letters constituting part of a contract made between the parties to an action are introduced in evidence on the examination in chief of one of the plaintiffs, it is error to reject the answers to such letters when offered by the defendant on the cross-examination of such witness. The proper order of proof requires the admission of the answers when so offered and the defendant should not be compelled to introduce them at a time when under the rules he must make the witness his own, and thereby be precluded from questioning any facts contained in the testimony if untrue. *Gage v. Meyers*, 59 Mich. 300, 26 N. W. 522.

In *Thayer v. Hoffman*, 53 Kan. 723, 37 Pac. 125, it is held that where all negotiations between the parties are included in letters and telegrams, and one party offers a part of the correspondence after having identified the same by the other party as a witness, it is proper for the court to permit the witness on cross-examination to identify the residue of the correspondence relat-

ing to the same transaction and introduce the same in evidence in connection with the cross-examination.

**Admissions in Letter.** entire correspondence may be received. See article "ADMISSIONS," Vol. I, p. 609.

32. *Buffum v. York Mfg. Co.*, 175 Mass. 471, 56 N. E. 599; *Fearing v. Kimball*, 4 Allen (Mass.) 125, 81 Am. Dec. 690; *Trischet v. Hamilton Mut. Ins. Co.*, 14 Gray (Mass.) 456; *Graham v. McReynolds*, 90 Tenn. 673, 18 S. W. 272; *Overman v. Clemmons*, 19 N. C. (2 Dev. & B. L. 185; *Lester v. Sutton*, 7 Mich. 329.

"When a document includes a reference to another existing one and is unintelligible without such reference, the one so referred to becomes a part of the one making such reference," and is admissible in connection with it. *Sears v. Howe*, 80 Conn. 414, 68 Atl. 983.

33. *England.*—*Lord Barrymore v. Taylor*, 1 Esp. 326; *DeMedina v. Owen*, 3 Car. & K. 72.

*Georgia.*—*Newton v. Price*, 41 Ga. 186.

*Illinois.*—*Barnes v. Northern Co.*, 169 Ill. 112, 48 N. E. 31.

*Iowa.*—*Brayley v. Ross*, 33 Iowa 505.

*Maine.*—*North Berwick Co., v. New England F. & M. Co.*, 52 Me. 336.

*Massachusetts.*—*Crary v. Pol-lard*, 14 Allen 284; *Stone v. Sanborn*, 104 Mass. 319, 6 Am. Rep. 238.

*Nebraska.*—*New Hampshire Tr. Co. v. Kormeyer P. & H. Co.*, 57 Neb. 784, 78 N. W. 303.

*New York.*—*Dainese v. Allen*, 45 How. Pr. 430.

*Texas.*—*Dix v. Jackman* (Tex. Civ. App.), 37 S. W. 344.

a failure to produce them may affect the weight to be given the answer.<sup>34</sup>

n. *Lack of Conclusiveness.* — The fact that a letter or telegram does not afford complete evidence of the fact which it is introduced to prove does not render it inadmissible.<sup>35</sup>

o. *Misdirected Letter.* — A letter intended for a certain person, which was misdirected and received by another person, is nevertheless admissible in evidence against the person for whom it was intended if it later comes into his hands.<sup>36</sup>

p. *Lack of Addressee.* — The fact that a letter is not expressly directed to any particular person, does not necessarily render it inadmissible where it is produced by a party under natural circumstances and contains intrinsic evidence that it refers to matter in issue.<sup>37</sup> But where there is nothing to show that it ever reached the person for whom it was evidently intended, it is inadmissible

*Vermont.* — *Hayward R. Co. v. Dunklee*, 30 Vt. 29.

*Contra*, *Watson v. Moore*, 1 Car. & K. (Eng.) 626. And see *Sears v. Howe*, 80 Conn. 414, 68 Atl. 983.

*Brayley v. Ross*, 33 Iowa 505. The court in speaking of the objection, said: "This may be the rule, if the first letter is necessary to the understanding of the one offered, or will aid in the better understanding of it; or where it appears that the answer may be misunderstood without the letter to which it is a reply being read. But if the letter offered in evidence contains distinct and independent propositions, or statements of facts, which cannot be misunderstood if read alone, and are in no way dependent upon the first letter, we are of the opinion that it is admissible without the condition suggested by counsel. The letter in question is of this character, and the court correctly ruled in admitting it against defendant's objection."

Where a reply letter has been received it is not admissible merely because of that fact, if not otherwise relevant or necessary for a proper understanding of the first letter. *Hale Bros. v. Milliken*, 5 Cal. App. 344, 90 Pac. 365 (applying California Code Civ. Proc. § 1854, which authorizes admission of detached writings where necessary to explain other writings).

34. *New Hampshire Tr. Co. v.*

*Korsmeyer P. & H. Co.*, 57 Neb. 784, 78 N. W. 303.

35. A telegram merely agreeing to transport freight is admissible as evidence tending to show a contract to ship to a specific point, as the surrounding circumstances may show that this was the intention of the parties. *Taylor v. Steamboat Robert Campbell*, 20 Mo. 254.

*Instrument Insufficient by Itself*, in general, see *supra*, I, 22.

36. *Ryland v. Heney*, 130 Cal. 426, 62 Pac. 616; *Wilkins v. Burton*, 5 Vt. 76.

The fact that a telegram sought to be used in evidence was addressed to a third person not a party to the suit is immaterial if it is shown that it came into the possession of the party sought to be charged thereby, and that he recognized it by sending a reply. *Eldridge v. Hargreaves*, 30 Neb. 638, 46 N. W. 923.

37. *Armistead v. Brooke*, 18 Ark. 521; *Bogliolo v. Scott*, 5 Mo. 341.

In *Armistead v. Brooke*, 18 Ark. 521, where the plaintiff read in evidence two letters proved to have been in the handwriting of the defendant, although addressed to no one and containing matters in which there was a reasonable ground to infer that they related to the subject matter of litigation, it was held that since the letters were produced by the plaintiff and no suspicion was thrown upon his possession of them, their introduction in evidence was proper.



against them,<sup>38</sup> though it may be used as an admission by the writer.<sup>39</sup>

q. *Errors and Mistakes.* — Slight errors or discrepancies in letters will not render them inadmissible as there is always a probability that evidence will be given explaining the matters.<sup>40</sup>

r. *Best and Secondary Evidence.* — (1.) *In General.* — The general rule requiring the production of a written instrument to prove the contents thereof applies in respect of a letter or telegram, and accordingly before secondary evidence thereof can be received the non-production of the original document should be accounted for.<sup>41</sup> But where it does not appear that a message given to a telegraph operator for transmission was in writing, or was reduced to writing when received, it cannot be held that the admission of parol evidence of the contents of the message was improper.<sup>42</sup>

*Non-Production or Giving Notice* is excused, as in other cases, where the letter or telegram is the basis of the action.<sup>43</sup>

*As an Admission.* — Where the oral admission of the writer as to

38. *Dance v. McBride*, 43 Iowa 624.

39. See *supra*, L, d.

40. *Knowles v. Williams*, 62 Ga. 316 (letter admissible though not accurately describing notes in issue); *Homeyer v. New Jersey S. & W. Co.*, 20 N. Y. Supp. 814 (discrepancy in dates); *Tinsley v. Dowell* (Tex. Civ. App.) 24 S. W. 928 (parol evidence admissible to correct description); *Shaw v. Davis*, 7 Mich. 318.

41. *Alabama.* — *American Union Tel. Co. v. Daugherty*, 89 Ala. 191, 7 So. 660; *McCormick v. Joseph*, 83 Ala. 401, 3 So. 796; *Western Union Tel. Co. v. Way*, 83 Ala. 542, 4 So. 844.

*Illinois.* — *Chicago & I. R. Co. v. Russell*, 91 Ill. 298, 33 Am. Rep. 54; *Cairo & St. L. R. Co. v. Mahoney*, 82 Ill. 73, 25 Am. Rep. 299.

*Iowa.* — *Riordan v. Guggerty*, 74 Iowa 688, 39 N. W. 107.

*Kansas.* — *Barons v. Brown*, 25 Kan. 410.

*Maryland.* — *Smith v. Easton*, 54 Md. 138, 39 Am. St. Rep. 355.

*Michigan.* — *People v. Hammond*, 132 Mich. 422, 93 N. W. 1084.

*Minnesota.* — *Magie v. Herman*, 50 Minn. 424, 52 N. W. 909, 36 Am. St. Rep. 660; *Nichols v. Howe*, 43 Minn. 181, 45 N. W. 14.

*Mississippi.* — *Williams v. Brickell*, 37 Miss. 682, 75 Am. Dec. 88.

*Missouri.* — *Lindauer v. Meyberg*, 27 Mo. App. 181.

*North Carolina.* — *Blair v. Brown*, 116 N. C. 631, 21 S. E. 434.

*South Carolina.* — *Mims v. Western Union Tel. Co.*, 64 S. E. 236.

*South Dakota.* — *Distad v. Shanklin*, 15 S. D. 507, 90 N. W. 151.

*Vermont.* — *State v. Hopkins*, 50 Vt. 316.

*Wisconsin.* — *Saveland v. Green*, 40 Wis. 431.

And see article "BEST AND SECONDARY EVIDENCE," Vol. II.

*Proof of Rule* that after six months all telegraph messages are destroyed by the company, and that this period has elapsed, authorizes the introduction of secondary evidence. *Oregon S. S. Co. v. Otis*, 14 Abb. Cas. (N. Y.) 388; *Western Union Tel. Co. v. Collins*, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515.

42. *Terre Haute & I. R. Co. v. Stockwell*, 118 Ind. 98, 20 N. E. 650.

43. Where a letter is in the possession of the other party, secondary evidence of its contents can only be given after reasonable notice has been given such party to produce it. *Rheinstein D. G. Co. v. McDougall*, 149 N. C. 252, 62 S. E. 1085; *Reliance Lumb. Co. v. Western Union Tel. Co.*, 58 Tex. 394, 44 Am. Rep. 620, *disapproving* *Western Union Tel. Co. v. Hopkins*, 49 Ind. 223.

the contents of a letter or telegram is sought to be established it is unnecessary to produce the instrument itself.<sup>44</sup>

(2.) Which Is Original Telegram. — (A.) IN GENERAL. — In the case of telegrams, the original, where the person to whom it is sent takes the risk of its transmission, or is the employer of the telegraph company, is the message delivered to the operator for transmission; but where the person sending the message takes the initiative, so that the telegraph company is to be regarded as his agent, the original is the transcribed message actually delivered.<sup>45</sup>

(B.) AS BETWEEN SENDER AND TELEGRAPH COMPANY. — Where the controversy is one between a telegraph company and a customer, the message sent to the office to be transmitted in reply to one received is the original, and not the message received at the place to which it is transmitted. The latter must be considered as a copy, and carries with it none of the qualities of primary evidence.<sup>46</sup>

44. *Purinton v. Purinton*, 101 Me. 250, 63 Atl. 925.

The admission of the alleged writer of a telegram that he did send it, and of its contents, is competent to establish the same without proof of the loss or destruction of the original. *Williams v. Brickell*, 37 Miss. 682, 75 Am. Dec. 88.

45. *Georgia*. — *Western Union Tel. Co. v. Shotter*, 71 Ga. 760.

*Illinois*. — *Morgan v. People*, 59 Ill. 58; *Annheuser-Busch Brew. Assn. v. Huttmacher*, 127 Ill. 652, 21 N. E. 626, 4 L. R. A. 575; *Mattison v. Noyes*, 25 Ill. 591.

*Massachusetts*. — *Nickerson v. Spindell*, 164 Mass. 25, 41 N. E. 105.

*Minnesota*. — *Wilson v. Minneapolis & N. W. R. Co.*, 31 Minn. 481, 18 N. W. 291.

*New York*. — *Dunning v. Roberts*, 35 Barb. 463.

*South Dakota*. — *Western Twine Co. v. Wright*, 11 S. D. 521, 78 N. W. 942. And see article "COPIES," Vol. III.

*Vermont*. — *Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127.

*Wisconsin*. — *Saveland v. Green*, 40 Wis. 431.

Where one for his own purposes commences a correspondence with another by telegraph, he makes the telegraph company his agent for the transmission and delivery of his communication, and the transcribed message actually delivered is primary evidence. *Wilson v. Minnea-*

*polis, etc. R. Co.*, 31 Minn. 481, 18 N. W. 291; *Magie v. Herman*, 50 Minn. 424, 52 N. W. 909, 36 Am. St. Rep. 660.

**Reply Telegrams.** — A telegraphic message to be transmitted in reply to one received, is the original, and not the message received at the place to which it is transmitted. The latter must be considered as a copy and carries with it none of the qualities of primary evidence. Ordinarily the usual course is to show the delivery of the original message of the party, sought to be charged, at the office from which it is to be telegraphed, and then show that it was transmitted and delivered at the place of its destination. But even where the original is produced its authenticity must be established. *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355.

46. *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355.

In an action against a telegraph company for damages for default in the transmission and delivery of a telegram, the original telegram delivered to the operator for transmission is the primary evidence and should be produced or its absence properly accounted for before secondary evidence can be admitted. *Western Union Tel. Co. v. Hopkins*, 49 Ind. 223.

To the effect that in an action by the sender of a message the original message delivered by him to the

(C.) CONTRACTS EFFECTED BY MEANS OF TELEGRAMS. — There is a class of cases in which contracts have been made by telegrams, where for the purpose of showing what the contract is, the message which was delivered to the person addressed and the answer of acceptance as delivered by him for transmission have been considered the originals.<sup>47</sup>

M. POSTMARKS. — In civil cases the postmark on a letter is admissible and is sufficient *prima facie* evidence of the time and place of mailing.<sup>48</sup>

company for transmission is the original and best evidence of its contents, see *Western Union Tel. Co. v. Lindley*, 89 Ga. 484, 15 S. E. 636, *holding*, however, that the introduction by the plaintiff of secondary evidence of the contents of the message without accounting for the non-production of the original was not error in that particular case because the defendant failed to object; and that it made no difference that the defendant was not present nor represented by counsel at trial, the case being in default.

In an action by the addressee of a telegraph message for the statutory penalty for failure to deliver with due diligence, the message delivered to the plaintiff is admissible as original evidence on his behalf, and the original message delivered to the company for transmission need not be called for or produced. *Conyers v. Postal Tel. Cable Co.*, 92 Ga. 619, 19 S. E. 253, 44 Am. St. Rep. 100. See also *Western Union Tel. Co. v. Bates*, 93 Ga. 352, 20 S. E. 639, and *Western Union Tel. Co. v. Blance*, 94 Ga. 431, 19 S. E. 255.

In *Western Union Tel. Co. v. Hines*, 94 Ga. 430, 20 S. E. 349, an action by the addressee of a message to recover special damages, the case being one in which the contents of the message sent were material, it was held that the loss by the plaintiff of the message received was not sufficient foundation for the introduction of evidence of its contents, without accounting, by notice to produce or otherwise, for the non-production of the telegram written and delivered to the company by the sender for transmission.

<sup>47</sup>. *Dunning v. Roberts*, 35 Barb. (N. Y.) 463; *Trevor v. Wood*, 36

N. Y. 307, 93 Am. Dec. 511; *Ayer v. Western Union Tel. Co.*, 79 Me. 493, 1 Am. St. Rep. 353; *Saveland v. Green*, 40 Wis. 431; *Durkee v. Vermont Cent. Co.*, 29 Vt. 127, in which the court said: "In regard to the particular end of the line where inquiry is first to be made, it depends upon which party is responsible for the transmission across the line, or in other words, whose agent the telegraph company is. The first communication in the transaction if it is all negotiated across the wires will only be effective in the form in which it reaches its destination. In such case inquiry should be made for the dispatch delivered. In default of that, its contents may be shown by the next best proof."

<sup>48</sup>. *Burgess v. Clark*, 3 Ind. 250.

The postmark on the envelope in which a deposition was received may be resorted to to furnish evidence that the deposition was taken at that place. *McKinney v. Wilson*, 133 Mass. 131.

There is no presumption that a drop letter was deposited in the post-office on the day of the date of its postmark. *Shelburne Falls Nat. Bank v. Townsley*, 102 Mass. 177, 3 Am. Rep. 445.

The postoffice stamp or postmark upon a letter is *prima facie* evidence that it was mailed, even though there is testimony that other postmasters have on occasions, in aid of justice, furnished numerous empty envelopes bearing stamps of their postoffices which have never been through the mail; such evidence does not show a deviation from the regular course of business sufficient to overcome the presumption. *United States v. Noelke*, 1 Fed. 426.

N. PRIVATE MEMORANDA. — a. *In General*. — The private memoranda of a person are inadmissible as independent evidence of the facts recorded,<sup>49</sup> where their execution has not been authorized by the party against whom they are to be used, nor their accuracy acknowledged.<sup>50</sup>

b. *Memoranda Used in Refreshing Memory*. — (1.) *In Behalf of Offering Party*. — The memoranda used by a witness to refresh his memory<sup>51</sup> are inadmissible as independent evidence<sup>52</sup> of the facts

49. *California*. — *In re Flint's Estate*, 100 Cal. 391, 34 Pac. 863 (nurse's memoranda as to what occurred at testator's sick bed in relation to the execution of his will); *People v. Elyea*, 14 Cal. 144.

*New York*. — *Crouch v. Parker*, 56 N. Y. 597; *Judd v. Cushing*, 50 Hun 181, 2 N. Y. Supp. 836.

*Pennsylvania*. — *Franklin F. Ins. Co. v. Updegraff*, 43 Pa. St. 350.

*South Dakota*. — See *Fallon v. Rapid City*, 17 S. D. 570, 97 N. W. 1009.

*Vermont*. — *Pingree v. Johnson*, 69 Vt. 225, 39 Atl. 202; *Godding v. Orcutt*, 44 Vt. 54.

Under a statute authorizing the admission of any writing to explain a detached writing, private memoranda are admissible. *Sturgis v. Baker*, 39 Or. 541, 65 Pac. 810.

*Ex Parte Affidavit* as proof of execution of an agreement as to time of bringing suit and waiver of service is insufficient under Alabama Code 1896, § 1792, providing that testimony must be given in open court under oath of witness. *Durr v. Hanover Nat. Bank*, 148 Ala. 363, 42 So. 599.

50. *Germania F. Ins. Co. v. Stone*, 21 Fla. 555; *Henderson v. Miller*, 36 Ill. App. 232; *Watson v. Yates*, 10 Mart. O. S. (La.) 687.

*Memoranda Compared by Parties* and agreed to be correct, are admissible. *Meyer v. Reichart*, 112 Mass. 108.

51. *Instruments That May Be Used as Memoranda*, see article "REFRESHING MEMORY," Vol. XI.

*Need Not Be Admissible as Independent Evidence* to be used to refresh the memory of the witness. *Webster v. Clark*, 30 N. H. 245; *White v. Tucker*, 9 Iowa 100.

52. *Alabama*. — *Acklen's Exr. v.*

*Hickman*, 63 Ala. 494, 35 Am. Rep. 54. See *Atlanta & B. Air L. R. v. Brown*, 48 So. 73.

*Arkansas*. — *Moore v. Lumber Co.*, 82 Ark. 485, 102 S. W. 385.

*California*. — *Baum v. Reay*, 96 Cal. 462, 29 Pac. 117, 31 Pac. 561.

*Connecticut*. — *Erie Preserving Co. v. Miller*, 52 Conn. 444, 52 Am. Rep. 607; *Curtis v. Bradley*, 65 Conn. 99, 31 Atl. 591, 48 Am. St. Rep. 177, 28 L. R. A. 143; *Palmer v. Hartford Dredg. Co.*, 73 Conn. 182, 47 Atl. 125.

*District of Columbia*. — *Laas v. Scott*, 26 App. Cas. 354.

*Illinois*. — *Kent v. Mason*, 1 Ill. App. 466; *Cairns v. Hunt*, 78 Ill. App. 420; *Illinois Cent. R. Co. v. Seitz*, 105 Ill. App. 89.

*Indiana*. — *Elmore v. Overton*, 104 Ind. 548, 4 N. E. 197, 54 Am. Rep. 343.

*Kentucky*. — *Wilson v. Com.*, 21 Ky. L. Rep. 1333, 54 S. W. 946; *Western Assur. Co. v. Ray*, 105 Ky. 523, 49 S. W. 326.

*Massachusetts*. — *Holden v. Prudential Ins. Co.*, 191 Mass. 153, 77 N. E. 309.

*Montana*. — *Kipp v. Silverman*, 25 Mont. 296, 64 Pac. 884.

*New Hampshire*. — *Watts v. Sawyer*, 55 N. H. 38.

*New Jersey*. — *Diamant v. Colloty*, 66 N. J. L. 295, 49 Atl. 445, 808.

*New York*. — *Driggs v. Smith*, 4 Jones & S. (36 N. Y. Super.) 283; *Howard v. McDonough*, 77 N. Y. 592; *Butler v. Benson*, 1 Barb. 526.

*Oregon*. — *Friendly v. Lee*, 20 Or. 202, 25 Pac. 396; *Susewind v. Lever*, 37 Or. 365, 61 Pac. 644.

*South Carolina*. — *Hicks v. Southern R. Co.*, 63 S. C. 559, 41 S. E. 753.

*Texas*. — *Tobler v. Austin* (Tex. Civ. App.), 71 S. W. 467.

recited in them, or in corroboration of the testimony of the witness.<sup>53</sup>

(2.) *In Behalf of Opponent.*—But when the instrument has been used by the witness and he testifies after perusing it, the opponent of the party using it may cross-examine the witness in regard to it, and it may go to the jury at least for the purpose of showing that it could not properly refresh the memory of the witness.<sup>54</sup>

c. *As Evidence of Past Recollection.*—(1.) *In General.*—A private memorandum is admissible as evidence of the recollection a witness had at the time when the memorandum was made and when the events recorded were fresh in his mind, in connection with the testimony of the witness, if it is shown that at the time it was made he knew its contents and knew them to be true.<sup>55</sup>

*Virginia.*—*Fant v. Miller*, 17 Gratt. 187, 224.

*West Virginia.*—*State v. Legg*, 59 W. Va. 315, 53 S. E. 545.

*Compare* *Skeels v. Starrett*, 57 Mich. 350, 24 N. W. 98; *Bates v. Preble*, 151 U. S. 149.

*Paper Itself Admissible* is not rendered inadmissible by use to refresh memory of a witness. *Raynor v. Norton*, 31 Mich. 210. And see *Black v. Pate*, 130 Ala. 514, 30 So. 434.

53. *Field v. Thompson*, 119 Mass. 151; *Jones v. State*, 147 Ala. 701, 41 So. 299. But see *Selover v. Rexford*, 52 Pa. Ct. 308; *Alabama & V. R. Co. v. Fried*, 81 Miss. 314, 33 So. 74; *Logan v. Freerks*, 14 N. D. 127, 103 N. W. 426; *Pingree v. Johnson*, 69 Vt. 225, 39 Atl. 202.

54. *Acklen's Exr. v. Hickman*, 63 Ala. 494, 35 Am. Rep. 54; *Smith v. Jackson*, 113 Mich. 511, 71 N. W. 843; *Logan v. Freerks*, 14 N. D. 127, 103 N. W. 426.

55. *United States.*—*Dunlap v. Hopkins*, 95 Fed. 231, 37 C. C. A. 52.

*Alabama.*—*Alabama G. S. R. Co. v. Clark*, 145 Ala. 459, 39 So. 816; *Bondurant v. Bank*, 7 Ala. 830; *Mims v. Sturdevant*, 36 Ala. 630; *Acklen's Exr. v. Hickman*, 63 Ala. 494, 35 Am. Rep. 54; *Jaques v. Horton*, 76 Ala. 238; *Anderson v. English*, 121 Ala. 272, 25 So. 748.

*Arkansas.*—*St. Louis S. W. R. Co. v. White S. M. Co.*, 78 Ark. 1, 93 S. W. 58; *Woodruff v. State*, 61 Ark. 157, 32 S. W. 102; *Phoenix Ins. Co. v. Public Parks Co.*, 63 Ark. 187, 37 S. W. 959.

*California.*—*Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444; *People v. Ammerman*, 118 Cal. 23, 50 Pac. 15.

*Connecticut.*—*New Haven Co. Bank v. Mitchell*, 15 Conn. 206, 224; *Curtis v. Bradley*, 65 Conn. 99, 31 Atl. 591, 48 Am. St. Rep. 177, 28 L. R. A. 143.

*Delaware.*—*Redden v. Spruance*, 4 Har. 265.

*Florida.*—*Spann v. Baltzell*, 1 Fla. 338.

*Georgia.*—*Akins v. Georgia R. & Bkg. Co.*, 111 Ga. 815, 35 S. E. 671.

*Illinois.*—*Wolcott v. Heath*, 78 Ill. 433.

*Indiana.*—*Johnson v. Culver*, 116 Ind. 278, 19 N. E. 129; *Bass v. State*, 136 Ind. 165, 36 N. E. 124; *Higgins v. State*, 157 Ind. 57, 60 N. E. 685.

*Iowa.*—*O'Brien v. Stambach*, 101 Iowa 40, 69 N. W. 1133, 63 Am. St. Rep. 368; *State v. Smith*, 99 Iowa 26, 68 N. W. 428, 61 Am. St. Rep. 219; *State v. McGruder*, 125 Iowa 741, 101 N. W. 646.

*Kansas.*—*Solomon R. Co. v. Jones*, 34 Kan. 443, 8 Pac. 730; *Wright v. Wright*, 58 Kan. 525, 50 Pac. 444; *Garden City v. Heller*, 61 Kan. 764, 60 Pac. 1060.

*Louisiana.*—*Bullard v. Wilson*, 5 Mart. (N. S.) 196.

*Maryland.*—*Lewis v. Kramer*, 3 Md. 265, 287; *Martin v. Good*, 14 Md. 398, 74 Am. Dec. 545; *Owens v. State*, 67 Md. 307, 10 Atl. 210.

*Massachusetts.*—*Briggs v. Rafferty*, 14 Gray 525; *Shove v. Wiley*, 18 Pick. 558.

*Michigan.*—*Crane Lumb. Co. v.*

## (2.) Absence of Recollection. — It must appear, however, that the

Bellows, 116 Mich. 304, 74 N. W. 481; Mason v. Phelps, 48 Mich. 126, 11 N. W. 413, 837; Raynor v. Norton, 31 Mich. 210; Lucker v. Liske, 111 Mich. 683, 70 N. W. 421.

*Mississippi*. — Alabama & V. R. Co. v. Sol Fried, 81 Miss. 314, 33 So. 74; New Orleans, etc. R. Co. v. Echols, 54 Miss. 264.

*Missouri*. — Mathias v. O'Neill, 94 Mo. 520, 6 S. W. 253.

*Nebraska*. — Johnson v. Spaulding, 95 N. W. 808; Davis v. State, 51 Neb. 301, 70 N. W. 984.

*Nevada*. — McCausland v. Ralston, 12 Nev. 195, 217, 28 Am. Rep. 781.

*New Hampshire*. — Tuttle v. Robinson, 33 N. H. 104; Kelsea v. Fletcher, 48 N. H. 282; Haven v. Wendell, 11 N. H. 112; State v. Shinborn, 46 N. H. 497.

*New York*. — Mayor v. Second Ave. R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839; Kennedy v. Oswego & S. R. Co., 67 Barb. 169; Russell v. Hudson River Co., 17 N. Y. 134; Guy v. Mead, 22 N. Y. 465; National Ulster Co. Bank v. Mad-den, 114 N. Y. 280, 21 N. E. 408, 11 Am. St. Rep. 633; Halsey v. Sinsebaugh, 15 N. Y. 485; Shear v. Van Dyke, 10 Hun 528; Merrell v. Ithaca & O. R. Co., 16 Wend. 586, 30 Am. Dec. 130; Bank of Monroe v. Culver, 2 Hill 531.

*North Carolina*. — Southern L. & T. Co. v. Benbow, 131 N. C. 413, 42 S. E. 896 (but see contrary holding in same case on rehearing, 135 N. C. 303, 47 S. E. 435); Bank v. Fidelity & Dep. Co., 128 N. C. 366, 38 S. E. 908, 83 Am. St. Rep. 682; Bryan v. Moring, 94 N. C. 687.

*Ohio*. — Moots v. State, 21 Ohio St. 653.

*Oklahoma*. — First Nat. Bank v. Yeoman, 14 Okla. 626, 78 Pac. 388.

*Oregon*. — Susewind v. Lever, 37 Or. 365, 61 Pac. 644.

*Pennsylvania*. — Clark v. Union Tract Co., 210 Pa. St. 636, 60 Atl. 302. See First Nat. Bank v. First Nat. Bank, 114 Pa. St. 1, 6 Atl. 366; Long v. Regen, 119 Pa. St. 403, 13 Atl. 442.

*South Carolina*. — Bank v. Zorn, 14 S. C. 444, 37 Am. Rep. 733; State

v. Rawle, 2 Nott & McC. 331; Pearson v. Wightman, 1 Mills Const. 336, 12 Am. Dec. 636.

*South Dakota*. — Mt. Terry M. Co. v. White, 10 S. D. 620, 74 N. W. 1060.

*Tennessee*. — Rogers v. Burton, 7 Tenn. 108.

*Texas*. — Underwood v. Parrott, 2 Tex. 168; International & G. N. R. Co. v. Startz, 42 Tex. Civ. App. 85, 94 S. W. 207; Davie v. Terrill, 63 Tex. 105.

*Vermont*. — Lapham v. Kelly, 35 Vt. 195; Davis v. Field, 56 Vt. 426; Williams v. Wager, 64 Vt. 326, 24 Atl. 765.

*Washington*. — State v. Douette, 31 Wash. 6, 71 Pac. 556.

*Wisconsin*. — Bourda v. Jones, 110 Wis. 52, 85 N. W. 671; Manning v. School Dist., 124 Wis. 34, 102 N. W. 356.

Compare the following cases:

*United States*. — Grunberg v. United States, 145 Fed. 81, 76 C. C. A. 51; Bates v. Preble, 151 U. S. 149.

*Alabama*. — Baird Lumb. Co. v. Devlin, 124 Ala. 245, 27 So. 425.

*California*. — People v. Elyea, 14 Cal. 144.

*Indiana*. — Southern R. Co. v. State, 165 Ind. 613, 75 N. E. 272.

*Kentucky*. — Calvert v. Fitzgerald, Litt. Sel. Cas. 388.

*Minnesota*. — Hoffman v. R. Co., 40 Minn. 60, 41 N. W. 301.

*Nebraska*. — Lipscomb v. Lyon, 19 Neb. 511, 27 N. W. 731.

*North Carolina*. — Trust Co. v. Benbow, 135 N. C. 303, 47 S. E. 435 (absence of chance to cross-examine considered very important); Kello v. Maget, 18 N. C. (1 Dev. & B. L.) 414.

*West Virginia*. — Vinal v. Gilman, 21 W. Va. 301, 309, 45 Am. Rep. 562.

"A memorandum made contemporaneous with the facts to which it relates is admissible as auxiliary to the oral testimony where it appears that the witness is unable, with the aid of the memorandum, to speak from memory of the facts." Flood v. Mitchell, 68 N. Y. 507.

witness has no memory of the facts before such a memorandum will be admitted.<sup>56</sup>

(3.) **Time of Making.** — The record or memorandum must have been made at or about the time the event recorded occurred,<sup>57</sup> when the events recorded were fairly fresh in the mind of the witness.<sup>58</sup>

(4.) **Person Making.** — The memorandum need not have been

**In Massachusetts** the admissibility of instruments as to which the witness has a past recollection only is apparently limited to instruments in which entries were made in the regular course of business. *Costello v. Crowell*, 133 Mass. 352; *Com. v. Clancy*, 154 Mass. 128, 27 N. E. 1001; *Holden v. Prudential Ins. Co.*, 191 Mass. 153, 77 N. E. 309; *Dugan v. Mahoney*, 11 Allen 572. But see *Cobb v. Boston*, 109 Mass. 438.

**56. United States.** — *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99.

**Alabama.** — *Nashville, etc. R. Co. v. Parker*, 123 Ala. 683, 27 So. 323; *Jaques v. Horton*, 76 Ala. 238.

**Arkansas.** — *Phoenix Ins. Co. v. Public Parks Co.*, 63 Ark. 187, 37 S. W. 959.

**Kansas.** — *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318.

**Louisiana.** — *State v. Menard*, 110 La. 1098, 35 So. 360.

**Michigan.** — *Weaver v. Bromley*, 65 Mich. 212, 31 N. W. 839.

**Minnesota.** — *Stahl v. Duluth*, 71 Minn. 341, 74 N. W. 143 (but compare *Chute v. State*, 19 Minn. 271); *Howe v. Cochran*, 47 Minn. 403, 50 N. W. 368; *National Bank of Com. v. Meader*, 40 Minn. 325, 41 N. W. 1043.

**New Hampshire.** — *Kelsea v. Fletcher*, 48 N. H. 282; *Watts v. Sawyer*, 55 N. H. 38.

**New York.** — *Kennedy v. Oswego & S. R. Co.*, 67 Barb. 169; *Collins v. Rockwood*, 64 How. Pr. 57; *Cunningham v. Massena Spr. R. Co.* 63 Hun 439, 18 N. Y. Supp. 600; *Cunard v. Manhattan R. Co.*, 1 Misc. 151, 20 N. Y. Supp. 724; *Voisin v. Commercial Mut. Ins. Co.*, 67 Hun 365, 22 N. Y. Supp. 348; *Rosenberg v. Klein*, 43 Misc. 652, 88 N. Y. Supp. 134; *Cullinan v. Moncrief*, 90 App. Div. 538, 85 N. Y. Supp. 745; *National Ulster Co. Bank v. Madden*, 114 N. Y. 280, 21 N. E. 408,

11 Am. St. Rep. 633; *People v. McLaughlin*, 150 N. Y. 365, 44 N. E. 1017; *Gans v. Wormser*, 83 App. Div. 505, 82 N. Y. Supp. 441.

**Oregon.** — *Friendly v. Lee*, 20 Or. 202, 25 Pac. 396.

**Wisconsin.** — *Coxe Bros. & Co. v. Milbrath*, 110 Wis. 499, 86 N. W. 174.

**57. United States.** — *Maxwell's Exrs. v. Wilkinson*, 113 U. S. 656. **Alabama.** — *Acklen's Exr. v. Hickman*, 63 Ala. 494, 35 Am. Rep. 54.

**Arkansas.** — *St. Louis, S. W. R. Co. v. White S. M. Co.*, 78 Ark. 1, 93 S. W. 58.

**Georgia.** — *Williams v. Kelsey*, 6 Ga. 365, 374.

**Illinois.** — *Chicago R. Co. v. Adler*, 56 Ill. 344.

**Louisiana.** — *Bullard v. Wilson*, 5 Mart. (N. S.) 196.

**Maryland.** — *Green v. Caulk*, 16 Md. 556.

**Mississippi.** — *New Orleans, etc. R. Co. v. Echols*, 54 Miss. 264.

**New Hampshire.** — *Seavy v. Dearborn*, 19 N. H. 351; *Webster v. Clark*, 30 N. H. 245.

**New York.** — *Merrill v. Ithaca & O. R. Co.*, 16 Wend. 586, 595, 30 Am. Dec. 130.

**South Carolina.** — *Bank v. Zorn*, 14 S. C. 444, 37 Am. Rep. 733.

**Vermont.** — *Davis v. Field*, 56 Vt. 426.

**Examples of Excluded Memoranda.** *Spring Garden Mut. Ins. Co. v. Evans*, 15 Md. 54, 74 Am. Dec. 555 (made five months after transaction); *Watson v. Walker*, 23 N. H. 471, 496 (three years); *Ballard v. Ballard*, 5 Rich. (S. C.) (two weeks).

**Unknown Time** memoranda will be rejected. *Bates v. Preble*, 151 U. S. 149.

**58. Chamberlin v. Ossipee**, 60 N. H. 212; *Lawson v. Glass, 6 Colo. 134; *Paige v. Carter*, 64 Cal. 489;*

made by the witness who guarantees its truth and in connection with whose testimony it is admitted.<sup>59</sup>

(5.) **Purpose of Making.**—It would seem from some cases that such a memorandum was inadmissible unless made for the very purpose of preserving the facts recorded.<sup>60</sup>

(6.) **Accuracy of Memorandum.**—(A.) **IN GENERAL.**—Before such a memorandum is admissible the witness must testify to its accuracy either by testifying to a distinct remembrance that when he made or saw the memorandum it was correct,<sup>61</sup> or that he is certain of its accuracy from the fact that it was his habit or custom to make memoranda in the manner in which the one in question was made,<sup>62</sup> or that from some particular circumstance he is willing to guarantee its accuracy.<sup>63</sup>

(B.) **PERSONAL KNOWLEDGE.**—It follows from the rule as just stated that it is only where the witness had personal knowledge of the accuracy of the memorandum that it is admissible.<sup>64</sup>

*Murray v. Dickens*, 149 Ala. 240, 42 So. 1031; *Volusia Bank v. Bigelow*, 45 Fla. 638, 33 So. 704.

59. *Alabama.*—*Acklen's Exr. v. Hickman*, 63 Ala. 494, 35 Am. Rep. 54; *Anderson v. English*, 121 Ala. 272, 25 So. 748.

*Arkansas.*—*St. Louis S. W. R. Co. v. White S. M. Co.*, 78 Ark. 1, 93 S. W. 58.

*California.*—*McGowan v. McDonald*, 111 Cal. 57, 43 Pac. 418, 52 Am. St. Rep. 149; *People v. Brown*, 3 Cal. App. 178, 84 Pac. 670.

*Connecticut.*—*Curtis v. Bradley*, 65 Conn. 99, 31 Atl. 591, 48 Am. St. Rep. 177, 28 L. R. A. 143; *Wood v. Holah*, 79 Conn. 215, 64 Atl. 220.

*Maine.*—*Chamberlain v. Sands*, 27 Me. 458.

*Maryland.*—*Green v. Caulk*, 16 Md. 556, 573; *Owens v. State*, 67 Md. 307, 10 Atl. 210.

*Nebraska.*—*Kearney v. Theman-son*, 48 Neb. 74, 66 N. W. 996.

*New York.*—*McCarthy v. Meaney*, 183 N. Y. 190, 76 N. E. 36; *Merrill v. Ithaca & O. R. Co.*, 16 Wend. 586, 595, 30 Am. Dec. 130; *Clark v. National Shoe Co.*, 32 App. Div. 316, 52 N. Y. Supp. 1064, *affirmed*, 164 N. Y. 498, 58 N. E. 659.

*Oregon.*—*Oyler v. Dautoff*, 36 Or. 357, 59 Pac. 474.

*Vermont.*—*Davis v. Field*, 56 Vt. 426.

*Wisconsin.*—*Bounda v. Jones*, 110 Wis. 52, 85 N. W. 671.

60. *Trust Co. v. Benbow*, 135 N. C. 303, 47 S. E. 435. And see *New Orleans, etc. R. Co. v. Echols*, 54 Miss. 264.

61. *Diamond Glue Co. v. Wietzychowski*, 227 Ill. 338, 81 N. E. 392; *Acklen's Exr. v. Hickman*, 63 Ala. 494, 35 Am. Rep. 54; *Louisville & N. R. Co. v. Cassibry*, 109 Ala. 697, 19 So. 900; *Misner v. Darling*, 44 Mich. 438, 7 N. W. 77; *Titus v. Gunn*, 69 N. J. L. 410, 55 Atl. 735; *Russell v. Hudson River R. Co.*, 17 N. Y. 134.

62. *Acklen's Exr. v. Hickman*, 63 Ala. 494, 35 Am. Rep. 54; *Hancock v. Kelly*, 81 Ala. 368, 2 So. 281; *Williams v. Kelsey*, 6 Ga. 365, 374; *Leonard v. Mixon*, 96 Ga. 239, 23 S. E. 80, 51 Am. St. Rep. 134; *St. Louis S. W. R. Co. v. White S. M. Co.*, 78 Ark. 1, 93 S. W. 58. But see *Pocock v. Hendricks*, 8 Gill & J. (Md.) 421.

**Recognition of Handwriting** sufficient where witness testifies that he would not have signed such a paper unless certain formalities had first been complied with. *Pearson v. Wightman*, 1 Mills Const. (S. C.) 336, 12 Am. Dec. 636. And see *Franklin v. Atlanta, etc. R. Co.*, 74 S. C. 332, 54 S. E. 578.

63. *Wheeler v. Hatch*, 12 Me. 389; *Owens v. State*, 67 Md. 307, 10 Atl. 210 (check mark after each item); *Davie v. Terrill*, 63 Tex. 105.

64. *United States.*—*Grunberg v.*



(C.) CONTENTS. — It is also held that such a memorandum is inadmissible unless it purports to contain all that transpired at the time.<sup>65</sup>

(7.) When Original Memorandum Required. — (A.) IN GENERAL. — The original memorandum must be produced if it is available,<sup>66</sup> but if it has been lost or destroyed a copy may be used<sup>67</sup> even though made and verified by a person other than the witness, provided the witness can still vouch for the accuracy of the statements made.<sup>68</sup>

(B.) MEMORANDUM OF ORAL STATEMENT. — In several jurisdictions the principle has been still further extended and a memorandum of the oral statements of a witness is admitted if supported by the testimony of the person making the statement and the person recording it.<sup>69</sup>

(8.) Memoranda of Details. — Courts are more liberal in admitting memoranda of details than in other cases, and where such a memorandum is shown to have been made near the time of the transac-

United States, 145 Fed. 81, 76 C. C. A. 51.

*Alabama.* — *Bolling v. Fannin*, 97 Ala. 619, 12 So. 59.

*Connecticut.* — *Norwalk v. Ireland*, 68 Conn. 1, 35 Atl. 804.

*Georgia.* — *Orr v. Farmers' Alliance W. & C. Co.*, 97 Ga. 241, 22 S. E. 937; *Phoenix Ins. Co. v. Hart*, 112 Ga. 765, 38 S. E. 67.

*Kansas.* — *Atchison, etc. R. Co. v. Osborn*, 58 Kan. 768, 51 Pac. 286.

*Maryland.* — *Dryden v. Barnes*, 101 Md. 346, 61 Atl. 342; *State v. Trimble*, 104 Md. 317, 64 Atl. 1026.

*New Jersey.* — *Titus v. Gunn*, 69 N. J. L. 410, 55 Atl. 735; *Hill v. Adams Exp. Co.*, 74 N. J. L. 338, 68 Atl. 94.

*Vermont.* — *Pingree v. Johnson*, 69 Vt. 225, 39 Atl. 202.

*Wisconsin.* — *Hart v. Godkin*, 122 Wis. 646, 100 N. W. 1057.

**Inventory Made by Several Persons**, working at different times, is inadmissible as a whole in the absence of testimony by each person that it is a correct record. *Whitley Groc. Co. v. Roach*, 115 Ga. 918, 42 S. E. 282.

<sup>65.</sup> *Trust Co. v. Benbow*, 135 N. C. 303, 47 S. E. 435.

<sup>66.</sup> *England.* — *Doe v. Perkins*, 3 Durnf. & E. 749.

*Canada.* — *Taylor v. Massey*, 20 Ont. 429.

*Connecticut.* — *Clark v. Holmes*, 71 Conn. 749, 43 Atl. 194.

*Florida.* — *Eatman v. State*, 48 Fla. 21, 37 So. 576.

*Iowa.* — *State v. Maloy*, 44 Iowa 104, 115.

*Maryland.* — *Green v. Caulk*, 16 Md. 556, 572.

*Michigan.* — *Caldwell v. Bowen*, 80 Mich. 382, 45 N. W. 185.

*Minnesota.* — *Amor v. Stoeckele*, 76 Minn. 180, 78 N. W. 1046.

*New Hampshire.* — *Watson v. Walker*, 23 N. H. 471, 495.

*Oregon.* — *Manchester Assur. Co. v. Oregon R. Co.*, 46 Or. 162, 79 Pac. 60, 69 L. R. A. 475.

<sup>67.</sup> *District of Columbia.* — *O'Brien v. United States*, 27 App. Cas. 263.

*Florida.* — *Davis v. State*, 47 Fla. 26, 36 So. 170; *Adams v. Board*, 37 Fla. 266, 20 So. 266.

*Illinois.* — *Clifford v. Drake*, 110 Ill. 135; *Bonnet v. Glattfeldt*, 120 Ill. 166, 11 N. E. 250.

*Kansas.* — *Smith v. Scully*, 66 Kan. 139, 71 Pac. 249.

*Kentucky.* — *Moore v. Beale*, 20 Ky. L. Rep. 2029, 50 S. W. 850.

*Wisconsin.* — *Nehrling v. Herold Co.*, 112 Wis. 558, 88 N. W. 614.

<sup>68.</sup> *State v. Shinborn*, 46 N. H. 497, 88 Am. Dec. 224; *Birmingham v. McPoland*, 96 Ala. 363, 11 So. 427; *Chicago & A. R. Co. v. American Strawboard Co.*, 190 Ill. 268, 60 N. E. 518. *Compare Peck v. Valentine*, 94 N. Y. 569.

<sup>69.</sup> *Mayor v. Second Ave. R. Co.*,

tion and is proved by the person who made it, to be accurate,<sup>70</sup> it is generally admitted, in connection with his testimony,<sup>71</sup> upon proof that the witness cannot remember the facts recorded.<sup>72</sup>

d. *Statements Prepared for Use at Trial.* — Compilations of complicated matters prepared in advance by witnesses for use at the trial are admissible where they involve the mere making of computations, and their accuracy is vouched for by the witness and the original records are open to the other party.<sup>73</sup> And where the work involved the labor of many clerks, it has been held that it is sufficient if the persons under whose supervision it was done testify to their belief in its accuracy.<sup>74</sup>

e. *Statements of Account.* — Statements of account are inadmissible as evidence of the truthfulness of the facts recited unless they have been acquiesced in or acted upon by the party charged,<sup>75</sup> and this rule is especially applicable where the account is stated merely for the purposes of the action.<sup>76</sup> They may be admitted, however, to prove collateral matters.<sup>77</sup>

f. *As Res Gestae.* — A memorandum which is a part of the *res gestae* is admissible.<sup>78</sup>

102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839 (leading case); Stettauer v. White, 98 Ill. 72; Littlefield v. Rice, 10 Metc. (Mass.) 287; Miller v. Shay, 145 Mass. 163, 13 N. E. 468, 1 Am. St. Rep. 446; Chicago Lumb. Co. v. Hewitt, 64 Fed. 314, 12 C. C. A. 129; Murray v. Dickens, 149 Ala. 240, 42 So. 1031; Péttey v. Benoit, 193 Mass. 233, 79 N. E. 245. Compare Snow Hdw. Co. v. Loveman, 131 Ala. 221, 31 So. 19; Tupper v. International B. & T. Co., 24 Nova Scotia 256.

70. Peterson Bros. v. Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162.

71. Norwalk v. Ireland, 68 Conn. 1, 35 Atl. 804; Curtis v. Bradley, 65 Conn. 99, 31 Atl. 591, 48 Am. St. Rep. 177, 28 L. R. A. 143; Chicago & A. R. Co. v. American Strawboard Co., 91 Ill. App. 635, *affirmed*, 190 Ill. 268, 60 N. E. 518; Ins. Co. v. Weides, 14 Wall. (U. S.) 375.

72. Stahl v. City of Duluth, 71 Minn. 341, 74 N. W. 143.

**Face of Instrument** may show that the items are so numerous that they could not possibly be remembered, and in this case direct testimony of the witness is not required. Meyers v. McAllister, 94 Minn. 510, 103 N. W. 564.

73. See Koplan v. Boston Gas Light Co., 177 Mass. 15, 58 N. E. 183; State v. Brady, 100 Iowa 191, 69 N. W. 290, 62 Am. St. Rep. 560; Jordan v. Warner's Estate, 107 Wis. 539, 83 N. W. 946; Burton v. Driggs, 20 Wall. (U. S.) 125, 136; San Pedro Lumb. Co. v. Reynolds, 121 Cal. 74, 53 Pac. 410.

74. Northern Pac. R. Co. v. Keyes, 91 Fed. 47.

75. Grant v. Cole, 8 Ala. 519; O'Donoghue v. Title G. & T. Co., 79 Ill. App. 263; *In re* Coventry Evans Furn. Co., 166 Fed. 516. See Zimmerman Mfg. Co. v. Dunn, 151 Ala. 435, 44 So. 533.

76. Schnellbacher v. McLoughlin Plum. Co., 85 Ill. App. 158; Nelms v. Steiner Bros., 113 Ala. 562, 22 So. 435.

77. Davis Provision Co. v. Fowler Bros., 20 App. Div. 626, 47 N. Y. Supp. 205 (admissible to explain declarations of parties); Brickle v. Leach, 55 S. C. 510, 33 S. E. 720 (admissible to prove payment for land where title is involved); Missouri, K. & T. R. Co. v. Hopkins (Tex. Civ. App.), 113 S. W. 306 (account stated between consignor and consignee admissible in action against carrier for failure to deliver according to contract).

78. See Norwalk v. Ireland, 68

g. *As Corroborative Evidence.* — A private memorandum which is inadmissible generally is not admissible merely to corroborate the witness who made it.<sup>79</sup>

h. *Memorandum of Parol Transaction.* — A memorandum made by a person at the time of the making of a parol contract,<sup>80</sup> or at the occurrence of a conversation is inadmissible<sup>81</sup> unless read or assented to by the person against whom it is offered.<sup>82</sup>

i. *Admissibility in Connection With Testimony of Witness.* Neither is the memorandum made by a witness admissible in connection with his own testimony,<sup>83</sup> except in those cases in which it is received to evidence his past recollection.<sup>84</sup>

j. *Death of Maker.* — The fact that the memorandum was made by a person who has since died does not render it admissible.<sup>85</sup>

## II. METHOD OF INTRODUCING IN EVIDENCE.

A formal offer of a writing in evidence has not been regarded by the courts as necessary in all cases; it seems to be sufficient if

Conn. 1, 35 Atl. 804; State Nat. Bank v. Weed, 39 App. Div. 602, 57 N. Y. Supp. 706; Gans v. Wormser, 83 App. Div. 505, 82 N. Y. Supp. 441.

79. State Nat. Bank v. Weed, 39 App. Div. 602, 57 N. Y. Supp. 706; Obermeier v. Whalen, 21 Misc. 37, 46 N. Y. Supp. 872; Hurd v. Birch, 11 N. Y. St. 870; Whitaker v. White, 69 Hun 258, 23 N. Y. Supp. 487; Strauss v. Phenix Ins. Co., 9 Colo. App. 386, 48 Pac. 822; Sechrist v. Atkinson, 31 App. Cas. (D. C.) 1. Compare Jaquith Co. v. Shumway's Estate, 80 Vt. 556, 69 Atl. 157; Stillwell v. Farewell, 64 Vt. 286, 24 Atl. 243; Glaspie v. Keator, 56 Fed. 203, 5 C. C. A. 474; Shadbolt v. Shaw, 40 Iowa 583; Ladd v. Dudley, 45 N. H. 61.

80. Boone v. Rickard, 125 Ill. App. 438. And see Carpenter v. Virginia-Carolina Chem. Co., 98 Va. 177, 35 S. E. 358.

81. Ingram v. Hilton & D. Lumb. Co., 108 Ga. 194, 33 S. E. 961; National Bank v. Meader, 40 Minn. 325, 41 N. W. 1043.

82. Illinois. — Monroe v. Snow, 131 Ill. 126, 23 N. E. 401.

Indiana. — Cook v. Anderson, 20 Ind. 15; Tomlinson v. Briles, 101 Ind. 538.

Iowa. — McDermott v. Abney, 106 Iowa 749, 77 N. W. 505.

Kentucky. — McClelland v. Crawford, 2 Bibb 336.

Massachusetts. — Dickinson v. Robbins, 12 Pick. 74.

Michigan. — Collins v. Shaw, 124 Mich. 474, 83 N. W. 146.

Nebraska. — Carstens v. McDonald, 38 Neb. 858, 57 N. W. 757.

New York. — Lathrop v. Bramhall, 64 N. Y. 365.

Pennsylvania. — Fifth Mut. Bldg. Soc. v. Holt, 184 Pa. St. 572, 39 Atl. 293.

South Carolina. — Miller v. Creyon, 2 Brev. 108.

Virginia. — Carpenter v. Virginia, C. Chem. Co., 98 Va. 177, 35 S. E. 358.

Wisconsin. — Hazer v. Streich, 92 Wis. 505, 66 N. W. 720.

83. State Nat. Bank v. Weed, 39 App. Div. 602, 57 N. Y. Supp. 706; Williamson v. Brooklyn Hts. R. Co., 53 App. Div. 399, 65 N. Y. Supp. 1054; Metzger v. Burnett, 5 Kan App. 374, 48 Pac. 599.

84. See *supra*, I, 28, N. c.

85. Alabama. — Harrison v. Cordle, 22 Ala. 457; Avery v. Avery, 49 Ala. 193.

Arkansas. — Crump v. Starke, 23 Ark. 131.

California. — Thompson v. Orena, 134 Cal. 26, 66 Pac. 24.

District of Columbia. — Page v. Burnstine, 3 MacArthur 194.

Illinois. — Sherman v. Whiteside, 93 Ill. App. 572, *affirmed*, 190 Ill. 576, 60 N. E. 838.

the parties treat it as in evidence,<sup>86</sup> though the better practice is to make a formal offer.<sup>87</sup>

*Massachusetts.*—*Mair v. Bassett*, 117 Mass. 356.

*New York.*—*Vaughn v. Strong*, 52 Hun 610, 4 N. Y. Supp. 686, 689.

*Texas.*—*Turner v. Cochran*, 30 Tex. Civ. App. 549, 70 S. W. 1024.

*West Virginia.*—*Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544. 87 Am. St. Rep. 796 *Compare* *Buckley v. Buckley*, 16 Nev. 180.

86. *McChesney v. Chicago*, 152 Ill. 543, 38 N. E. 767 (where the documents in question were not formally offered in evidence, but they were all before the court and were so treated); *Cothran v. Ellis*, 125 Ill. 496, 16 N. E. 646; *Wright v. Roseberry*, 81 Cal. 87, 22 Pac. 336; *Bevington v. State*, 2 Ohio St. 161; *Zieverink v. Kemper*, 50 Ohio St. 208, 34 N. E. 250.

When documents or instruments which are legitimate evidence of fact are produced by one of the parties at a trial, and submitted to the examination of the jury or judge sitting instead of a jury, and witnesses testify with regard to them, whose testimony would be unintelligible without such documents or instruments, the documents or instruments are thereby made evidence in the cause on the side of the party producing them, without a more formal offer; and it is not an error of which the opposite party can complain if the trial judge so rules. *Convery v. Conger*, 53 N. J. L. 468, 22 Atl. 43, 549.

In *Charles v. Patch*, 87 Mo. 450, the question was whether or not a certain document was offered or introduced in evidence. From the record it appeared that the paper was shown and handed to a witness who was standing in the presence of the court and jury, and who used it in his testimony. In holding that the paper was offered and introduced the court said that if what the record showed was in fact done in the presence and sight of the jury, could it be said that the paper was not offered or introduced in evidence within the mean-

ing of the law, or was it necessary that in addition the paper must be formally handed or given to the jury for their inspection when not so requested by them? "From the record as to what was thus done we are hardly authorized to say that the paper was not in evidence within the rule and the usual practice of trial courts in such cases."

**Formal Statement of Purpose Unnecessary.**—"There is no absolute rule that a party offering a writing can be called upon to state formally the purpose of the offer. Generally the other party has a right to examine the paper before it is passed upon by the judge, though there may be exceptional cases where even this right would be suspended for a time, if the peculiar exigency of the case demanded it. On view of the paper, counsel may call for a statement of the purpose for which it is offered, but how formally this statement is to be made, in how much detail, etc., are matters necessarily within the discretion of the presiding judge, and this court will not reverse unless there is a manifest abuse of such discretion." *Myers v. Kingston Coal Co.*, 126 Pa. St. 582, 17 Atl. 891. See also *Willard v. Pike*, 59 Vt. 202, 9 Atl. 907.

87. *Smith v. Gorham*, 119 Ind. 436, 21 N. E. 1096. See also *Cook v. Berrott*, 66 Hun 633, 21 N. Y. Supp. 358.

In the case of an offer of documentary evidence, each piece offered should be presented by itself to the presiding judge, exhibited if desired to opposing counsel, identified by the court or stenographer with suitable marks, and, if objected to, its genuineness established by testimony. *Virgie v. Stetson*, 73 Me. 452.

**Offer Differing From Paper Itself.** Whenever the offer in its description of a paper proposed to be given in evidence differs from the paper, the paper itself must determine whether it is admissible. *Keedy v. Newcomer*, 1 Md. 241.

## III. COMPELLING PRODUCTION ON NOTICE.

This subject is treated elsewhere in this work.<sup>88</sup>

## IV. AUTHENTICATION.

1. **Necessity.** — A. IN GENERAL. — As a general rule every written instrument must be properly authenticated before it is admissible in evidence,<sup>89</sup> unless it falls within one of the exceptions

<sup>88.</sup> See article "DOCUMENTARY EVIDENCE," Vol. IV.

<sup>89.</sup> *United States.* — *Cunard S. S. Co. v. Kelley*, 115 Fed. 678, 53 C. C. A. 310 (bills of lading).

*Alabama.* — *Richmond & D. R. Co. v. Jones*, 92 Ala. 218, 9 So. 276; *Collier v. Carlisle*, 133 Ala. 478, 31 So. 970; *Johnson v. Alabama Gas Co.*, 90 Ala. 505, 8 So. 101.

*Arkansas.* — *Lane v. Farmer*, 13 Ark. 63; *Southern Exp. Co. v. Hill*, 81 Ark. 1, 98 S. W. 371 (express receipt).

*California.* — *Pennsylvania Min. Co. v. Owens*, 15 Cal. 135.

*Connecticut.* — *Neil v. Miller*, 2 Root 117.

*Florida.* — *Germania F. Ins. Co. v. Stone*, 21 Fla. 555; *Williams v. Keyser*, 11 Fla. 234, 89 Am. Dec. 243.

*Georgia.* — *Long v. Georgia L. & W. Co.*, 82 Ga. 628, 9 S. E. 425; *Equitable Mfg. Co. v. Davis*, 130 Ga. 67, 60 S. E. 262; *Crutchfield v. Dailey*, 98 Ga. 462, 25 S. E. 526 (insurance policy).

*Illinois.* — *St. Louis L. & I. Co. v. Yantis*, 173 Ill. 321, 50 N. E. 807.

*Indiana.* — *Hagaman v. Stafford*, 2 Blackf. 361; *Lingg v. State ex rel. Weitzel*, 28 Ind. App. 248, 61 N. E. 696; *Smith v. Scantling*, 4 Blackf. 443; *Johnson v. Prather*, 6 Blackf. 411 (answer in chancery).

*Kentucky.* — *Hellard v. Nance*, 114 S. W. 277 (assignment); *McClain v. Esham*, 17 B. Mon. 146; *Burgen v. Com.*, 8 Ky. L. Rep. 613.

*Louisiana.* — *Hawes v. Bryan*, 10 La. 136; *Pendery v. Crescent Mut. Ins. Co.*, 21 La. Ann. 410 (bill of lading); *Succession of Sallier*, 115 La. 97, 38 So. 929 (private act).

*Maine.* — *Webber v. Stratton*, 89 Me. 379, 36 Atl. 614; *Hutchinson v. Chadbourne*, 35 Me. 189; *Boody v. McKenney*, 23 Me. 517.

*Maryland.* — *Equitable End. Assn. v. Fisher*, 71 Md. 430, 18 Atl. 808; *DiGorgio Imp. & S. S. Co. v. Pennsylvania R. Co.*, 104 Md. 693, 65 Atl. 425, 8 L. R. A. (N. S.) 108 (requisition for cars).

*Michigan.* — *McHugh v. Brown*, 33 Mich. 2.

*Minnesota.* — *Lamb Lumb. Co. v. Benson*, 90 Minn. 403, 97 N. W. 143; *State ex rel. Prince Inv. Co. v. Weld*, 66 Minn. 219, 68 N. W. 1068 (plat); *Brayley v. Kelly*, 25 Minn. 160.

*Missouri.* — *Tittman v. Thornton*, 107 Mo. 500, 17 S. W. 979, 16 L. R. A. 410; *Ramsey v. Waters*, 1 Mo. 406; *Lewin v. Dille*, 17 Mo. 64; *Acoc's Admr. v. McBroom*, 38 Mo. 342; *Wieland v. Weyland*, 64 Mo. 168.

*New Jersey.* — *Linn v. Ross*, 16 N. J. L. 55; *Williamson v. Wright*, 3 N. J. L. 984.

*New York.* — *Jackson ex dem. Barclay v. Hopkins*, 18 Johns. 487; *Wheeler & Wilson Co. v. McLaughlin*, 54 Hun 639, 8 N. Y. Supp. 95.

*North Carolina.* — *Shaffer v. Bledsoe*, 118 N. C. 279, 23 S. E. 1000.

*Ohio.* — *Hamilton v. Phelps*, Wright 689.

*Oregon.* — *Baum v. Rainbow Smelt. Co.*, 42 Or. 453, 71 Pac. 538; *Ayre v. Hixson*, 98 Pac. 515 (certificate of county clerk indorsed on conveyance, as to time of record).

*Pennsylvania.* — *Miller v. Binder*, 28 Pa. St. 489; *Broadrick v. Broadrick*, 25 Pa. Super. 225 (marriage certificate); *American Underwriters' Assn. v. George*, 97 Pa. St. 238.

*South Carolina.* — *Mahoney v. Southern R. Co.*, 64 S. E. 231 (annotations on plat).

*Texas.* — *Watson v. Winston* (Tex. Civ. App.), 43 S. W. 852 (bill of lading); *Hander v. Baade*, 16 Tex. Civ. App. 119, 40 S. W. 422;

hereafter noted, or is made self-proving by some particular statute,<sup>90</sup> or proof of execution is waived by the parties.<sup>91</sup>

*Staples v. Word* (Tex. Civ. App.), 48 S. W. 751; *Watson v. Hopkins*, 27 Tex. 637 (power of attorney); *Betterton v. Echols*, 85 Tex. 212, 20 S. W. 63; *Walker v. Texas & M. O. R. Co.* (Tex. Civ. App.), 112 S. W. 436.

*Vermont.*—*Jaquith Co. v. Shumway's Estate*, 80 Vt. 556, 69 Atl. 157.

"To render an instrument in writing competent evidence, it is necessary that some proof should be given from which the jury can legally infer that it was executed by the party." *Curtis v. Hall*, 4 N. J. L. 148.

The law is unquestionably in regard to receipts generally that they shall be proved like all other papers introduced in evidence, and unless there is some statutory provision making the receipts of a tax collector self-proving it must be proved as any other receipt unless it is shown to be an ancient document. *Chastang v. Chastang*, 141 Ala. 451, 37 So. 799, where it was held that the statutes providing for making certain books and official papers self-proving did not embrace tax receipts. See also *McReynolds v. Longenberger*, 57 Pa. St. 13.

**Deeds.**—Execution must be proved. *Dail v. Moore*, 51 Mo. 589; *Winlock v. Hardy*, 4 Litt. (Ky.) 272; *Dunlap v. Glidden*, 31 Me. 510. And see article "DEEDS," Vol. IV.

**By-Laws** must be shown to have been adopted by a society before they are admissible. *Cotton Jammers' Assn. v. Taylor*, 23 Tex. Civ. App. 367, 56 S. W. 553.

**County Warrants.**—"The mere production of a piece of paper upon which is written or printed a promise to pay upon the part of a county, and upon which certain signatures appear, without the slightest proof of the genuineness of such signatures does not entitle such paper to be admitted in evidence." *Apache County v. Barth*, 177 U. S. 538.

**"American Trotting Register"** inadmissible unless authenticated, although a witness testifies that a registration in it would be recognized as authentic by horsemen all

over the country. *Texas & P. R. Co. v. Newsome* (Tex. Civ. App.), 98 S. W. 646.

Copy of an instrument must be shown to be such. *Lieberman v. Baltimore & O. R. Co.*, 115 N. Y. Supp. 1034. And see article "COPIES," Vol. III.

**Newspaper Advertisement** must be shown to have been authorized by the person purporting to have inserted it. *Mann v. Russell*, 11 Ill. 586.

**Unsigned Paper Attached to Signed Instrument**, the latter is properly excluded until the former is detached. *Proctor v. Rand*, 94 Me. 313, 47 Atl. 537.

**An Affidavit** containing admissions made by a decedent is not admissible as evidence on the final settlement of his estate without proof of its execution by the deceased, and the fact that the affidavit bears the certificate of a notary public of subscription and verification is not sufficient to make the writing self-proving. *Keyland v. Keyland*, 101 Ala. 297, 13 So. 278.

**Newspapers.**—In the absence of better available evidence in the prices published in a commercial journal are admissible in evidence as prices current, but where such evidence is sought to be introduced, the sources of information or the mode in which the prices are ascertained must first be shown to render it competent. *Willard v. Mellor*, 19 Colo. 534, 36 Pac. 148. And see article "Books," Vol. II, p. 586.

**Stencil Signature** must be proved. *Bell Bros. v. Western & A. R. Co.*, 125 Ga. 510, 54 S. E. 532.

**90. Under the Alabama Statute** (Code § 3265) a medical license is admissible without proof of the signatures attached thereto. *White v. Mastin*, 38 Ala. 147.

**91. An Agreement To Allow Secondary Evidence of the Contents of a Paper** alleged to be lost cannot be construed as an agreement to dispense with proof of its execution. *Moor v. Cary*, 42 Me. 29.

**Admission Without Objection.** Even though a paper, which it not

**B. BOOKS AND RECORDS OF CORPORATION.**—Corporation books are not self-proving but must be authenticated before they are admissible in evidence.<sup>92</sup>

**C. COLLATERAL WRITINGS.**—Where a writing is offered to prove a mere collateral fact, and its execution is not in issue,<sup>93</sup> no authentication of it is required.<sup>94</sup>

the basis of the action, has been admitted without objection, the adverse party may attack its genuineness. *Anderson v. Cuthbert*, 103 Ga. 767, 30 S. E. 244.

<sup>92.</sup> *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 565; *Glenn v. Orr*, 96 N. C. 413; *Smith v. Natchez S. B. Co.*, 1 How. (Miss.) 479; *Pittsburg Coal Co. v. Foster*, 59 Pa. St. 365; *Wright v. Farmers' Mut. L. S. Ins. Assn.*, 96 Iowa 360, 65 N. W. 308; *Whitman v. Granite Church*, 24 Me. 236; *Bartholomew v. Farwell*, 41 Conn. 107.

Entries in the books of a corporation of the acts and proceedings of the corporation cannot be admitted in evidence on behalf of the corporation by merely attaching them to a deposition and making them a part thereof; the entries must be authenticated as required by statute. *King v. Enterprise Ins. Co.*, 45 Ind. 43.

**Legal Organization of Corporation.** It is not necessary to prove that a corporation was legally organized before written instruments purporting to have been executed by it are admissible. *Smith v. Mayfield*, 163 Ill. 447, 45 N. E. 157.

But in *Parkerson v. Burke*, 59 Ga. 100, it was held that a medical diploma from a college in another state was not admissible without proof of the character of the college.

<sup>93.</sup> *Hightower v. Ogletree*, 114 Ala. 94, 21 So. 934 (letters); *Western Mut. L. Assn. v. People*, 73 Ill. App. 496; *Barron v. Walker*, 80 Ga. 121, 7 S. E. 272; *Jessup v. Gray*, 7 Blackf. (Ind.) 332; *Cartmell v. Walton*, 4 Bibb (Ky.) 488.

<sup>94.</sup> *State v. Waldrop*, 73 S. C. 60, 52 S. E. 793; *Lowry v. Pinson*, 2 Bailey (S. C.) 324, 23 Am. Dec. 140; *Sims v. Jones*, 43 S. C. 91, 20 S. E. 905; *Barber's Appeal*, 63 Conn. 393, 27 Atl. 973; *Skinner v. Brigham*, 126 Mass. 132.

Where a deed refers to another

deed for its description, the latter need not be shown to have been duly executed. *Hicks v. Coleman*, 25 Cal. 122, 85 Am. Dec. 103. And see article "DEEDS," Vol. IV, p. 156.

Where a settlement of accounts is made and reduced to writing upon the back of another instrument to which the settlement refers, proof of the execution of the instrument so referred to is not necessary in order to authorize the introduction of the settlement in evidence. *Walker v. Driver*, 7 Ala. 679.

In *Rhame v. Bower*, 27 Ga. 408, the note in suit referred to a bond as having been given by the plaintiff, who was the payee of the note, to the defendant who was the maker of the note. After the plaintiff had read the note in evidence the defendant offered a bond as the bond referred to in the note. It was held that since the note and bond agreed in many particulars and differed in none, the admission of the bond without further proof of its attestation was proper.

In *Neuval v. Cowell*, 36 Cal. 648, it was held that in an action on a contract which referred to another contract as containing the plan by which the work was to be done and the prices to be paid, the latter was admissible for purposes of description without proof of execution. And see *Rhame v. Bower*, 27 Ga. 408.

In *Jones v. Cooke*, 25 App. Cas. (D. C.) 524, where letters were introduced merely as collateral evidence relating to the conduct of the parties, it was held that the fact that they were received in due course of mail and acted upon by both parties was sufficient proof of their genuineness.

In an action for fraud in representing a bill of sale to be a valid security for a loan, the instrument itself is admissible in evidence without proof of its execution. *Western*

**D. INDORSEMENTS AND ASSIGNMENTS.** — Indorsements and assignments upon the instruments to which they refer are to be treated as instruments separate and distinct from the original instruments,<sup>95</sup> and their execution must be duly proved although slight proof is often sufficient on account of the circumstances under which they were made.<sup>96</sup>

**E. JOINT INSTRUMENTS.** — Instruments signed by several persons are admissible against the persons whose signatures are proved, and the signatures of the others purporting to have signed the instrument need not be proved<sup>97</sup> unless it is such an instrument as requires the signature of all the parties interested before becoming effective as to any who signed.<sup>98</sup>

**F. BOTH PARTIES CLAIMING UNDER SAME INSTRUMENT.** Where both parties claim under the same instrument, it may be admitted in evidence without proof of its authenticity.<sup>99</sup>

*Cottage P. & O. Co. v. Anderson*, 45 Tex. Civ. App. 513, 101 S. W. 1061.

In *Jessup v. Gray*, 7 Blackf. (Ind.) 332, an action of assumpsit for money paid by the plaintiff for the defendant's use and at his request, on a writing obligatory for the payment of money payable to a third person in which the defendant was principal and the plaintiff surety, and which the plaintiff had to pay, it was held that the writing although not the foundation of the suit was not admissible in evidence without proof of its execution for the purpose of showing the consideration of the promise on which the suit was founded.

Letters found among testator's effects are admissible without proof of their genuineness where they are offered merely to show the testator's mental capacity by showing his replies to them. *In re Barber's Appeal*, 63 Conn. 393, 27 Atl. 973. Compare *Hightower v. Ogletree*, 114 Ala. 94, 21 So. 934.

**Reasonable Diligence** in the search for lost deed may be shown by letters received from various persons to whom inquiries were sent, without proof of the signatures of the writer. *McDonald v. Hanks* (Tex. Civ. App.), 113 S. W. 604.

In Louisiana when a private instrument is referred to in public act executed between the same parties, and annexed to it, further evidence

of its authenticity is not required. *Delogny v. Nash*, 3 La. 425.

**Writing Explanatory of Declarations.** — Where a written instrument is so connected with the declarations of a party that they cannot be fully understood without it, proof of its execution is not a pre-requisite to its admissibility in evidence in connection with, and as explanatory of, the declarations. *Mims' Exr. v. Sturtevant*, 18 Ala. 359.

**To Support Adverse Possession of lands**, a deed is admissible without proof of its execution. See article "DEEDS," Vol. IV, p. 155.

<sup>95.</sup> *Turrell v. Morgan*, 7 Min. 368, 82 Am. Dec. 101.

<sup>96.</sup> See *Isbell v. Brinkham*, 70 Ind. 118.

<sup>97.</sup> *Conard v. Atlantic Ins. Co.* 1 Pet. (U. S.) 386; *State v. Blair*, 32 Ind. 313; *Harrelson v. Sarvis*, 39 S. C. 14, 17 S. E. 368; *Kolb v. Jones*, 62 S. C. 193, 40 S. E. 168 (quit claim deed). But see *Stamphill v. Bullen*, 121 Ala. 250, 25 So. 928.

Proof of the signature of one of two makers of a bill of sale is sufficient proof of its execution to entitle the bill to be read in evidence. *Dencey v. Sugg*, 46 Miss. 606.

<sup>98.</sup> See *Arthur v. Anderson*, 9 S. C. 234.

<sup>99.</sup> In *Adams v. O'Connor*, 100 Mass. 515, 1 Am. Rep. 137, the plaintiff sued for conversion. Both parties claimed ownership of the goods under a bill of lading—the plaintiff by virtue of an endorsement to



G. PROOF OF ORIGINAL WHERE CERTIFIED COPY IS OFFERED. Ordinarily where a certified copy of an instrument is admissible the execution of the original need not be shown to authorize the admission of the copy where the original was entitled to record and was properly recorded.<sup>1</sup>

H. ANCIENT DOCUMENTS. — It is a well-settled principle of the law that ancient documents prove themselves.<sup>2</sup>

I. ACKNOWLEDGED AND RECORDED INSTRUMENTS. — In many states by statutory enactment the certificate of the recorder appearing upon a duly<sup>3</sup> acknowledged and recorded instrument which is entitled to record dispenses with other proof of its execution when

him by the consignor. It was held that the bill of lading was admissible over the defendant's objection.

1. *California*. — *Mayo v. Mazeaux*, 38 Cal. 442; *Anthony v. Chapman*, 65 Cal. 73, 2 Pac. 889.

*Connecticut*. — *Colchester Sav. Bank v. Brown*, 75 Conn. 69, 52 Atl. 316.

*Georgia*. — *Conley v. State*, 85 Ga. 348, 11 S. E. 659.

*Idaho*. — *Kramer v. Settle*, 1 Idaho 485.

*Indiana*. — *Nutzenholster v. State*, 37 Ind. 457.

*Iowa*. — *Carter v. Davidson*, 73 Iowa 45, 34 N. W. 603.

*Maine*. — *Whitmore v. Learned*, 70 Me. 276.

*Massachusetts*. — *Ward v. Fuller*, 15 Pick. 185.

*Pennsylvania*. — *McCoy v. Lightner*, 2 Watts 347.

*South Carolina*. — *McLeod v. Roger*, 2 Rich. L. 19; *Stone v. Fitts*, 38 S. C. 393, 17 S. E. 136.

*Tennessee*. — *Owen v. Owen*, 5 Humph. 352.

*Texas*. — *Storey v. Flanagan*, 57 Tex. 649.

*Washington*. — *Chrast v. O'Connor*, 41 Wash. 360, 83 Pac. 238.

See the following cases:

*California*. — *Powell's Heirs v. Hendricks*, 3 Cal. 427.

*Florida*. — *Skinner v. Pinney*, 19 Fla. 42, 45 Am. Rep. 1.

*Maine*. — *Egan v. Horrigan*, 96 Me. 46, 51 Atl. 246 (inadmissible when party offering it is the grantee or claims as heir).

*Michigan*. — *Sheldon v. Merrill*, 69 Mich. 156, 37 N. W. 66.

*Missouri*. — *Musick v. Barney*, 49 Mo. 458.

*New York*. — *Fellows v. Van Hyring*, 23 How. Pr. 230; *Phoenix Mills v. Miller*, 42 Hun 654.

*Texas*. — *Robbins v. Hubbard* (Tex. Civ. App.), 108 S. W. 773; *Jester v. Steiner*, 86 Tex. 415, 25 S. W. 411; *Thompson v. Johnson*, 24 Tex. Civ. App. 246, 58 S. W. 1030. But see articles "RECORDS," Vol. X, p. 863.

2. See article "ANCIENT DOCUMENTS," Vol. I.

3. Under Code Civ. Proc. Dak., Par. 493, providing that every instrument acknowledged and "duly recorded" is admissible in evidence without further proof, the omission of the clerk, in recording a deed, to make on the record a similitude of the notarial seal, or a scroll or symbol to indicate it, does not make the original inadmissible without further proof.

*Smith v. Gale*, 144 U. S. 509, affirming *Gale v. Shillock*, 4 Dak. 182, 29 N. W. 661, and *Gale v. Frazier*, 4 Dak. 196, 30 N. W. 138.

**Defective Acknowledgment** prevents a deed from being self-proving. *Stamphill v. Bullen*, 121 Ala. 250, 25 So. 928; *Powers v. Hatter*, 152 Ala. 636, 44 So. 859. And see *Smith v. Kenney* (Tex. Civ. App.), 54 S. W. 801.

**Delay in Recording** beyond time specified in statute also prevents the admission of a deed without further proof. *Stamphill v. Bullen*, 121 Ala. 250, 25 So. 928; *Lewis v. Glass* (Ala.), 39 So. 771; *Sharpe v. Orme*, 61 Ala. 263.

**Record in Proper County** must be shown to render the instrument self-proving. *Coker v. Ferguson's Admr.*, 70 Ala. 284.

offered by the grantee,<sup>4</sup> though in the absence of such a statute an

4. *United States*.—*Smith v. Gale*, 144 U. S. 509.

*Alabama*.—*Jones v. State*, 113 Ala. 95, 21 So. 229; *Hertzfield v. Bailey*, 103 Ala. 473, 15 So. 912; *Patterson v. Jones*, 89 Ala. 388, 8 So. 77; *Twelves v. Nevill*, 39 Ala. 175; *Hart v. Ross*, 57 Ala. 518; *Jinwright v. Nelson*, 105 Ala. 399, 17 So. 91. See *Lewis v. Glass*, 39 So. 771 (Alabama Code 1896, § 992).

*Arkansas*.—*Hogins v. Brashears*, 13 Ark. 242; *McNeill v. Arnold*, 17 Ark. 154.

*California*.—*Clark v. Troy*, 20 Cal. 219; *Landers v. Bolton*, 26 Cal. 393.

*Colorado*.—*Knight v. Lawrence*, 19 Colo. 425, 36 Pac. 242.

*Delaware*.—*Doe d. Short v. Prettyman*, 1 Houst. 334.

*Georgia*.—*Ross v. Campbell*, 73 Ga. 309; *Long v. Powell*, 120 Ga. 621, 48 S. E. 185; *Tenant v. Blacker*, 27 Ga. 418; *Bell v. McCawley*, 29 Ga. 355; *Leverett v. Tift* (Ga. App.), 64 S. E. 317 (Georgia Civ. Code 1895, § 3628 (bill of sale)); *Bale v. Todd*, 123 Ga. 99, 50 S. E. 990; *Conley v. State*, 85 Ga. 348, 11 S. E. 659; *McRae v. Stillwell*, *Millen & Co.*, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513; *Flint River Lumb. Co. v. Smith*, 122 Ga. 5, 49 S. E. 745, 106 Am. St. Rep. 85; *Charles v. Valdosta Foundry & M. Co.*, 4 Ga. App. 733, 62 S. E. 493 (bill of sale); *Anderson v. Leverette*, 116 Ga. 732, 42 S. E. 1026.

*Illinois*.—*Holbrook v. Nichol*, 36 Ill. 161.

*Indiana*.—*Krom v. Vermillion*, 143 Ind. 75, 41 N. E. 539.

*Iowa*.—*Carter v. Davidson*, 73 Iowa 45, 34 N. W. 603.

*Kansas*.—*Stout v. Crosby*, 10 Kan. App. 580, 63 Pac. 661.

*Kentucky*.—*Sharp v. Wickliffe*, 3 Litt. 10, 14 Am. Dec. 37; *Bibb v. Williams*, 4 T. B. Mon. 579. See *Burkhart v. Loughridge*, 116 Ky. 604, 76 S. W. 397.

*Louisiana*.—*Werner v. Marx*, 113 La. 1002, 37 So. 905.

*Maryland*.—*Barry v. Hoffman*, 6 Md. 78.

*Michigan*.—*Webb v. Holt*, 113 Mich. 338, 71 N. W. 637.

*Minnesota*.—*Ferris v. Boxell*, 34 Minn. 262, 25 N. W. 592; *Romer v. Conter*, 53 Minn. 171, 54 N. W. 1052 (indemnity bond); *McMillan v. Edfast*, 50 Minn. 414, 52 N. W. 907; *Ellingboe v. Brakken*, 36 Minn. 156, 30 N. W. 659.

*Nebraska*.—*Brown v. Collins*, 96 N. W. 173.

*New York*.—See *Simmons v. Havens*, 101 N. Y. 427, 5 N. E. 73.

*North Carolina*.—*Griffith v. Richmond*, 126 N. C. 377, 35 S. E. 620.

*Oregon*.—*Ayre v. Hixson*, 98 Pac. 515 (§ 5355 B. & C. Comp.).

*Texas*.—*Stooksberry v. Swann*, 12 Tex. Civ. App. 66, 34 S. W. 369; *Moses v. Dibrell*, 2 Tex. Civ. App. 457, 21 S. W. 414.

*Vermont*.—*Williams v. Wetherbee*, 2 Aik. 329; *Johnson's Admr. v. McGuire*, 4 Vt. 327; *Manwell v. Manwell*, 14 Vt. 14.

*Virginia*.—*Raines v. Walker*, 77 Va. 92.

*Washington*.—*Blewett v. Bash*, 22 Wash. 536, 61 Pac. 770.

*West Virginia*.—See *Rutherford v. Rutherford*, 55 W. Va. 56, 47 S. E. 240.

*Wisconsin*.—*Hinchliff v. Hinman*, 118 Wis. 130.

"Now by what magic has a copy from the registry acquired more solemnity and virtue than the original and why is it entitled to more credit in a court of Justice? Why is it not a registered, unproved, original deed as good, as safe, and as satisfactory evidence, as a certified copy of such improved original?" *Knox v. Silloway*, 1 Fairf. (Me.) 201, 218.

**Foreign Acknowledgment.**—In *Vizard v. Moody*, 119 Ga. 918, 47 S. E. 348, a deed to lands located in Georgia was executed in Mississippi in January 1900, but was attested by only one witness. In February, 1901, the maker acknowledged the deed in Mississippi before two witnesses, one of whom was a notary public who attached his seal to his attestation. It was held that the instrument was entitled to record in Georgia and was admissible in evidence in a trial involving title to the land embraced therein. But

instrument must be proved although acknowledged and recorded.<sup>5</sup> In several states an instrument is admissible merely upon the strength of its certificate of acknowledgment.<sup>6</sup>

it has been held that a deed of New York lands does not prove itself under the Michigan statutes (*Gault v. Van Zile*, 37 Mich. 22), and also that the fact that a mortgage was executed and recorded in Alabama is no proof of its execution within the terms of the Georgia statute on the trial of a case in Georgia, and in the absence of other proof of its execution it is properly excluded. *Baskin v. Vernon*, 74 Ga. 370; *Papout v. Southwestern R. Co.*, 74 Ga. 296. And see *Tittman v. Thornton*, 107 Mo. 500, 17 S. W. 979, 16 L. R. A. 410.

**Filing Before Trial.**—In Texas, an instrument which is permitted or required to be recorded need not be filed three days before trial to be admissible as an original after proof of execution. (*Clayton v. Ingram* (Tex. Civ. App.), 107 S. W. 880; *McGhee v. Minter* (Tex. Civ. App.), 25 S. W. 718), though this is required where it is sought to use the instrument without proof of execution. *Morrow v. State*, 22 Tex. App. 239, 2 S. W. 624; *Stark v. Harris* (Tex. Civ. App.), 106 S. W. 887, *reversed* on other points, 110 S. W. 737.

In Maine, attested copies of anterior deeds may be offered without further proof, but the deed to the party himself must be directly proved. *Webber v. Stratton*, 89 Me. 379, 36 Atl. 614.

**Affidavit of Forgery**, being filed, it is necessary to give further proof of a deed although it has been recorded on proper probate. *Leverett v. Tift* (Ga. App.), 64 S. E. 317; *DeVaughn v. McLeroy*, 82 Ga. 687, 10 S. E. 211.

In Iowa § 3656 of the Code provides: "Every private writing, except a last will and testament, after being acknowledged or proved and certified in the manner prescribed for the proof or acknowledgment of conveyances of real property, may be read in evidence without further proof." *Chicago, B. & Q. R. Co. v. Lewis*, 53 Iowa 101, 4 N. W. 842. In this case it was held that under

this statute a lease containing mutual covenants must be acknowledged by both parties in order to be admissible in evidence.

5. *Carver v. Carver*, 97 Ind. 497; *Webber v. Stratton*, 89 Me. 379, 36 Atl. 614; *Burkhart v. Loughridge*, 116 Ky. 604, 76 S. W. 397 (title bond); *Rollins v. Henry*, 78 N. C. 342; *Skinner v. Pinney*, 19 Fla. 42, 45 Am. Rep. 1; *Hogan v. Carruth*, 18 Fla. 587.

**Chattel Mortgage** not admissible until proved. *Peterson v. Martinez*, 34 Tex. Civ. App. 212, 78 S. W. 401; *Betterton v. Echols*, 85 Tex. 212, 20 S. W. 63; *Ames Iron Wks. v. Chinn* (Tex. Civ. App.), 38 S. W. 247; *Becker v. Bowen* (Tex. Civ. App.), 79 S. W. 45.

6. *United States*.—*Smith v. Gale*, 144 U. S. 509 (applying § 493 Dakota Code Civ. Proc.); *Houghton v. Jones*, 68 U. S. 702 (applying statutes of California).

*California*.—*Wetherbee v. Dunn*, 32 Cal. 106.

*Colorado*.—*Chivington v. Colorado Springs Co.*, 9 Colo. 597, 14 Pac. 212.

*Illinois*.—*Ross v. Hole*, 27 Ill. 104. *Indiana*.—*Krom v. Vermillion*, 143 Ind. 75, 41 N. E. 539.

*Kansas*.—*Stinson v. Geer*, 42 Kan. 520, 22 Pac. 586; *Wilkins v. Moore*, 20 Kan. 538.

*Michigan*.—*Webb v. Holt*, 113 Mich. 338, 71 N. W. 637.

*Minnesota*.—*Ferris v. Boxell*, 34 Minn. 262, 25 N. W. 592; *Romer v. Conter*, 53 Minn. 171, 54 N. W. 1052; *Tucker v. Helgren*, 102 Minn. 382, 113 N. W. 912 (§ 4710 Minnesota Rev. Laws 1905).

*Missouri*.—*Shumate v. Reavis*, 49 Mo. 333. See *Miller v. Wells*, 5 Mo. 6.

*Nebraska*.—*McKenzie v. Beaumont*, 70 Neb. 179, 97 N. W. 225.

*Nevada*.—*Sharon v. Davidson*, 4 Nev. 416.

*New Jersey*.—*Den v. Wade*, 20 N. J. L. 291; *Wells v. Wright*, 12 N. J. L. 131.

*New York*.—*Roberts v. Jackson*, 1 Wend. 478; *Morris v. Wadsworth*,

**J. INSTRUMENTS EXECUTED BY COURT OFFICERS.**—Before instruments purporting to be executed by an officer of the court under the authority of the court are admissible it must appear that such person was actually authorized to act, by a court having jurisdiction of the person and the subject-matter.<sup>7</sup>

**K. INSTRUMENTS EXECUTED BY AGENTS.**—*a. In General.*—The authority of a person who purports to sign an instrument as the agent of another person must be established before the instrument is admissible.<sup>8</sup> And there is no presumption that a person purport-

17 Wend. 103; *Goodman v. Greenberg*, 53 Misc. 583, 103 N. Y. Supp. 779 (but a lease for less than three years is not a "conveyance"); *Van Cortlandt v. Tozer*, 17 Wend. 338, *affirmed*, 20 Wend. 423; *Jackson v. Shepard*, 2 Johns. 77; *Smith v. Guarantee Dental Co.*, 114 N. Y. Supp. 867. See *McKay v. Lasher*, 121 N. Y. 477, 24 N. E. 711.

*North Carolina.*—*Rhodes v. Holmes*, 9 N. C. (2 Hawks) 193; *Hunter v. Kelly*, 92 N. C. 285.

*Pennsylvania.*—*Morris' Lessee v. Vanderen*, 1 Dall. 64; *Keichline v. Keichline*, 54 Pa. St. 75.

*Tennessee.*—*Carter's Lessees v. Parrot*, 1 Overt. 237; *Cox v. Bowman's Lessee*, 2 Yerg. 108.

*Texas.*—*Boykin v. Rosenfield*, 69 Tex. 115, 9 S. W. 318.

*Virginia.*—*Hassler's Lessee v. King*, 9 Gratt. 115.

*Washington.*—*Gardner v. Pt. Blakely Mill Co.*, 8 Wash. 1, 35 Pac. 402.

Compare the following cases:

*Alabama.*—*Ravisies v. Alston*, 5 Ala. 297.

*Arkansas.*—*Wilson v. Spring*, 38 Ark. 181.

*Florida.*—*Neal v. Spooner*, 20 Fla. 38; *Hogans v. Carruth*, 18 Fla. 587.

*Indiana.*—*Mullis v. Cavins*, 5 Blackf. 77; *Bowser v. Warren*, 4 Blackf. 522.

*Maryland.*—*Eichelberger v. Sifford*, 27 Md. 320.

*Massachusetts.*—*Dudley v. Sumner*, 5 Mass. 438.

*Missouri.*—*Smith v. Mounts*, 1 Mo. 671.

*Texas.*—*Dennis v. Sanger*, 15 Tex. Civ. App. 411, 39 S. W. 997.

7. *Hagan v. Holderby*, 62 W. Va. 106, 57 S. E. 289 (conveyance by special receiver); *Bynum v. Hew-*

*lett*, 137 Ala. 333, 34 So. 391 (sheriff's deed); *Lynch v. Munson* (Tex. Civ. App.), 61 S. W. 140 (receipt given by guardian); *Winn v. Cogins*, 53 Fla. 327, 42 So. 897; *Simmons v. Spratt*, 20 Fla. 495.

In *LaPlante v. Lee*, 83 Ind. 155, it was held that where a party produces an administrator's deed as a muniment of title he must show that its execution was authorized; that the accuracy of recitals in the deed of its having been made upon the order of the court in which the trial was had could not be judicially noticed by the court. *Citing Armstrong v. Jackson*, 1 Blackf. (Ind.) 210, 12 Am. Dec. 225; *Huddleston v. Ingels*, 47 Ind. 498.

Where title is claimed through a sale by a trustee in bankruptcy, a letter evidencing the sale is inadmissible in the absence of all proof as to the adjudication of bankruptcy and the appointment of a trustee. *Keller v. Faickney*, 42 Tex. Civ. App. 483, 94 S. W. 103.

A sheriff's deed purporting to have been made by virtue of a tax execution is not admissible in evidence unless accompanied by such execution. *Carr v. Georgia L. & T. Co.*, 108 Ga. 757, 33 S. E. 190.

**Giving of Bond** by a receiver as required by the decree appointing him must be shown. *Hagan v. Holderby*, 62 W. Va. 106, 57 S. E. 289.

**Order of Proof.**—In an action on a guardian's bond the bond itself may be given in evidence before proof of its approval by the court, providing of course that proof of such approval is made subsequently. *Allen v. State ex rel. Stevens*, 61 Ind. 268, 28 Am. St. Rep. 673.

8. *California.*—*Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607.

ing to sign as agent for another person was duly authorized to act.<sup>9</sup>

b. *By Officer of Corporation.*—Where an instrument purports to be executed by a corporation, through the officers who are shown to have charge of its business, such officers are presumed to have had the power to execute the instrument<sup>10</sup> if the corporate seal is

*Georgia.*—*Southern R. Co. v. Ethridge*, 108 Ga. 121, 33 S. E. 850; *Johnson v. East Tennessee, etc. R. Co.*, 90 Ga. 810, 17 S. E. 121 (telegram).

*Illinois.*—*Gray v. Gillilan*, 15 Ill. 453, 60 Am. Dec. 761; *Dorst v. Dorn*, 138 Ill. App. 397.

*Indiana.*—*Hargrove v. John*, 120 Ind. 285, 22 N. E. 132 (letter).

*Missouri.*—*Hancock v. Whybark*, 66 Mo. 672.

*Nebraska.*—*Green v. Barker*, 47 Neb. 934, 66 N. W. 1032.

*Oregon.*—*McClung v. McPherson*, 47 Or. 73, 81 Pac. 567, 82 Pac. 13.

*Texas.*—*Underwriters' F. Assn. v. Henry* (Tex. Civ. App.), 79 S. W. 1072.

And see article "PRINCIPAL AND AGENT," Vol. X.

**Attorney in Fact.**—*James v. Gordon*, 1 Wash. C. C. 333, 13 Fed. Cas. No. 7,181; *Carnall v. Duval*, 22 Ark. 136; *Hughes v. Holliday*, 3 G. Gr. (Iowa) 30; *Tolman v. Emerson*, 4 Pick. (Mass.) 160; *Lamberton v. Windom*, 18 Minn. 506; *Chaffee v. Blaisdell*, 142 Mass. 538, 8 N. E. 435.

**Authority of Writer of Letter Purporting To Be an Agent** must be shown. *Cobb v. Malone*, 91 Ala. 388, 6 So. 693; *Wheeler & Wilson v. McLaughlin*, 54 Hun 639, 8 N. Y. Supp. 95; *Yost v. Mensch*, 141 Pa. St. 73, 21 Atl. 507 (reply letter).

Where a deed purports on its face to have been executed by an attorney in fact and the execution of the deed is put in issue, the power under which it was executed must be produced and proved. *Elliott v. Pearce*, 20 Ark. 508. See also *Carnall v. Duval*, 22 Ark. 136, where it was held that the power of attorney to execute a deed must, in order to be used in an action where-in the deed is the subject matter of litigation, be admitted or proved.

*9. Whalen v. Gleeson* (Conn.), 71 Atl. 908.

In *Prestige v. Irwin*, 46 Ala. 653,

it was held that a letter acknowledging the receipt of money subscribed with the name of a party per another purports to be his writing, executed by his agent, and was admissible in evidence to charge him where the person so signing it testifies that he was the clerk of the other in a different department of his business, had written some letters for him at his request and dictation and none without it, though he does not remember anything in connection with the particular letter except that it is in his handwriting.

*10. Alabama.*—*Burgin v. Marx*, 48 So. 348; *Jinwright v. Nelson*, 105 Ala. 399, 17 So. 91.

*Colorado.*—*Londoner v. Stewart*, 3 Colo. 47.

*Georgia.*—*Carr v. Georgia I. & T. Co.*, 108 Ga. 757, 33 S. E. 190; *Raleigh & G. R. Co. v. Pullman Co.*, 122 Ga. 700, 50 S. E. 1008; *Almand v. Equitable Mtg. Co.*, 113 Ga. 983, 39 S. E. 421.

*Illinois.*—*Springer v. Bigford*, 160 Ill. 495, 43 N. E. 751; *Smith v. Mayfield*, 60 Ill. App. 266; *Sawyer v. Cox*, 63 Ill. 130; *Bills v. Stanton*, 69 Ill. 51; *Indianapolis & St. L. R. Co. v. Morganstern*, 103 Ill. 149; *Consolidated Coal Co. v. Peers*, 150 Ill. 344, 37 N. E. 937.

*Iowa.*—*Chicago, B. & Q. R. Co. v. Lewis*, 53 Iowa 101, 4 N. W. 842. See also *Blackshire v. Iowa Homestead Co.*, 39 Iowa 624.

*Massachusetts.*—*Chamberlain v. Bradley*, 101 Mass. 188.

*Montana.*—*Tague v. John Caplice Co.*, 28 Mont. 51, 72 Pac. 297.

*North Carolina.*—*Shaffer v. Hahn*, 111 N. C. 1, 15 S. E. 1033.

*South Carolina.*—*Leesville Mfg. Co. v. Iron Wks.*, 75 S. C. 342, 55 S. E. 768.

*South Dakota.*—*Armstrong v. Advance Threshing Co.*, 5 S. D. 12, 57 N. W. 1131 (letter).

*Texas.*—*Orange Rice Mill Co. v. McIlhenny*, 33 Tex. Civ. App. 592, 77 S. W. 428.

attached to the instrument and it appears to be regular on its face.<sup>11</sup>

**L. LETTERS AND TELEGRAMS.** — a. *In General.* — Generally a letter<sup>12</sup> is inadmissible unless shown to have been actually written

*Compare* Elkhart Hydraulic Co. v. Turner, 169 Ind. 455, 84 N. E. 812.

A written instrument purporting to have been executed by an incorporated bank signed by the president and cashier and attested by the bank's seal, is admissible in evidence without proof of authority to execute the contract, or that the seal was attached by authority. *National Bank of Commerce v. Atkinson*, 8 Kan. App. 30, 54 Pac. 8. See also *Town Co. v. Swigart*, 43 Kan. 292, 23 Pac. 569, 19 Am. St. Rep. 137.

**Letters.** — In *Bloom v. State Ins. Co.*, 94 Iowa 359, 62 N. W. 810, it was held that letters written on paper containing the letter head of an insurance company, in answer to letters written to the company, and signed by its secretary and the superintendent of the loss department, should be presumed to have been written by persons duly authorized. The court said: "It should be presumed that the letters addressed to the defendant were answered by the proper officers. Surely it ought not to be held, without some evidence rebutting the presumption, that some janitor, floor sweeper, or other subordinate employe, obtained possession of the correspondence, and answered the letters."

**Official Report** of a railroad corporation filed many years before, in accordance with a legislative act, will be presumed to have been executed by authorized agents. *MacDonald v. New York, etc. R. Co.*, 25 R. I. 40, 54 Atl. 795.

**Judicial Notice** not taken of the substance of by-laws or customs of private corporation to show that the president had authority to sign promissory notes. *Elkhart Hydraulic Co. v. Turner*, 169 Ind. 455, 84 N. E. 812.

**Official Capacity Must Be Shown.** The fact that the person purporting to sign as an officer of a corporation was really such officer must be shown. *Smith v. Guarantee Dental Co.*, 114 N. Y. Supp. 867.

Where the name of the corporation is stamped on an instrument, followed by the name of an individual, written in ink, the authority of that person to act as agent for the corporation is not established. *Underwriters' F. Assn. v. Henry* (Tex. Civ. App.), 79 S. W. 1072.

**Authenticity of Signature Must Be Established.** — Where an instrument is signed by a person in behalf of a corporation it must still be shown that the signature is that of the person who purported to sign. *Smith v. Guarantee Dental Co.*, 114 N. Y. Supp. 867.

11. *Almand v. Equitable Mtg. Co.*, 113 Ga. 983, 39 S. E. 421; *Dodge v. American Freehold Co.*, 109 Ga. 394, 34 S. E. 672; *Bale v. Todd*, 123 Ga. 99, 50 S. E. 990; *Tague v. Caplice Co.*, 28 Mont. 51, 72 Pac. 297; *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607.

"It is an ancient and well established rule of law that where the seal of a corporation is affixed to a contract or written instrument, to which such corporation is a party, and it is signed by the president and secretary or other proper officers, it will be presumed that such officers did not exceed their powers, as the seal is *prima facie* proof that it was attached by proper authority and it lies with the party objecting to its execution to show that it was affixed surreptitiously or improperly." *Quackenboss v. Globe & R. F. Ins. Co.*, 177 N. Y. 71, 69 N. E. 223, reversing 77 App. Div. 168, 78 N. Y. Supp. 1019.

12. *United States.* — *In re Ladue Tate Mfg. Co.*, 135 Fed. 910.

*Alabama.* — *Louisville & N. R. Co. v. Britton*, 149 Ala. 552, 43 So. 108; *O'Connor Min. & Mfg. Co. v. Dickson*, 112 Ala. 304, 308, 20 So. 413; *Owensboro Wagon Co. v. Hall*, 149 Ala. 210, 43 So. 71.

*California.* — *Sinclair v. Wood*, 3 Cal. 98.

*Georgia.* — *Freeman v. Brewster*, 93 Ga. 648, 21 S. E. 165; *Allen, McIntosh & Co. v. Farmers' & F. Nat. Bank*, 129 Ga. 748, 59 S. E. 813.

by the purported author, or at his direction,<sup>13</sup> and that it was duly

*Indiana*. — *Baltimore & O. R. Co. v. McWhinney*, 36 Ind. 436; *Lingg v. State ex rel. Weitzel*, 28 Ind. App. 248, 61 N. E. 698.

*Iowa*. — *Dance v. McBride*, 43 Iowa 624; *State v. Waite*, 101 Iowa 377, 70 N. W. 596.

*Kentucky*. — *Donnelly v. Donnelly*, 25 Ky. L. Rep. 1543, 78 S. W. 182.

*Missouri*. — *Brown v. Massey*, 138 Mo. 519, 38 S. W. 939.

*Nebraska*. — *Peycke v. Shinn*, 68 Neb. 343, 94 N. W. 135; *Gartrell v. Stafford*, 12 Neb. 545, 11 N. W. 732, 41 Am. Rep. 767.

*New York*. — *Rothchild v. Schwarz*, 28 Misc. 521, 59 N. Y. Supp. 527.

*North Carolina*. — *Foushee v. Owen*, 122 N. C. 360, 29 S. E. 770.

*Pennsylvania*. — *Sweeney v. Ten Mile O. & G. Co.*, 130 Pa. St. 193, 18 Atl. 612.

*Texas*. — *International Harvester Co. v. Campbell*, 43 Tex. Civ. App. 421, 96 S. W. 93; *Ex parte Denning*, 50 Tex. Crim. 629, 100 S. W. 401; *Henry v. Vaughan* (Tex. Civ. App.), 103 S. W. 192.

In *O'Connor Min. & Mfg. Co. v. Dickson*, 112 Ala. 304, 20 So. 413, the court said: "The law presumes that a letter prepaid and posted and properly addressed to the sendee at the usual place of receiving his mail was delivered in due course. It rests upon the assumption that the post officials and post men discharge their duties; but there is no presumption that a person whose name is signed to a letter is its author merely because it was carried by the post."

Evidence of the receipt of a letter purporting to have been written by a person and mailed at his place of residence is not sufficient to authorize its introduction in evidence against the alleged writer; there must be proof either that he wrote it or authorized it to be written or sent. *Nichols v. Kingdom Iron Ore Co.*, 56 N. Y. 618.

Letters signed by the "H. E. Owen Grain Co." are inadmissible as letters of "H. E. Owen" without proof that they are one and the

same person. *Foushee v. Owen*, 122 N. C. 360, 29 S. E. 770.

Postscript must be shown to have been written by the purported author. *Love v. Love*, 98 Mo. App. 562, 73 S. W. 255.

**Anonymous Letters**, inadmissible unless their authorship is proved. *Pilon v. Viger*, 198 Mass. 118, 84 N. E. 310.

13. *Hightower v. Ogletree*, 144 Ala. 94, 21 So. 934; *Deep River Nat. Bank's Appeal*, 73 Conn. 341, 47 Atl. 675 (signature affixed to type-written letter by stamp); *Nichols v. Kingdom Iron Ore Co.*, 56 N. Y. 618; *Hargrove v. John*, 120 Ind. 285, 22 N. E. 132; *Butler v. Price*, 115 Mass. 578.

In *Cobb v. Malone*, 91 Ala. 388, 8 So. 693, where the question turned on whether or not the plaintiff had agreed to dismiss a suit on the execution of a certain mortgage, and a letter to that effect to which the plaintiff's name was signed was produced but it appeared that the letter was written by the plaintiff's clerk and the plaintiff denied his authority to write it, it was held that the letter was not admissible because there was no evidence tending to show that the clerk had authority to write it.

In *Butler v. Price*, 115 Mass. 578, it was held that evidence that the holder of a promissory note had written to the maker demanding payment, to which he had received a reply from the maker's wife enclosing money in part payment of the note, was not sufficient evidence that the maker authorized the writing of the letter so as to permit the letter to be introduced in evidence against him.

In *Reynolds v. Phillips* (Neb.), 95 N. W. 491, an action upon a promissory note purporting to have been executed by an agent, wherein one of the matters in dispute was the authority of the agent to execute the note in the name of the defendants, it was held error to permit the plaintiff to read in evidence a letter purporting to have come from the defendants recogniz-

sent<sup>14</sup> and received.<sup>15</sup> And the same is true of a telegram.<sup>16</sup>

Copies of a letter or telegram are only admissible after the execution of the original has been proved.<sup>17</sup>

b. *Reply Letter*.—A *prima facie* case of authenticity is made where it is shown that the letter<sup>18</sup> was a reply received in due

ing the existence and validity of the note, but to which the name of the defendants was impressed by means of a rubber stamp, and there was no evidence by whom or by what authority the stamp was affixed.

14. Testimony that letters were sent to a person will be construed as meaning that they were mailed in the usual manner. *Oregon S. S. Co. v. Otis*, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221.

15. *United States*.—*Smiths v. Shoemaker*, 17 Wall. 630.

*California*.—*Eppinger v. Scott*, 112 Cal. 369, 42 Pac. 301, 44 Pac. 723, 53 Am. St. Rep. 220.

*Georgia*.—*Foster v. Leeper*, 29 Ga. 294.

*Kentucky*.—*Donnelly v. Donnelly*, 25 Ky. L. Rep. 1543, 78 S. W. 182.

*Massachusetts*.—*Davis v. Mason*, 4 Pick. 156.

*Pennsylvania*.—*Huckestein v. Kelly & Jones Co.* 139 Pa. St. 201, 21 Atl. 78.

*Texas*.—*Griffith v. Lake*, 12 S. W. 285.

*Utah*.—*Cooney v. McKinney*, 25 Utah 329, 71 Pac. 485.

*Wisconsin*.—*Whiting v. Mississippi Mut. Ins. Co.*, 76 Wis. 592, 45 N. W. 672.

16. *United States*.—*Drexel v. True*, 74 Fed. 12, 20 C. C. A. 265.

*Connecticut*.—*Lewis v. Havens*, 40 Conn. 363.

*Illinois*.—*Chicago & I. R. Co. v. Russell*, 91 Ill. 298, 33 Am. Rep. 54.

*Louisiana*.—*Ritchie v. Bass*, 15 La. Ann. 668.

*Maryland*.—*Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355.

*Minnesota*.—*Burt v. Winona*, etc. R. Co., 31 Minn. 472, 18 N. W. 285, 289; *Adams v. Mille Lacs Lumb. Co.*, 32 Minn. 216, 19 N. W. 735.

*Nebraska*.—*Yeiser v. Cathers*, 97 N. W. 840; *Peycke v. Shinn*, 68 Neb. 343, 94 N. W. 135.

*South Dakota*.—*Reynolds v. Hinrichs*, 16 S. D. 602, 94 N. W. 694.

*Texas*.—*Chester v. State*, 23 Tex. App. 577, 5 S. W. 125.

*Vermont*.—*Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127.

*West Virginia*.—*National Bank v. National Bank*, 7 W. Va. 544; *Cobb v. Glenn B. & L. Co.*, 57 W. Va. 49, 49 S. E. 1005.

17. *Huckestein v. Kelly & Jones Co.*, 139 Pa. St. 201, 21 Atl. 78; *Davis v. Mason*, 4 Pick. (Mass.) 156; *Whiting v. Mississippi Val. Ins. Co.*, 76 Wis. 592, 45 N. W. 672; *Joannes v. Millerd*, 90 Wis. 68, 62 N. W. 916; *Foster v. Leeper*, 29 Ga. 294.

18. *England*.—*Ovenston v. Wilson*, 2 Car. & K. 1.

*United States*.—*Scofield v. Parlin & Orendorff Co.*, 61 Fed. 804, 10 C. C. A. 83; *National Acc. Soc. v. Spiro*, 78 Fed. 774, 24 C. C. A. 334.

*Alabama*.—*White v. Tolliver*, 110 Ala. 300, 20 So. 97; *Louisville & N. R. Co. v. Britton*, 149 Ala. 552, 43 So. 108.

*Colorado*.—*Chicago, B. & Q. R. Co. v. Roberts*, 10 Colo. App. 87, 49 Pac. 428; *Atlantic Ins. Co. v. Manning*, 3 Colo. 224.

*Georgia*.—*Ragan v. Smith*, 103 Ga. 556, 29 S. E. 759.

*Illinois*.—*Consolidated Perfume Co. v. National Bank*, 86 Ill. App. 642; *Dick v. Zimmerman*, 207 Ill. 636, 69 N. E. 754.

*Iowa*.—*Davis v. Robinson*, 67 Iowa 355, 25 N. W. 280; *Bloom v. State Ins. Co.*, 94 Iowa 359, 62 N. W. 810; *Lyon v. Railway Pass. Assur. Co.*, 46 Iowa 631; *Nichols-Shepard Co. v. Ringler*, 135 Iowa 181, 112 N. W. 543; *City Nat. Bank v. Jordan*, 117 N. W. 758.

*Kansas*.—*Norwegian Plow Co. v. Munger*, 52 Kan. 371, 35 Pac. 11; *Huber Mfg. Co. v. Claudel*, 71 Kan. 441, 80 Pac. 960.



course of mail; and the same presumption obtains in the case of a reply telegram.<sup>19</sup>

*Maine*.—Abbott *v.* McAloon, 70 Me. 98.

*Massachusetts*.—Connecticut *v.* Bradish, 14 Mass. 296.

*Minnesota*.—Hoxsie *v.* Empire Lumb. Co., 41 Minn. 548, 43 N. W. 476; Melby *v.* Osborne, 33 Minn. 492, 24 N. W. 253.

*Missouri*.—Hays *v.* General Benev. Assn., 127 Mo. App. 195, 104 S. W. 1141; Sanders Pub. Co. *v.* Emerson, 2 Mo. App. Rep'r. 1116; Kloes *v.* Wurmser, 34 Mo. App. 453.

*Nebraska*.—Peycke *v.* Shinn, 76 Neb. 364, 107 N. W. 386. See *s. c.*, 68 Neb. 343, 94 N. W. 135; People's Nat. Bank *v.* Geisthardt, 55 Neb. 232, 75 N. W. 582; Gartrell *v.* Stafford, 12 Neb. 545, 11 N. W. 732, 41 Am. Rep. 767; Helwig *v.* Aulabaugh, 120 N. W. 162.

*South Carolina*.—Leesville Mfg. Co. *v.* Morgan Wood & Iron Wks., 75 S. C. 342, 55 S. E. 768.

*South Dakota*.—Armstrong *v.* Advance Thresher Co., 5 S. D. 12, 57 N. W. 1131.

*Texas*.—Ullman *v.* Babcock, 63 Tex. 68; Lewis *v.* Alexander (Tex. Civ. App.), 31 S. W. 414; Dix *v.* Jackman (Tex. Civ. App.), 37 S. W. 344; Sun Mfg. Co. *v.* Egbert, 37 Tex. Civ. App. 512, 84 S. W. 667.

*West Virginia*.—Loverin *v.* Bumgarner, 59 W. Va. 46, 52 S. E. 1000.

**Typewritten Letter.**—In Davis *v.* Robinson, 67 Iowa 355, 25 N. W. 280, the court, against plaintiffs' objection, admitted in evidence certain letters which purported to be written by plaintiffs to defendant, and which related to the subject of the controversy. They were written with a typewriter, and there was no direct evidence that they were written by plaintiffs or by their direction. It was shown, however, that defendant received them through the mail, and they purported to be in answer to letters which he had written to plaintiffs. They were held admissible without further proof than this that they were written by plaintiffs.

**Admissible Over Alleged Writer's Declaration That it Is a Forgery.** Illinois Cent. R. Co. *v.* Messnard, 15 Ill. App. 213.

**Typewritten Signature** to reply letter,—same rule applies. Lancaster *v.* Ames, 103 Me. 87, 68 Atl. 533, 17 L. R. A. (N. S.) 229. And see Davis *v.* Robinson, 67 Iowa 355, 25 N. W. 280.

**Letters Arranged for in Previous Conversations.**—The rule stated in the text seems to have been applied in the case of Sun Mfg. Co. *v.* Egbert, 37 Tex. Civ. App. 512, 84 S. W. 667, to a state of facts in which the letter was construed as a reply or answer to a previous verbal proposition, made in a conversation between the parties.

19. *Michigan*.—People *v.* Hammond, 132 Mich. 422, 93 N. W. 1084.

*Minnesota*.—Melby *v.* Osborne, 33 Minn. 492, 24 N. W. 253.

*Missouri*.—Taylor *v.* Steamer Robert Campbell, 20 Mo. 254.

*Nebraska*.—People's Nat. Bank *v.* Geisthardt, 55 Neb. 232, 75 N. W. 582.

*New York*.—Thorpe *v.* Philbin, 3 N. Y. Supp. 939 (telegram in reply to a letter).

*North Carolina*.—Edwards Bros. *v.* Erwin, 148 N. C. 429, 62 S. E. 545.

*South Dakota*.—Western Twine Co. *v.* Wright, 11 S. D. 521, 78 N. W. 942, 44 L. R. A. 438; Armstrong *v.* Advance Thresher Co., 5 S. D. 12, 57 N. W. 1131.

*Contra*, Howley *v.* Whipple, 48 N. H. 487; Smith *v.* Easton, 54 Md. 138.

"The principle upon which the cases rests is that there is a presumption that those in charge of receiving and transmitting mail perform the duties entrusted to them, and this coupled with the fact that the letter received on its face purports to be a reply to the one sent, and coming from the source from which it might be expected, raises a joint inference that it is in fact a

of the letter to which it is alleged to be an answer must be made.<sup>20</sup>

M. INSTRUMENT PRODUCED ON NOTICE. — a. *In General.* Where papers are produced on notice from the adverse party<sup>21</sup> and the party producing them is a party to the instrument or claims under it, no proof of the execution of the instrument is required<sup>22</sup> though proof is necessary where the party producing it is not a party and does not claim any interest under it.<sup>23</sup>

b. *Where Notice Is Unnecessary.* — The same rule applies in

reply. We see no reason why this same presumption of the performance of duty should not obtain as to the employes of a telegraph company." *Edwards Bros. v. Erwin*, 148 N. C. 429, 62 S. E. 545.

In *Howley v. Whipple*, 48 N. H. 487, the leading case holding to the contrary of the rule as stated, the court said: "But there is a difference in principle between the two cases—the letter received in reply to a written communication, and the despatch received in reply to the same communication sent by telegraph. Telegraphic messages are instruments of evidence for various purposes and are governed by the same general rules which are applied to other writings. If there be any difference, it results from the fact that messages are first written by the sender, and are again written by the operator at the other end of the line, thus causing the inquiry as to which is the original.

... It will be seen at a glance that there is nothing about the handwriting here that could indicate that the message came from Gould, nor is there anything in the case to make this message evidence any more than there would be if Gould had sent a verbal message by one man who had communicated it to another, and the latter had, at length, conveyed the message to the party for whom it was designed and to whom it was originally sent. This message might be received as it was sent, and would ordinarily be acted on in the business of life, but the only way to prove such a message in a court of law would be to summon both the intermediate agents or bearers of the message, and in that way to trace the message from the lips of the one party

until it was received in the ear of the other party. Anything short of that would be to rely upon hearsay evidence of the loosest character."

<sup>20.</sup> *Linn v. Ins. Co.*, 78 Mo. App. 192.

<sup>21.</sup> It is immaterial that the party giving notice is a stranger to the instrument. *Jackson v. Kingsley*, 17 Johns. (N. Y.) 158.

<sup>22.</sup> *England.* — *Pearce v. Hooper*, 3 Taunt. 60; *Roe v. Wilkins*, 4 Ad. & El. 86, 31 E. C. L. 35.

*United States.* — *Rhoades v. Selin*, 4 Wash. C. C. 715, 20 Fed. Cas. No. 11,740.

*Alabama.* — *Ward v. Reynolds*, 32 Ala. 384; *Woodstock Iron Co. v. Reed*, 84 Ala. 493, 4 So. 369.

*Delaware.* — *Taylor v. Jackson*, 5 Houst. 224.

*Florida.* — *Williams v. Keyser*, 11 Fla. 234, 89 Am. Dec. 243.

*Georgia.* — *Rogers v. Hoskins*, 15 Ga. 270; *Herring v. Rogers*, 30 Ga. 615; *Campbell v. Roberts*, 66 Ga. 733; *Beverly v. Burke*, 9 Ga. 440, 54 Am. Dec. 351.

*Massachusetts.* — *McGregor v. Wait*, 10 Gray 72, 69 Am. Dec. 305.

*New York.* — *White v. Miller*, 7 Hun 427; *Jackson v. Kingsley*, 17 Johns. 158; *Betts v. Badger*, 12 Johns. 223, 7 Am. Dec. 309.

*North Carolina.* — *Bernhardt v. Brown*, 122 N. C. 587, 29 S. E. 884, 65 Am. St. Rep. 725.

*Pennsylvania.* — *Frantz v. Harmon*, 2 Yeates 473.

*South Carolina.* — *Izlar v. Hartley*, 24 S. C. 382.

*Texas.* — *Simonton v. Mayblum*, 59 Tex. 9.

*Admissible in Subsequent Trials of Same Cause of Action.* — *Cushman v. Coleman*, 92 Ga. 772, 19 S. E. 46; *Wooten v. Nall*, 18 Ga. 609.

<sup>23.</sup> *Jackson v. Kingsley*, 17

cases in which for any reason notice to produce need not be given by the adverse party.<sup>24</sup>

c. *As Evidence for Party Producing.* — Where papers produced on notice are placed in evidence by the party calling for them, they may, of course, be used by the party producing them;<sup>25</sup> but the mere inspection of the papers by the party calling for them does not authorize their introduction by the other party without proof of their execution,<sup>26</sup> although there are some authorities to the contrary.<sup>27</sup>

N. DENIAL OF EXECUTION. — In many states where an action is brought upon a written instrument or it is referred to in the plead-

Johns. (N. Y.) 158; Rhoades v. Selin, 4 Wash. C. C. 715, 20 Fed. Cas. No. 11,740; Taylor v. Jackson, 5 Houst. (Del.) 224; Campbell v. Roberts, 66 Ga. 733.

24. *Nature of Action* may itself give notice. Maffi v. Stephens (Tex. Civ. App.), 93 S. W. 158.

25. *Letters Produced on Notice but Not Examined* must be proved by party producing them before they are admissible. Stetson v. Lyons, 34 Ala. 140; Wooten v. Nall, 18 Ga. 609.

*Mere Notice To Produce Papers* does not require the party giving notice to read them in evidence. Blight v. Ashley, 1 Pet. C. C. 15, 3 Fed. Cas. No. 1,541; Saunders v. Duval, 19 Tex. 467; Penobscot Boom Corp. v. Lamson, 16 Me. 224, 33 Am. Dec. 656; Blake v. Russ, 33 Me. 360.

26. Carr v. Gale, 3 Woodb. & M. 38, 5 Fed. Cas. No. 2,435; Austin v. Thomson, 45 N. H. 113; Withers v. Gillespy, 7 Serg. & R. (Pa.) 10 (dicta); Carradine v. Hotchkiss, 120 N. Y. 608, 24 N. E. 1020; Kenny v. Clarkson, 1 Johns. (N. Y.) 385, 3 Am. Dec. 336. See Worrall v. Davis C. & C. Co., 113 Fed. 549, 557.

"The claim that it gives the party calling for a paper an unfair advantage if he may inspect it and then decline to put it in evidence, seems to us rather specious than sound. The same objection would lie in case of bills for discovery. . . . The party who has in his possession books or papers which may be material to the case of his opponent has no moral right to

conceal them from his adversary. If on inspection, the party calling for them finds nothing to his advantage his omission to put them in evidence does not prevent the party producing them from proving and introducing them in evidence if they are competent against the other party." Smith v. Rentz, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138.

27. *England.* — Wharam v. Routledge, 5 Esp. 235, 8 R. R. 851; Calvert v. Flower, 7 Car. & P. 386.

*United States.* — Jordan v. Wilkins, 2 Wash. C. C. 482, 13 Fed. Cas. No. 7,526 (note); Waller v. Stewart, 4 Cranch C. C. 532, 29 Fed. Cas. No. 17,109; Edison Elec. Co. v. United States Co., 45 Fed. 55.

*Delaware.* — Randel v. Chesapeake & D. C. Co., 1 Har. 233, 284.

*Georgia.* — Wooten v. Nall, 18 Ga. 609; Blizzard v. Nosworthy, 50 Ga. 514.

*Maine.* — Blake v. Russ, 33 Me. 360.

*Massachusetts.* — Clark v. Fletcher, 1 Allen 53; Com. v. Davidson, 1 Cush. (Mass.) 33; Long v. Drew, 114 Mass. 77.

*The Reason Assigned* for the rule making documents produced on notice and inspected evidence in the case for both parties is that it would give an unconscionable advantage to enable a party to pry into the affairs of his adversary for the purpose of compelling him to furnish evidence against himself without at the same time subjecting him to the risk of making whatever he inspects evidence for both parties. Wooten v. Nall, 18 Ga. 609.

ings,<sup>28</sup> the execution of the instrument need not be proved unless it is specifically<sup>29</sup> denied by affidavit before the commencement of the trial,<sup>30</sup> or its execution is expressly denied<sup>31</sup> by verified plead-

28. In *Williams v. Rawlings*, 10 Ga. 491, it was held that the Georgia act prohibiting defendants from contesting the genuineness of any instrument therein named unless upon oath applies to such instruments only as are the foundation of the suit and not to such as are collaterally introduced in evidence, and that either party in an ejectment cause is entitled to impeach by proof, without making the affidavit of forgery, the genuineness of a deed tendered in evidence.

29. *Garland v. Gaines*, 73 Conn. 662, 49 Atl. 19, 84 Am. St. Rep. 182.

In *Wisconsin*, a writing purporting to be signed by a person proves itself unless such person "specifically denies" the signature or execution. Stat. 1898, § 4192. *Illinois Steel Co. v. Paczocha* (Wis.), 119 N. W. 550.

30. *Roberts v. Iron Car Equip. Co.*, 161 Pa. St. 348, 29 Atl. 38; *Conshohocken Tube Co. v. Iron Car Equipment Co.*, 161 Pa. St. 391, 28 Atl. 1119; *Clarke v. Newton*, 235 Ill. 539, 85 N. E. 747, affirming 138 Ill. App. 196 (3 Starr & C. Ann. Stat. 1896, p. 3017, c. 110, par. 34); *Stewart v. Gleason*, 23 Pa. Super. 325.

Where an instrument appears duly executed on its face and there is no denial of the allegation that it was executed by the parties, proof of execution need not be made. *Hargrove v. Adcock*, 111 N. C. 166, 16 S. E. 16.

In *Wilbur v. Stoepel*, 82 Mich. 344, 46 N. W. 724, 21 Am. St. Rep. 568, where the defendants denied under oath the execution of the contract in suit, the jury had been charged that the burden of proof was on the defendant to show that the contract was not executed. In holding this to be error the court said: "Whenever the execution of an instrument sued on is denied by affidavit, under circuit court rule 79, the burden of proof is upon the plaintiff to show the execution of the instrument. No instrument is executed until delivered. In such case, delivery,

which is an essential part of the execution, cannot be inferred from possession. The burden of proof remained throughout the trial upon the plaintiff."

**Rule of Court**, formerly existed in Pennsylvania under which no proof need be made in such a case unless the adverse party notified the other party that he would require it. *Reese v. Reese*, 90 Pa. St. 89.

In *Virginia* the declaration must declare that the defendant or person stated to have made the writing, subscribed his name thereto. *Kelly v. Paul*, 3 Gratt. (Va.) 182; *Shepherd v. Frys*, 3 Gratt. (Va.) 422.

31. *United States v. Apache County v. Barth*, 177 U. S. 538, reversing 6 Ariz. 13, 53 Pac. 187 (applying Arizona Rev. Stat. 1887, § 735); *Moline Plow Co. v. Webb*, 141 U. S. 616 (Texas statute).

*Alabama*.—*Capehart v. Granite Mills*, 97 Ala. 353, 12 So. 44.

*California*.—*Horn v. Water Co.*, 13 Cal. 62, 73 Am. Dec. 569; *Corcoran v. Doll*, 32 Cal. 82.

*Colorado*.—*Lothrop v. Roberts*, 16 Colo. 250, 27 Pac. 698.

*Georgia*.—*Wylly v. Screven*, 98 Ga. 213, 25 S. E. 435 (Georgia Code §§ 2851, 3454, 3472, 4149). See *Pratton v. Bank of Lafayette*, 124 Ga. 965, 53 S. E. 664.

*Illinois*.—*Shepherd v. Royce*, 71 Ill. App. 321; *Zuel v. Bowen*, 28 Ill. 234; *Shulfeldt v. Henderson*, 26 Ill. App. 593.

*Indiana*.—*Belton v. Smith*, 45 Ind. 291; *Woollen v. Wire*, 110 Ind. 251, 11 N. E. 236.

*Iowa*.—*Smith v. King*, 88 Iowa 105, 55 N. W. 88.

*Maine*.—See *Flynn v. Sullivan*, 91 Me. 355, 40 Atl. 136.

*Maryland*.—*Prudential Ins. Co. v. Devoe*, 98 Md. 584, 56 Atl. 809.

*Michigan*.—*Homminger v. Western Assur. Co.*, 95 Mich. 355, 54 N. W. 949; *Ortmann v. Merchants' Bank*, 41 Mich. 482, 2 N. W. 677; *New York Iron Mine v. Citizens' Bank*, 44 Mich. 344, 6 N. W. 823.

ings, providing the instrument purports<sup>32</sup> to be signed by the party against whom it is offered in evidence.<sup>33</sup>

O. NOTIFICATION OF INTENTION TO USE. — Very similar statutes exist in some states under which if a party notify his adversary of his intention to use as evidence any material writing and offer

*Minnesota.* — *London & N. W. R. Co. v. St. Paul Co.*, 84 Minn. 144, 86 N. W. 872 (Minnesota Gen. Stats. 1894, § 5751); *In re O'Neil's Estate*, 76 N. W. 27.

*Mississippi.* — *Wanita Woolen Mills v. Rollins*, 75 Miss. 253, 22 So. 819.

*Texas.* — *Fine v. Freeman*, 83 Tex. 529, 17 S. W. 783, 18 S. W. 963; *Close v. Judson*, 34 Tex. 288 (action on letter acknowledging an indebtedness).

*Wisconsin.* — *Parroski v. Goldberg*, 80 Wis. 339, 50 N. W. 191.

In *Leary v. Meier*, 78 Ind. 393, an action to recover possession of property leased by the defendant from the plaintiff, the execution of the lease not being denied by affidavit before the commencement of the trial, nor by a pleading under oath, it was held that as the lease was referred to in the complaint it might be read in evidence on the trial without proof of its execution.

In *Brooks v. Brady*, 53 Ill. App. 155, an action upon a written instrument as follows: "Pays William Morris one hundred and five and 70-100 dollars with eight per cent. interest," and signed, it was held that as its execution was not denied by a verified plea it was admissible under § 34 of the Practice Act without proof of the signature of the maker.

**Death of Party Executing Such Instrument**, in such a case the rule does not apply, under some statutes. *Fitzgerald v. English*, 73 Minn. 266, 76 N. W. 27. See *London & N. W. Co. v. St. Paul P. I. Co.*, 84 Minn. 144, 86 N. W. 872; *Julian v. Rogers*, 87 Mo. 229. And see article "EXECUTORS AND ADMINISTRATORS," Vol. V, p. 408.

**Effect.** — "A failure to deny the execution by a pleading under oath has been held to be so far an admission of the genuineness of the instrument as to preclude its being

controverted by proof. This rule would perhaps apply to a case like this where the denial is by affidavit. The reason of this ruling, as stated in the earliest decision upon the subject under these statutes, is that the party relying upon the instrument has a right to be forewarned of any contemplated attack upon it." *Carver v. Carver*, 97 Ind. 497.

**Purpose of Such Statutes** is not to shift the burden of proof but simply to relieve the party relying upon a written instrument of the burden of making proof of its execution unless the execution be denied under oath. *Carver v. Carver*, 97 Ind. 497.

**Effect of Denial.** — Where the execution of a written instrument is denied under oath, this does not cast upon the party offering it the necessity of proving it more strictly than he would be required to do at common law. *Jones v. Rives*, 3 Ala. 11. And see *Stewart v. Gleason*, 23 Pa. Super. 325.

32. Instrument purporting to be signed by "S. Holdridge" is inadmissible without proof of its execution against a defendant whose name is "C. S. Holdridge." *Massillon Eng. & T. Co. v. Holdridge*, 68 Minn. 393, 71 N. W. 399. And see *Illinois Steel Co. v. Paczocha* (Wis.), 119 N. W. 550.

33. *Fitzgerald v. English*, 73 Minn. 266, 76 N. W. 27; *Mast & Co. v. Matthews*, 30 Minn. 441, 16 N. W. 155.

In *Indiana*, the rule applies as against all parties to an action, whether the instrument was executed by them or not. *Belton v. Smith*, 45 Ind. 291; *Carver v. Carver*, 97 Ind. 497.

In *Texas*, such an instrument is inadmissible against the vendee of the person executing it, unless it is proved. *Lignoski v. Crooker*, 86 Tex. 324, 24 S. W. 278, 788.

him an inspection, the execution of the writing need not be proved unless expressly denied by affidavit.<sup>84</sup>

**2. Mode of Proof.** — A. UNATTESTED INSTRUMENTS. — a. *In General.* — (1.) **Proof of Handwriting.** — The ordinary method of proving the signature to a written instrument is to prove the handwriting of the writer.<sup>85</sup>

(2.) **Witness Present at Execution.** — A person present at the time an instrument was drawn up and signed may of course testify to its execution.<sup>86</sup>

(3.) **Circumstantial Evidence.** — (A.) *IN GENERAL.* — The authenticity of an instrument may be sufficiently established by circumstantial evidence.<sup>87</sup>

(B.) **HABITUAL METHOD OF SIGNING.** — The fact that a name was

**34. Carver v. Carver, 97 Ind. 497.**

An Indiana statute (Burns Rev. Stat. 1901 § 486; Horner's Rev. Stat. 1901, § 478) provides that if either party before trial permits the other to inspect any material writing with notice that he intends to read it as evidence, it may be so read without proof of genuineness of execution unless denied by affidavit before trial; and in *Boseker v. Chamberlain*, 160 Ind. 114, 66 N. D. 448, it was held that a written assignment of the claim sued upon might be read in evidence by the plaintiff, he having complied with this statute, without proof of its execution, although it was not the foundation of the action.

**35. Seibold v. Rogers, 110 Ala. 438, 18 So. 312; Williams v. Keyser, 11 Fla. 234, 89 Am. Dec. 243; Pullen v. Hutchinson, 25 Me. 249; Curtis v. Hall, 4 N. J. L. 148; Rutherford v. Dyer, 146 Ala. 665, 40 So. 974.**

A written instrument, not attested by a subscribing witness, is sufficiently proved to authorize its introduction by competent proof, that the signature of the person, whose name is undersigned, is genuine. The party producing it is not required to proceed further upon a mere suggestion of a false date, when there are no indications of falsity found upon the paper, and prove that it was actually made on the day of the date. After proof that the signature is genuine, the law presumes that the instrument in all its parts is genuine, also, when there are no indications to be found upon it to

rebut such a presumption. *Pullen v. Hutchinson*, 25 Me. 249.

**Letters.** — *Broadrick v. Broadrick*, 25 Pa. Super. 225; *Pearson v. McDaniel*, 62 Ga. 100; *Swicard v. Hooks*, 85 Ga. 580, 11 S. E. 863; *Parker v. Amazon Ins. Co.*, 34 Wis. 363.

Where the handwriting in which was affixed the signature to a letter has been identified as that of one of the parties to the action on trial, the letter if otherwise proper evidence is admissible even though the signature thereto is denied by the testimony of the party charged as the author of the letter. *Burgess v. Burgess*, 44 Neb. 16, 62 N. W. 242.

**Manner of Proving Handwriting.** See article "HANDWRITING," Vol. VI.

**36. Jones v. Hough, 77 Ala. 437; Stoddard v. Hill, 38 S. C. 385, 17 S. E. 138; Clayton v. Ingram (Tex. Civ. App.), 107 S. W. 880; Dundy v. Chambers, 23 Ill. 369.**

**37. Price v. Garvin (Tex. Civ. App.), 69 S. W. 985; Bentley v. McCall, 119 Ga. 530, 46 S. E. 645; Payne v. Ormond, 44 Ga. 514; Terry v. Rodahan, 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep. 420; Bugbee v. Davis, 167 Mass. 33, 44 N. E. 1055; International Harv. Co. v. Campbell, 43 Tex. Civ. App. 421, 96 S. W. 93; Forgerson v. Smith, 104 Ind. 246, 3 N. E. 866.**

Where a contract purported to be executed by the defendant corporation and it appears that the parties acted in accordance with its provisions, the execution of the contract will be considered proved. *Nelson*

signed in the manner customarily employed by the person is some evidence of the genuineness of the signature.<sup>38</sup>

(C.) INSTRUMENT SENT EXPRESSLY FOR SIGNATURE. — Although an instrument is sent to a person for the express purpose of obtaining his signature and is returned signed, this is not enough of itself to establish the genuineness of the signature.<sup>39</sup>

(4.) Admissions. — The admissions of the adverse party may sufficiently supply proof of the authenticity of an instrument and dispense with all affirmative proof upon the part of the person offering the instrument.<sup>40</sup>

*v. Western Steam Nav. Co. (Wash.)*, 100 Pac. 325.

The fact that a consignor had a telephone conversation with some person at the office of the express company does not sufficiently authenticate an express receipt received by the consignor from his messenger. *Hill v. Adams Exp. Co.*, 74 N. J. L. 338, 68 Atl. 94.

38. *Produce Exch. Tr. Co. v. Bieberbach*, 176 Mass. 577, 58 N. E. 162; *International Harv. Co. v. Campbell*, 43 Tex. Civ. App. 421, 96 S. W. 93.

"In some instances the signature of the company was made by the use of a rubber stamp; in others it was typewritten, and in others it was in the handwriting of the secretary, and in these respects the notes admitted were similar to those in suit. All this evidence was admitted rightly because it was competent as against defendant company." *Produce Exch. Tr. Co. v. Bieberbach*, 176 Mass. 577, 58 N. E. 162.

**Signing by Stencil.** — See *Bell Bros. v. Western & A. R. Co.*, 125 Ga. 510, 54 S. E. 532; *Burriss v. Missouri Pac. R. Co.*, 105 Mo. App. 659, 78 S. W. 1042.

39. *Baum v. Rainbow Smelt. Co.*, 42 Or. 453, 71 Pac. 538.

The fact that a consignor received an express receipt from the messenger to whom he had intrusted a package to be delivered to the express company does not sufficiently authenticate the receipts. *Hill v. Adams Exp. Co.*, 74 N. J. L. 338, 68 Atl. 94.

"The fact that the lease was sent by the plaintiff to Thomas J. Gaines, Jr., to be executed, that he received

it, that it was returned to the plaintiff with his name signed to it, and that he afterwards occupied the rooms, was *prima facie* proof of the execution of the lease by him." *Garland v. Gaines*, 73 Conn. 662, 49 Atl. 19, 84 Am. St. Rep. 182.

40. *Delaware.* — *Plunkett v. Dil- lon*, 4 Del. Ch. 198.

*Georgia.* — *Vizard v. Moody*, 119 Ga. 918, 47 S. E. 348; *Wood v. Isom*, 68 Ga. 417.

*Illinois.* — *Lowman v. Aubery*, 72 Ill. 619; *Dundy v. Chambers*, 23 Ill. 369.

*Indiana.* — *Rhode v. Louthain*, 8 Blackf. 413.

*Massachusetts.* — *Nichols v. Allen*, 112 Mass. 23.

*Minnesota.* — *Pottgieser v. Dorn*, 16 Minn. 204.

*Missouri.* — *Smith v. Witton*, 69 Mo. 458; *Powell v. Adams*, 9 Mo. 766.

*New York.* — *Hall v. Beston*, 26 App. Div. 105, 49 N. Y. Supp. 811, affirmed, 165 N. Y. 632, 59 N. E. 1123 (admission in answer); *Eichhold v. Tiffany*, 20 Misc. 681, 46 N. Y. Supp. 534, reversed on other points, 28 App. Div. 60, 50 N. Y. Supp. 964.

*Pennsylvania.* — *Stewart v. Gleason*, 23 Pa. Super. 325; *West Philadelphia Nat. Bank v. Field*, 143 Pa. St. 473, 22 Atl. 829, 24 Am. St. Rep. 562.

In *Des Moines Sav. Bank v. Kennedy (Iowa)*, 120 N. W. 742, the plaintiff had obtained an order of court requiring the defendant to produce a patent under which the defendant claimed. This was produced and offered in evidence without further identification by the defendant, and this was held proper as

**b. Books of Corporation.**—The books of a corporation may be proved by the testimony of the officer of the corporation who is shown to be their proper custodian,<sup>41</sup> and each entry need not be

the production of the patent in response to the order was a solemn admission that it was what the order called for—a patent from the government to the defendant.

In *Houston & T. C. R. Co. v. Bath*, 40 Tex. Civ. App. 270, 90 S. W. 55, the bill of exceptions showing that certain receipts were given by a witness, it was held that the appellant could not be heard to deny the proper execution of the receipts.

In *Crichton v. Smith*, 34 Md. 42, an action for damages for the alleged breach of contract, it was held that a copy thereof was admissible in evidence for the plaintiffs, the same having been produced and used by the defendants as the contract between the parties to the suit in another cause then pending in the federal court of the district of Maryland, that such use by the defendants constituted an admission of its authenticity. See also *Philadelphia W. & B. R. Co. v. Howard*, 13 How. (U. S.) 307, 332.

In *Nason v. Bangor Christian Church*, 66 Me. 100, where the question was whether or not the church named was properly entitled to a legacy in a will, extracts from the records of the "Maine Eastern Conference of Christian Churches" and from the records of the claimant church were by agreement of the parties expressly made part of the case, and it was held that this sufficed to make them legally proper to be considered by the court; that "made a part of the case as they are without objection the authenticity and correctness of these records must be deemed to be conceded."

**Instrument Need Not Be Shown**  
Party at the time, to render his admission of its execution competent. *Stewart v. Gleason*, 23 Pa. Super. 325; *Rowley v. Ball*, 3 Cow. (N. Y. 303, 15 Am. Dec. 266 (*distinguishing* *Shaver v. Ehle*, 16 Johns. (N. Y.) 201); *Pentz v. Winterbottom*, 5 Denio (N. Y.) 51.

**Letters.**—*Mead v. Randall*, 111

Mich. 268, 69 N. W. 506; *Aspell v. Smith*, 134 Pa. St. 59, 19 Atl. 484; *Dunbar v. United States*, 156 U. S. 185.

**Admissions in Pleadings** may authenticate documents. *Smith v. Gale*, 144 U. S. 509; *Thorp v. Koekuk Coal Co.*, 48 N. Y. 253.

**Admission by Surety** that he executed the bond sued upon, together with the fact that there was a signature above his, purporting to be that of the principal, and in the place where it would be expected, sufficiently prove as against the surety execution by the principal. *Valentine v. Wheeler*, 116 Mass. 478.

In *Alabama* under § 992 Code 1896, the execution of an attested instrument cannot be proved by the admission of the maker. *Sledge v. Singley*, 139 Ala. 346, 37 So. 98; *Lewis v. Glass* (Ala.), 39 So. 771.

41. *Lowry Nat. Bank v. Fickett*, 122 Ga. 489, 50 S. E. 396; *Smith v. Natchez Steamboat Co.*, 1 How. (Miss.) 479. And see article "CORPORATIONS," Vol. III, p. 610.

"The books do not prove themselves, but when they are produced by an officer of the corporation who is shown to be the legal custodian of the books and who testifies that they are the original books, and the court by inspection becomes satisfied that there is nothing suspicious in the books to raise a suspicion of fraud, the identification is sufficient." *Lowry Nat. Bank v. Fickett*, 122 Ga. 489, 50 S. E. 396.

Books of a religious corporation were held sufficiently identified where they were identified by the person who had charge of them at the time the transactions in issue took place, although he was not the custodian of the books at the time of trial. *Illinois Conference v. Plagge*, 76 Ill. App. 468, *affirmed*, 177 Ill. 431, 53 N. E. 76, 69 Am. St. Rep. 252.

**Trustee of Bankrupt Corporation** is proper custodian of the corporation books and may sufficiently



verified by the person making it.<sup>42</sup> Entries may also be verified by any person who saw them made.<sup>43</sup>

c. *Records of Unincorporated Societies.*—The records of unincorporated societies are sufficiently authenticated where it is made to appear that the records offered have been recognized and acted upon by the association in its transaction of business.<sup>44</sup>

d. *Instruments Furnished for Public Use.*—The genuineness of an instrument which is one of a large number furnished to the public for general use is sufficiently proved by this very fact.<sup>45</sup>

e. *Instruments Furnished for Use of Employees.*—Rules and regulations furnished by a company for the government of its servants are sufficiently proved when shown to be such, and need not be proved as are records of a corporation.<sup>46</sup>

identify them, and it need not be shown that he received them from the proper custodian. *Lowry Nat. Bank v. Fickett*, 122 Ga. 489, 50 S. E. 396.

**Entries in Regular Course of Business.**—Entries by the person having charge of the books are regular entries, and are admissible in case of such person's death. *Chenango Bridge Co. v. Lewis*, 63 Barb. (N. Y.) 111.

**Proof of Copies of Records of Private Corporations.**—See article "RECORDS," Vol. X, p. 861. And see *Miller v. Johnston*, 71 Ark. 174, 72 S. W. 371; *King v. Enterprise Ins. Co.*, 45 Ind. 43.

42. *Sigua Iron Co. v. Brown*, 171 N. Y. 488, 64 N. E. 194. But see *Union Gold Min. Co. v. Rocky Mt. Bank*, 2 Colo. 565.

**Entries in Handwriting of Officer.** "Mere proof that the entries therein are in the handwriting of an officer of the corporation does not seem to be sufficient identification unless it appears that it was the duty of such officer to make the entries." *Lowry Nat. Bank v. Fickett*, 122 Ga. 489, 50 S. E. 396.

43. *St. Lawrence Mut. Ins. Co. v. Paige*, 1 Hilt. (N. Y.) 430.

44. Where it is shown that a book which on its face purports to contain a record of the proceedings of an unincorporated society is the book in which the records of the meeting of the society are kept, it is admissible in favor of a stranger to show the organization and doings

of the society. *Tarbell v. Gifford* (Vt.), 72 Atl. 921.

A paper which purported to be the constitution of an unincorporated association and which was found and kept in the archives of the society and acted upon as a constitution is sufficiently authenticated and it is immaterial that it was not recorded in the record books of the society. *Tarbell v. Gifford* (Vt.), 72 Atl. 921.

The constitution and by-laws of a benefit society which purport to be published by the supreme council of the order and are furnished the inferior lodges by it, are admissible without proof that they were adopted by the local society, where they have been used by it. *Home Circle Soc. v. Shelton* (Tex. Civ. App.), 81 S. W. 84.

45. **Railroad Time Card.**—Official character shown by proof that it was such as were furnished to the general public by the railway company. *Western Union Tel. Co. v. O'Fiel* (Tex. Civ. App.), 104 S. W. 406.

**Advertising Circular** of a railroad admissible to show that a certain road was leased by another only when it is shown that the circular was obtained from an office of the latter road or was distributed by it. *Atchison, T. & S. F. R. Co. v. Cruzen*, 31 Kan. 718, 3 Pac. 520. And see to the same effect, *Berry v. Matthews*, 7 Ga. 457 (advertising circular of joint stock association).

46. *Dixon v. New England R. Co.*, 179 Mass. 242, 60 N. E. 581.

*f. Letters and Telegrams.* — (1.) **Receipt.** — (A.) **PRESUMPTIONS.** (a.) *Letters.* — There is a presumption that a properly addressed letter regularly mailed was received by the addressee.<sup>47</sup>

**Letter Not Deposited in Official Mail Box.** — The presumption that a letter properly addressed and stamped was received has been held to obtain although the letter was not deposited in an official mail box, if it appears that in the regular course of business it would reach such a place.<sup>48</sup>

(b.) *Telegrams.* — There is a presumption that when a telegram has been delivered to the telegraph company and accepted for transmission, that it has been duly forwarded and received.<sup>49</sup>

(B.) **ACKNOWLEDGMENT OF RECEIPT.** — An acknowledgment by the

47. *Dick v. Zimmerman*, 207 Ill. 636, 69 N. E. 754; *Oregon S. S. Co. v. Otis*, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221; *Melby v. Osborne*, 33 Minn. 492, 24 N. W. 253; *Brown v. Fraternal Acc. Assn.*, 18 Utah 265, 55 Pac. 63; *Cooney v. McKinney*, 25 Utah 329, 71 Pac. 485; *Garland v. Gaines*, 73 Conn. 662, 49 Atl. 19, 84 Am. St. Rep. 182. And see article "PRESUMPTIONS," Vol. IX, p. 897.

**Production by Writer.** — Although a letter alleged to have been sent and received by the addressee is produced from the possession of the writer, if it has the usual postmark upon it, and the writer explains his possession of it, and there is evidence that it was regularly mailed, it is admissible. *Starr v. Torrey*, 22 N. J. L. 190.

**Letter-Press Copy Book** of a deceased person admissible under Massachusetts Stat. 1898, c. 535, as containing his declarations or as entries in regular course of business, to show that the letters copied therein had been put in the regular channel for transmission, from which it might be inferred that they had reached their destination. *Green v. Crapo*, 181 Mass. 55, 62 N. E. 956. And see *Scott v. Bailey*, 73 Vt. 49, 50 Atl. 557.

48. *Swampscott Mach. Co. v. Rice*, 159 Mass. 404, 34 N. E. 520 (letter deposited in box from which an office boy regularly collected the mail); *Sanborn v. Cunningham (Cal.)*, 33 Pac. 894 (and see *Ford v. Cunningham*, 87 Cal. 209, 25 Pac.

403); *Phillips v. Scott*, 43 Mo. 86, 97 Am. Dec. 369.

49. *Com. v. Jeffries*, 7 Allen (Mass.) 548, 556, 83 Am. Dec. 712; *Western Twine Co. v. Wright*, 11 S. D. 521, 78 N. W. 942; *Perry v. German A. Bank*, 53 Neb. 89, 73 N. W. 538, 68 Am. St. Rep. 593; *Oregon S. S. Co. v. Otis*, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221; *State v. Hopkins*, 50 Vt. 316.

The fact that a telegram was sent is competent evidence as tending to show, and warrants the presumption that it was received. This presumption is one of fact, however, and is entitled to more or less weight according to the circumstances under which the telegram was sent; and its receipt may be disproved. *Ep-pinger v. Scott*, 112 Cal. 369, 42 Pac. 301, 44 Pac. 723, 53 Am. St. Rep. 220.

To prove the sending of telegrams, the originals being shown to have been destroyed by the telegraph company, the testimony of the sender that he sent certain messages by telegraph to a person who resided in another city, directed to him in that city, is sufficient; the presumption of their receipt being one of fact which may be rebutted or contradicted. There is something of a public character impressed upon the telegraph service by the guard and obligations of public law thrown around it, and presumptions of correct delivery similar to those attending the mailing of letters, but perhaps weaker in a degree, attend the delivery of messages to a telegraph company for purposes of transmission. *Oregon S.*

addressee, in a reply letter, of the receipt of a letter proves its delivery.<sup>50</sup>

(C.) CIRCUMSTANTIAL EVIDENCE. — The facts which appear in the case will often sufficiently prove the delivery and receipt of a letter.<sup>51</sup>

(D.) TELEGRAMS. — To prove that a telegram was sent and received the testimony of the agent of the company sending the message is admissible, or the entries in his books may be received when he is unavailable.<sup>52</sup>

S. Co. v. Otis, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221.

50. In *Dick v. Zimmerman*, 207 Ill. 636, 69 N. E. 754, it was held that delivery of a letter was sufficiently shown by another letter written by the addressee acknowledging the receipt thereof so as to admit copies of the former letter in evidence. And see *Distad v. Shanklin*, 15 S. D. 507, 90 N. W. 151; *Willis v. Hammond*, 41 S. C. 153, 19 S. E. 310.

51. Where a letter was found in the apartments of a woman which she had just vacated and it was in the handwriting of a person with whom she had been carrying on an extensive correspondence, it sufficiently appears that the letter had been actually received by her. *Purinton v. Purinton*, 101 Me. 250, 63 Atl. 925.

Admission by the writer of authorship of certain letters and production by him of letters written him by the addressee which he declares form a connected correspondence, sufficiently proves the receipt of the first group by the addressee. *Mead v. Randall*, 111 Mich. 268, 69 N. W. 506.

In *Hedden v. Roberts*, 134 Mass. 38, 45 Am. Rep. 276, an action to recover for goods sold where the issue was whether the plaintiff had sent to the defendant a bill for the goods by mail and the defendant had received it, was held proper to receive evidence that on the envelope containing the bill was printed a request for the return of the letter to the post-office address of the plaintiff if not called for in ten days and that the letter was not returned, in connection with evi-

dence that the plaintiff had sent the bill enclosed in that envelope by mail to the defendant.

**Return Address** on letter and proof that the letter never was returned is proof of its receipt by addressee. *Hedden v. Roberts*, 134 Mass. 38, 45 Am. Rep. 276; *Ackley v. Welch*, 85 Hun 178, 32 N. Y. Supp. 577.

**Possession of Letter** by addressee *prima facie* evidence of delivery. *Austin v. Long*, 1 Ga. App. 258, 57 S. E. 964.

52. "As telegraphic messages are read by sound, as well as automatically recorded in symbols, these entries (made by the despatcher's clerk in a train sheet from the telegraphic report of a station operator) stand upon the same footing as if made from oral statements uttered at the indicated station and audible in the despatcher's office; or, in view of the symbols in which the manipulation of his instrument by the operator who sends his message makes it visible at the receiving station, the entries are as if made from his signals given at . . . (the sending station) and visible in the despatcher's office," and therefore such entries are admissible without calling the operator who sent the message — in this way differing from the case of book entries made by a servant and transferred to his master's account book. *Donovan v. Boston & M. R. Co.*, 158 Mass. 450, 33 N. E. 583.

**Operator at Sending Station** may prove the sending of the telegram by producing his files, although he was not the operator who had sent the message. *Blalock & Co. v. Clark Bros.*, 137 N. C. 140, 49 S. E. 88.

(2.) **Genuineness.** — (A.) **OF LETTER.** — (a.) *In General.* — The genuineness of a letter may be established in the same manner as that of any other written instrument.<sup>53</sup> The surrounding circumstances may be given in evidence when they bear upon the question.<sup>54</sup>

(b.) *Customary Use of Stamp.* — Evidence that it was customary for the person whose name was affixed to a letter by a stamp to so sign his letters is admissible.<sup>55</sup>

(c.) *Typewritten Letter.* — Although a letter is typewritten, including the signature, it is admitted that a person may still recognize such peculiarities in the manner of writing or the character of the letters as to be able to identify it.<sup>56</sup>

(d.) *Contents.* — The nature of the contents of a letter may be some evidence of the genuineness of the letter,<sup>57</sup> though not of itself sufficient evidence.<sup>58</sup> They are especially valuable where the

**Memorandum** admissible in connection with the agent's testimony, where he vouches for its accuracy, though he cannot remember it, and it was made by another person. *St. Louis S. W. R. Co. v. White S. M. Co.*, 78 Ark. 1, 93 S. W. 58.

53. See *supra*, IV, 2 A, a.

54. *International Harv. Co. v. Campbell*, 43 Tex. Civ. App. 421, 96 S. W. 93.

In *Abbott v. McAloon*, 70 Me. 98, where the issue was whether or not an order for goods received by mail by the plaintiff purporting to be signed by the defendant had been signed or authorized by the defendant, it was held that the testimony of the plaintiff that the defendant had previously informed him that he would send such an order, and that a postscript on the order alluded to a matter known to no person but the defendant and himself, was sufficient proof *prima facie* to establish the fact that it was the authorized order of the defendant and warranted its admission in evidence. The court said: "Proof of handwriting is one mode of showing that papers are genuine or authorized. It may also be done by admission and conduct in various ways. Men may communicate by signs and cipher, as well as by using words in their ordinary signification."

**Receipt by Mail** is not sufficient evidence of the genuineness of a letter. *Sweeney v. Ten Mile O. & G. Co.*, 130 Pa. St. 193, 18 Atl. 612;

*Nichols v. Kingdom Iron Ore Co.*, 56 N. Y. 618.

**Entry in Book of Registered Letters** showing receipt of letter from a certain person addressed to a certain person, admissible as showing the genuineness of the letter presented. *In re Kennedy's Estate* (Cal.), 36 Pac. 1030.

**Letter-Head** is admissible as evidence to show the authorship of a letter. *International Harv. Co. v. Campbell*, 43 Tex. Civ. App. 421, 96 S. W. 93; *Hays v. General Benev. Assn.*, 127 Mo. App. 195, 104 S. W. 1141; *Leesville Mfg. Co. v. Morgan, Wood & Iron Wks.*, 75 S. C. 342, 55 S. E. 768. And see *National Acc. Soc. v. Spiro*, 78 Fed. 774, 24 C. C. A. 334; *Raleigh R. Co. v. Pullman Co.*, 122 Ga. 700, 50 S. E. 1008; *Allen, McIntosh & Co. v. Farmers' & T. Nat. Bank*, 129 Ga. 748, 59 S. E. 813.

55. *Union Cent. Ins. Co. v. Washburn* (Ala.), 48 So. 475.

56. *Huber Mfg. Co. v. Claudel*, 71 Kan. 441, 80 Pac. 960.

57. *International Harv. Co. v. Campbell*, 43 Tex. Civ. App. 421, 96 S. W. 93; *Scott v. Berkshire Co. Sav. Bank*, 140 Mass. 157, 2 N. E. 925.

**As strengthening Presumption of Authenticity of Reply Letter**, see *Lancaster v. Ames*, 103 Me. 87, 68 Atl. 533, 17 L. R. A. (N. S.) 229.

58. *Freeman v. Brewster*, 93 Ga. 648, 21 S. E. 165.

letter was written for an illiterate person,<sup>59</sup> or was typewritten.<sup>60</sup>

(B.) OF TELEGRAM. — Telegrams may be authenticated by proving the handwriting of the person purporting to have signed the original draft of the telegram presented for transmission.<sup>61</sup> In that numerous class of cases in which the telegram received by the addressee is considered to be the original, the handwriting of the agent of the telegraph company who received the message may be proved, and sufficiently establishes the genuineness of the telegram.<sup>62</sup>

B. ATTESTED INSTRUMENTS. — a. *Subscribing Witness Defined.* A subscribing witness is a person who was present at the execution of an instrument and who then signed his name thereto as a witness, or afterwards subscribed it as such at the request of the party who executed it.<sup>63</sup>

59. *Singleton v. Bremer*, Harp. L. (S. C.) 201.

"An illiterate person can only communicate by letter through the aid of an amanuensis. The signature must be that of the latter. Testimony from him that he wrote only what he was told to write is not the only means of determining that fact. The statements made may relate to what could not have been known to any one but the person from whom the letter purports to come; or they may be expressed in a particular way that is peculiar to him. They may be put in such a form as an uneducated person would naturally use and they may be phrased in a style which conclusively shows that the words are those of the amanuensis. If therefore the letter be lost or destroyed, proof of its contents may be of material importance in determining from whom the communication really came." *Whalen v. Gleeson*, (Conn.), 71 Atl. 908.

60. *In re Deep River Nat. Bank's Appeal*, 73 Conn. 341, 47 Atl. 675; *State v. Freshwater*, 30 Utah 442, 85 Pac. 447. But see *Sprinkle v. United States*, 150 Fed. 56, 82 C. C. A. 1.

61. *Distad v. Shanklin*, 15 S. D. 507, 90 N. W. 151; *Oregon S. S. Co. v. Otis*, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221; *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355.

The fact that a telegram if written in an original cipher is strong evidence that it was sent by the per-

son alleged to be the sender. *Oregon S. S. Co. v. Otis*, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221.

As secondary evidence that the telegram received was sent by the person alleged to have been the sender, the fact that the news conveyed is repeated in letters between the parties is strong evidence. *Oregon S. S. Co. v. Otis*, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221.

62. *Richie v. Bass*, 15 La. Ann. 668. And see cases cited, *supra*, I, 28, L. 1, (2.),

63. *England*. — *Roberts v. Phillips*, 4 El. & Bl. 450, 82 E. C. L. 450.

*Alabama*. — *Houston v. State*, 114 Ala. 15, 21 So. 813; *Chastain v. Porter*, 130 Ala. 410, 30 So. 492.

*Georgia*. — *Smith v. Crotty*, 112 Ga. 905, 38 S. E. 110.

*New York*. — *Pritchard v. Palmer*, 88 Hun 412, 34 N. Y. Supp. 787; *Earley v. St. Patrick's Church Society*, 81 Hun 369, 30 N. Y. Supp. 979; *Henry v. Bishop*, 2 Wend. 575; *Hollenback v. Fleming*, 6 Hill 303.

*Pennsylvania*. — *Huston v. Ticknor*, 99 Pa. St. 231.

*Tennessee*. — *Tate v. Lawrence*, 11 Heisk. 503.

Although a person may be present at the execution of an instrument, if he does not subscribe the instrument at that time as a witness, but does it afterwards without request of the parties, he is not a subscribing witness. *In re Clute's Estate*, 37 Misc. 586, 75 N. Y. Supp. 1059.

**Witnessing a Will.** — To attest or witness a will the subscribing wit-

b. *Necessity of Calling Subscribing Witnesses.*—To prove the execution of an attested instrument it is generally necessary to call a subscribing witness if such witness can be had.<sup>64</sup> This general

ness must be present when the writing is signed and thereby becomes a will, or the testator may, after he has affixed his signature, acknowledge it to be his act in the presence of the witnesses. *Irvine's Estate*, 206 Pa. St. 1, 55 Atl. 795.

64. *United States.*—*Rhodes v. Rigg*, 1 Cranch C. C. 87, 20 Fed. Cas. No. 11,749; *Clarke v. Courtney*, 5 Pet. 319; *Winn v. Patterson*, 9 Pet. 663, 674.

*Alabama.*—*Jenks v. Terrell*, 73 Ala. 238; *Houston v. State*, 114 Ala. 15, 21 So. 813; *Collins v. Sherbet*, 114 Ala. 480, 21 So. 997; *Martin v. Mayer*, 112 Ala. 620, 20 So. 963; *Richmond, etc. R. Co. v. Jones*, 92 Ala. 218, 9 So. 276.

*Arkansas.*—*Wilson v. Royston*, 2 Ark. 315; *Brock v. Saxton*, 5 Ark. 708.

*California.*—*Stevens v. Irwin*, 12 Cal. 306.

*Connecticut.*—*Knap v. Sacket*, 1 Root 501; *Kelsey v. Hanmer*, 18 Conn. 311.

*Delaware.*—*Boyer v. Norris*, 1 Har. 22; *Plunkett v. Dillon*, 4 Del. Ch. 198.

*Georgia.*—*Watts v. Kilburn*, 7 Ga. 356; *Coody v. Gress Lumb. Co.*, 82 Ga. 793, 18 S. E. 218; *Hudson v. Puett*, 86 Ga. 341, 12 S. E. 640; *Baker v. Massengale*, 83 Ga. 137, 10 S. E. 347; *McVicker v. Conkle*, 96 Ga. 584, 24 S. E. 23; *Fletcher v. Perry*, 97 Ga. 368, 23 S. E. 824.

*Illinois.*—*Mariner v. Saunders*, 10 Ill. 113.

*Indiana.*—*Sheets v. Dufour*, 5 Blackf. 549; *Sampson v. Grimes*, 7 Blackf. 176.

*Iowa.*—*Ballinger v. Davis*, 29 Iowa 512.

*Kentucky.*—*Goodall's Admr. v. Goodall*, 5 J. J. Marsh. 596.

*Louisiana.*—*Labarthe v. Gerbeau*, 1 Mart. (N. S.) 486.

*Maine.*—*Pullen v. Hutchinson*, 25 Me. 249.

*Maryland.*—*Handy v. State*, 7 Har. & J. 42. But see *Pannell v. Williams*, 8 Gill & J. 511.

*Massachusetts.*—*Whitaker v. Salisbury*, 15 Pick. 534.

*Missouri.*—*Glasgow v. Ridgeley*, 11 Mo. 34. But see *Moss v. Anderson*, 7 Mo. 337.

*Nebraska.*—*Buchanan v. Wise*, 34 Neb. 695, 52 N. W. 163.

*Nevada.*—*Kalmes v. Gerrish*, 7 Nev. 31.

*New Hampshire.*—*Foye v. Leighton*, 24 N. H. 29.

*New Jersey.*—*Williams v. Davis*, 2 N. J. L. 259; *Corlies v. Vannote*, 16 N. J. L. 324.

*New York.*—*Kayser v. Sichel*, 34 Barb. 84; *Jones v. Underwood*, 28 Barb. 481; *King v. Smith*, 21 Barb. 158. But see *Garvey v. Owens*, 9 N. Y. St. 227.

*North Carolina.*—*Johnston v. Knight*, 5 N. C. (1 Murph.) 293; *Johnson v. Knight*, 6 N. C. (2 Murph.) 237.

*Ohio.*—*Warner v. Baltimore & O. R. Co.*, 31 Ohio St. 265.

*Oregon.*—*Hannan v. Greenfield*, 36 Or. 97, 58 Pac. 888.

*Pennsylvania.*—*January v. Goodman*, 1 Dall. 208; *Tams v. Hitner*, 9 Pa. St. 441; *Truby v. Byers*, 6 Pa. St. 347; *Peters v. Condron*, 2 Serg. & R. 80. See also *Charles v. Scott*, 1 Serg. & R. 294.

*Rhode Island.*—*Kinney v. Flynn*, 2 R. I. 319.

*Texas.*—*Lewis v. Bell* (Tex. Civ. App.), 40 S. W. 747; *International & G. N. R. Co. v. McRae*, 82 Tex. 614, 18 S. W. 672, 27 Am. St. Rep. 926.

*Vermont.*—*Harding v. Cragie*, 8 Vt. 501.

*Wisconsin.*—*Carrington v. Eastman*, 1 Pin. 650.

*Compare Mississippi Lumb. & C. Co. v. Kelly*, 19 S. D. 577, 104 N. W. 265.

The objection arising from the absence of a subscribing witness was termed by Lord Mansfield in *Abbot v. Plumbe*, 1 Dougl. (Eng.) 216, as "a captious objection"; but he said that the rule requiring the testimony of the subscribing witness was a technical rule and was not to be dispensed with unless it appeared that his attendance could not be procured.

rule is equally applicable to deeds,<sup>65</sup> mortgages,<sup>66</sup> instruments under

**The Reason Assigned** for the rule requiring the production of the subscribing witness is that the parties by selecting him as such witness, have agreed to depend upon his testimony as to the fact of execution and because he is supposed to have a knowledge of facts and circumstances, many of which are unknown to other persons, or cannot be recalled or proved in any other way. *Russell v. Walker*, 73 Ala. 315; *Kinney v. Flynn*, 2 R. I. 319; *Hollenback v. Fleming*, 6 Hill (N. Y.) 303; *Cussons v. Skinner*, 11 M. & W. (Eng.) 161, 168; *Forsythe v. Hardin*, 62 Ill. 206. See also *Call v. Dunning*, 4 East (Eng.) 53; *Barnes v. Trompowski*, 2 Durnf. & E. (Eng.) 262. But see *Hall v. Phelps*, 2 Johns. (N. Y.) 451; *Henry v. Bishop*, 2 Wend. (N. Y.) 575; *Newsom v. Luster*, 13 Ill. 175.

"The rule may have been originally framed in reference to deeds or other solemn instruments usually attested by witnesses, but it is now extended to every private writing which the parties may have chosen to cause to be attested." *Ellerson v. State*, 69 Ala. 1.

Afterward the rule was placed upon the ground that the best evidence should be required, and hence very strict proof was demanded, or diligent search for the witness, or proof of his death, etc., before resort to secondary evidence was proper. *Cunliffe v. Sefton*, 2 East (Eng.) 183; *Cooke v. Woodrow*, 5 Cranch (U. S.) 13.

Later the courts considered the objection arising from the absence of the subscribing witness, unaccompanied with any suggestions of fraud as entitled to much less regard than formerly. As was said in *Jackson v. Burton*, 11 Johns. (N. Y.) 64, "the rules and practice of the court leaves this point with some latitude of discretion." And in *Crosby v. Percy*, 1 Taunt. 364, Sir James Mansfield after adverting to the difficulty of laying down as a general rule what shall be deemed sufficient inquiry for a subscribing witness before letting in other evidence refers the rule to the ground

of public convenience, observing that more inconvenience results from excluding than from admitting secondary evidence.

**In Proving Title to Personal Property** evidence of possession is admissible, but where a party seeks to prove title thereto by an attested instrument he must prove the instrument by the witnesses and cannot by a third person. *Patterson v. Kicker*, 72 Ala. 406.

**Whether Object Is To Prove Instrument Genuine or Forged** if it is attested, and subscribing witnesses must be called. *Stamper v. Griffin*, 20 Ga. 312, 65 Am. Dec. 628.

**Where One of Two Witnesses Is a Defendant**, a co-defendant cannot call such witness to prove the execution of the instrument, no evidence being introduced accounting for the absence of the other. *Umphreys v. Hendricks*, 28 Ga. 157. But see next succeeding note 78.

**To Explain an Instrument, Witness Not Necessary.**—Where there are three signers to a note and but one subscribing witness, the testimony of one, other than the subscribing witness, is admissible to show that two of these signatures were added subsequent to that of the subscribing witness. *Harding v. Cragie*, 8 Vt. 501.

**Where an Attester's Signature Is Written by a Third Person** parol admissions of the party whose name is so signed are admissible to show that the act of such third person was authorized. *Pottgieser v. Dorn*, 16 Minn. 204.

65. *Allred v. Elliott*, 71 Ala. 224; *Ellis v. Smith*, 10 Ga. 253; *Davis v. Alston*, 61 Ga. 225; *Sampson v. Grimes*, 7 Blackf. (Ind.) 176; *Woodman v. Segar*, 25 Me. 90; *Chaplain v. Briscoe*, 11 Smed. & M. (Miss.) 372; *Spencer v. Bedford*, 4 Strobb. (S. C.) 96.

**Time of Executing Deed** can only be proved by testimony of subscribing witnesses, unless their absence is accounted for. *McConnell v. Brown*, Litt. Sel. Cas. (Ky.) 459.

66. *Lewis v. Glass* (Ala.), 39 So. 771; *Brynjolfson v. Northwestern*

seal,<sup>67</sup> instruments not under seal,<sup>68</sup> bills of sale,<sup>69</sup> submissions and awards,<sup>70</sup> applications for life insurance policies,<sup>71</sup> assignments thereof,<sup>72</sup> constable's bonds,<sup>73</sup> and wills.<sup>74</sup>

**Proof of the Handwriting of a Subscribing Witness** is not admissible to prove execution of the instrument in the absence of proof as to his death, absence, or incapacity.<sup>75</sup> And though the death, absence, or incapacity of a witness is shown, proof of his handwriting is not admissible in the absence of evidence showing the impossibility of producing other witnesses.<sup>76</sup>

**Nor Is Proof of the Handwriting of the Maker** of an attested instrument admissible in the absence of evidence showing the witness' death, absence or incapacity.<sup>77</sup>

El. Co., 6 N. D. 450, 71 N. W. 555, 66 Am. St. Rep. 612.

In *Coleman v. State*, 79 Ala. 49, it was held that the execution of a mortgage purporting to have been attested by two witnesses should have been proved by at least one of these witnesses, or else the witnesses should all have been shown to be dead, insane, out of the jurisdiction of the court, or that they could not be found after diligent inquiry; or the case should otherwise have been brought within some established exception to the rule, in either of which contingencies the instrument could be proved by other evidence.

67. *Williamson v. Wright*, 3 N. J. L. 984; *Clarke v. Courtney*, 5 Pet. (U. S.) 319; *Lewis v. Ringo*, 3 A. K. Marsh. (Ky.) 247; *Henry v. Bishop*, 2 Wend. (N. Y.) 575; *Bennet v. Robinson's Admr.*, 3 Stew. & P. (Ala.) 227; *Trammell v. Roberts*, 1 McMull. L. (S. C.) 305.

68. *Bennet v. Robinson's Admr.*, 3 Stew. & P. (Ala.) 227; *Trammell v. Roberts*, 1 McMull. (S. C.) 305; *Townsend v. Covington*, 3 McCord (S. C.) 219.

69. *Martin v. Mayer*, 112 Ala. 620, 20 So. 963; *Collins v. Sherbet*, 114 Ala. 480, 21 So. 997; *Brown v. Hicks*, 1 Ark. 232; *Horton v. Hagler*, 8 N. C. (1 Hawks) 48.

70. *Tyler v. Stephens*, 7 Ga. 278.

71. *Read v. Metropolitan Life Ins. Co.*, 17 Misc. 307, 40 N. Y. Supp. 374.

72. *Pence v. Makepeace*, 65 Ind. 345.

73. *Petit v. McAdam*, 2 Serg. & R. (Pa.) 420.

74. **When Offered for Probate** the execution of a will must be proved by the subscribing witnesses if they can be produced. *Gillis v. Gillis*, 96 Ga. 1, 16, 23 S. E. 107, 51 Am. St. Rep. 121, 30 L. R. A. 143; *Jones v. Arterburn*, 11 Humph. (Tenn.) 97. And see article "WILLS."

75. *United States*.—*Spring v. South Carolina Ins. Co.*, 8 Wheat. 268.

*Alabama*.—*Allred v. Elliott*, 71 Ala. 224.

*California*.—*Powell's Heirs v. Hendricks*, 3 Cal. 427.

*Georgia*.—*Ellis v. Smith*, 10 Ga. 253.

*Indiana*.—*Sampson v. Grimes*, 7 Blackf. 176.

*Maine*.—*Woodman v. Segar*, 25 Me. 90.

*Mississippi*.—*Chaplain v. Briscoe*, 11 Smed. & M. 372.

*New York*.—*Jackson v. Cody*, 9 Cow. 140; *Jackson v. Gager*, 5 Cow. 383.

*South Carolina*.—*Spencer v. Bedford*, 4 Strobb. 96.

76. *Tams v. Hitner*, 9 Pa. St. 441; *Davison's Lessee v. Bloomer*, 1 Dall. (Pa.) 123; *Whittemore v. Brooks*, 1 Greenl. (Me.) 57; *Gelott v. Goodspeed*, 8 Cush. 411; *Chambers v. Handley*, 3 J. J. Marsh. (Ky.) 98.

77. *Wilson v. Royston*, 2 Ark. 315; *Boyer v. Norris*, 1 Har. (Del.) 22; *Barber v. Terrell*, 54 Ga. 146; *Bowser v. Warren*, 4 Blackf. (Ind.) 522. But see *Deas v. Marigault*, 1



**Testimony of Parties.**—In the absence of a statute to the contrary,<sup>78</sup> neither party to a written instrument to which there are

McCord (S. C.), *holding* that on a plea of *non est factum* to a bond, under the act of 1802, any competent witness may prove the handwriting of the obligor in the place of the subscribing witness, unless the plea of the defendant be verified by his oath. See also *Townsend v. Covington*, 3 McCord (S. C.) 219.

**78. England.**—1854, Stat. 17 and 18 Vict., c. 125, § 26. "It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission, or otherwise, as if there had been no attesting witnesses thereto."

**Alabama.**—Under code 1896, § 1797, the execution of any attested instrument may be proved by the maker without producing or accounting for the absence of the attesting witnesses. *Ballow v. Collins*, 139 Ala. 543, 36 So. 712; *Lewis v. Glass*, 39 So. 771; *Hayes v. Banks*, 132 Ala. 354, 31 So. 464. But if the instrument is valid only when witnessed, the maker must testify not only that he signed it, but also that the witness subscribed it as a witness. *Ballow v. Collins*, 139 Ala. 543, 36 So. 712. For cases decided before 1896 adhering to the orthodox rule, see *Russell v. Walker*, 73 Ala. 315; *Petree v. Wilson*, 104 Ala. 157, 16 So. 143.

**California.**—C. C. P. 1909, § 1940, any writing may be proved either by one who saw its execution, by proof of the maker's handwriting or by a subscribing witness. The case of *Landers v. Bolton*, 26 Cal. 393, was decided before the enactment of the statute noted above.

**Georgia.**—Under the act of 1895, now embraced in § 5244 of the Civil Code proof by subscribing witnesses may be dispensed with if the party executing the instrument testifies to its execution. *Standback v. Thornton*, 106 Ga. 81, 31 S. E. 805. But see *Fletcher v. Perry*, 97 Ga. 368, 23 S. E. 824; *McVicker v. Conkle*, 96 Ga. 584, 24 S. E. 23, de-

cided before the above act went into effect.

**Michigan.**—A statute of 1885 provides that whenever a written instrument is offered in evidence to which there is a subscribing witness it is not necessary to call such witness, but the instrument may be proved in the same manner as though there were no subscribing witnesses thereto, except in those cases where one or more subscribing witnesses are necessary to the validity of the instrument. See *Bulen v. Granger*, 63 Mich. 311, 29 N. W. 718.

**North Dakota.**—See *Brynjolfson v. Northwestern El. Co.*, 6 N. D. 450, 71 N. W. 555, 66 Am. St. Rep. 612; *McManus v. Commow*, 10 N. D. 340, 87 N. W. 8.

**Virginia.**—*Turner v. Stip*, 1 Wash. 319 (proof of deed need not be by subscribing witness, under Stat. 1748).

**Wyoming.**—In *Boswell v. First Nat. Bank*, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661, it is held that deeds or instruments conveying an interest in land, executed, acknowledged and attested in accordance with the laws of the state in force at the date thereof, are admissible in evidence, without in the first instance additional proof of execution; and this applies also to a power of attorney to convey lands as well as an executory contract for the sale or purchase of lands.

**Statute Authorizing Parties To Testify** do not by the weight of authority change the rule that attesting witnesses must be produced if living, competent and within reach of process. *Brigham v. Palmer*, 3 Allen (Mass.) 450; *Mitchell v. Shanley*, 12 Gray (Mass.) 206; *Hess v. Griggs*, 43 Mich. 397, 5 N. W. 427; *Henly v. Henning*, 7 Baxt. (Tenn.) 524, 32 Am. Rep. 568; *Hodnett v. Smith*, 32 N. Y. Super. 401, 41 How. Pr. 190, 10 Abb. Pr. (N. S.) 86; *Weigand v. Sichel*, 4 Abb. Dec. (N. Y.) 592. But see *Bowling v. Hax*, 55

subscribing witnesses can prove its execution without introducing or accounting for the absence of the witnesses.<sup>79</sup>

**Testimony of Agents.**—As to whether the testimony of an agent who executed an instrument for the parties is admissible to prove its execution, though a subscribing witness is not produced or accounted for, the authorities are in conflict.<sup>80</sup>

Mo. 446; *Garrett v. Hanshue* (Ohio St.), 42 N. E. 256; *McManus v. Commow*, 10 N. D. 340, 87 N. W. 8.

79. *Kentucky*.—See *McClain v. Gregg*, 2 A. K. Marsh. (Ky.) 454. But see: *Smith v. Morrow*, 7 J. J. Marsh. (Ky.) 442, holding that a grantor in a deed is a competent witness to prove its execution as far as he is personally concerned, where he acknowledges execution or is ready and willing to be a witness and that execution need not be shown by subscribing witnesses; but one grantor is incompetent to prove execution by a co-grantor.

*Louisiana*.—*Robertson v. Lucas*, 1 Mart. (N. S.) 187 (maker of an act *sous seing prive* may prove its execution).

*Massachusetts*.—*Compare White v. Solomon*, 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537.

*Nevada*.—*Kalmes v. Gerrish*, 7 Nev. 31.

*New York*.—*Willoughby v. Caledon*, 9 Johns. 136; *Van Dyne v. Thayer*, 19 Wend. 162; *King v. Smith*, 21 Barb. 158; *Keyser v. Sichel*, 34 Barb. 84.

*South Carolina*.—*Barry v. Wilbourne*, 2 Bailey 91; *Barton v. Keith*, 2 Hill 537. See *Martin v. Bowie*, 37 S. C. 102, 15 S. E. 736.

*Texas*.—*Wiggins v. Fleishel*, 50 Tex. 57. See also *Texas Land Co. v. Williams*, 51 Tex. 51. But see *White v. Holiday*, 20 Tex. 679, holding that a grantor may prove the execution of his deed when not disqualified by interest, without accounting for the absence of witnesses. And see also *Bohn v. Davis*, 75 Tex. 24, 12 S. W. 837.

**Party Calling Adversary To Prove Instrument Need Not Call Subscribing Witness.**—In *Rayburn v. Mason Lumb. Co.*, 57 Mich. 273, 23 N. W. 811, the court said: "But we further think that where one of the

parties in interest chooses to allow or to call the other party to prove an instrument, he may do so without calling the subscribing witness. Although there has been no entire agreement of courts on this subject where parties can be witnesses, the necessity of calling subscribing witnesses has not always been put upon tangible grounds. Where parties could not be sworn, it was reasonable to hold that the subscribing witness was a person who became so by agreement for their protection, who could not be dispensed with. It may be very proper to allow a party to decline calling his adversary, and to insist that this witness shall, if practicable, be produced. But where one party is willing to call the other, the latter can usually have no reason to complain, and we think that to this extent the reason of the rule has very little force to prevent it, and should not preclude such proof."

**Waiver of Proof by Subscribing Witnesses.**—Where the parties to a deed are both in court they may waive their right to require execution to be proved by the witnesses thereto, and execution may be proved by the grantor. *Forsythe v. Hardin*, 62 Ill. 206. See also *Rayburn v. Mason Lumb. Co.*, 57 Mich. 273, 23 N. W. 811; *Laing v. Raine*, 2 B. & P. (Eng.) 85.

**Instruments Incidentally or Collaterally in Issue** may be proved by the parties thereto. *Curtis v. Belknap*, 21 Vt. 433.

80. **Testimony of Agent Held Admissible.**—*Falls v. Gaither*, 9 Port. (Ala.) 605; *Jackson v. Britton*, 4 Wend. (N. Y.) 507.

**Testimony of Agent Held Inadmissible.**—*McMurtry v. Frank*, 4 T. B. Mon. (Ky.) 39; *Barry v. Ryan*, 4 Gray (Mass.) 523.

**Attorney Cannot Prove Co-Attor-**

**Admission of Maker or Grantor.**—There seems to be some conflict among the authorities as to the effect of an admission on the part of the maker or grantor of an instrument of execution. The prevailing rule is that in such case the testimony of witnesses may be dispensed with,<sup>81</sup> although the contrary has been held.<sup>82</sup>

**ney's Part** in the execution of a deed executed by them jointly, there being a subscribing witness. *Jackson v. Britton*, 4 Wend. (N. Y.) 507.

**81. United States.**—*Smith v. Carolin*, 1 Cranch C. C. 99, 22 Fed. Cas. No. 13,020; *Smith v. Gale*, 144 U. S. 509 (*affirming* *Gale v. Shillock*, 4 Dak. 182, 29 N. W. 661; *Gale v. Frazier*, 4 Dak. 196, 30 N. W. 138). **Connecticut.**—*Hale v. Hills*, 8 Conn. 39.

**Georgia.**—*Ellis v. Smith*, 10 Ga. 253.

**Kentucky.**—*Burgen v. Com.*, 8 Ky. L. Rep. 613.

**Missouri.**—*Powell v. Adams*, 9 Mo. 766.

**New York.**—*Whitman v. Horton*, 46 N. Y. Super. (14 Jones & S.) 531, judgment *affirmed*, 94 N. Y. 644; *Gibberton v. Ginochio*, 1 Hilt. 218; *McConn v. Biggs*, 2 Hill 121; *Simmons v. Havens*, 101 N. Y. 427, 5 N. E. *affirming* 29 Hun 118. See also *Losee v. Losee*, 2 Hill 609. But see *Fox v. Reil*, 3 Johns. 477.

**North Carolina.**—*Jones v. Henry*, 84 N. C. 320, 37 Am. Rep. 624.

**Tennessee.**—*Grady v. Sharon*, 6 Yerg. 320.

**Vermont.**—*Hodges v. Eastman*, 12 Vt. 358.

**Wisconsin.**—See *Crawford v. Witherbee*, 77 Wis. 419, 46 N. W. 545, 9 L. R. A. 561.

**In the English Courts** it is held that such admissions are admissible if it appears that a diligent search has been made for the subscribing witnesses. *Johnson v. Mason*, 1 Esp. 89; *Abbot v. Plumbe*, 1 Doug. 216; *Barnes v. Trompowski*, 7 Durnf. & E. 265; *Laing v. Raine*, 2 B. & P. 85.

**Admissions in Pleadings** as to execution of an instrument are sometimes held sufficient to permit of its introduction without calling the attesting witnesses. *Harrison v. Edwards*, 3 Litt. (Ky.) 340. But see *Roberts v. Tennell*, 3 T. B. Mon.

(Ky.) 247, *holding* that where a writing is introduced collaterally on a trial it must be proved, though its execution is admitted, by the party against whom it is offered, in an answer to a bill.

**Where a Deed Is Made an Exhibit** by a plaintiff, its execution will be deemed to be admitted when it is offered in evidence by defendant though not sufficiently authenticated. *Borah v. Archers*, 7 Dana (Ky.) 176.

**Introduction of Deed on Former Trial Without Proof of Execution** does not give such party permission to introduce it afterwards, on another trial, without such proof. *Baldrige v. Walton*, 1 Mo. 520. But see *Crichton v. Smith*, 34 Md. 42, *holding* that where in an action in a state court to recover damages for breach of a charter party plaintiff offers in evidence a charter party which had been produced and used by the defendant in a cause pending in the United States Court, as the true and genuine charter party between the parties, such paper is admissible, the use thereof by the defendant being an admission of its authenticity. See also *Gibbs v. Linabury*, 22 Mich. 479, 7 Am. Rep. 675. *Compare* *Williams v. Cowart*, 27 Ga. 187, *holding* that where a copy of a lost deed has been established by a court of competent jurisdiction, the copy is admissible in evidence in subsequent proceedings in another court without proof of execution of the original, particularly where the subscribing witnesses are dead.

**Admissions Admissible as Next Best Evidence.**—Upon failure of subscribing witnesses to a deed to prove that it was executed by a wife, whereby she relinquished her right of dower, the admissions of the wife after she became a widow as to her having executed the deed, are admissible as the next best evidence. *Frost v. Deering*, 21 Me. 156.

**82. Lowman v. Aubery**, 72 Ill.

**Instruments Incidentally or Collaterally in Issue.**—The rule that instruments purporting to be witnessed by a subscribing witness shall not be allowed to be introduced in evidence till their execution has been proved does not extend so far as to require every instrument which may be introduced incidentally and collaterally to be so proved; any competent evidence is sufficient in such case without reference to the special rule requiring production of subscribing witnesses.<sup>83</sup> The mere mental consciousness of a witness that an instrument was executed is not sufficient to constitute him

619; *Blake v. Sawin*, 10 Allen (Mass.) 340; *Hogland v. Sebring*, 4 N. J. L. 105; *Fox v. Reil*, 3 Johns. (N. Y.) 477; *Zerby v. Wilson*, 3 Ohio 42, 17 Am. Dec. 577; *Kinney v. Flynn*, 2 R. I. 319. See also *McGregor v. Wait*, 10 Gray (Mass.) 72, 69 Am. Dec. 305.

So strictly has the rule requiring the production of the attesting witnesses been observed that it has been held that an acknowledgment by the obligor himself that he executed the deed, or even the admission by the defendant in answer to a bill filed against him for a discovery will not dispense with the testimony of the subscribing witnesses; and the reason assigned is that a fact may be known to the subscribing witness not within the knowledge or recollection of the party himself and that he is entitled to avail himself of all the knowledge of the subscribing witness relevant to the transaction. And the rule that the acknowledgment by the party himself does not dispense with the necessity of producing the subscribing witness is the same whether the acknowledgment is offered as evidence against the party himself who made it or against a third person, or whether it is the foundation of the action or comes in question collaterally as a part of the evidence in the case. *Ellis v. Smith*, 10 Ga. 253.

The admission of the signer of a written instrument, to which there is an attesting witness, on cross-examination as a witness in his own case, that his signature is genuine, does not render the instrument admissible as evidence against his objection. *Richmond & D. R. Co. v. Jones*, 92 Ala. 218, 9 So. 276.

83. *United States*.—*Citizens'*

*Bank v. Nantucket Steamboat Co.*, 2 Story 16, 5 Fed. Cas. No. 2,730.

*Colorado*.—*Smith v. Soper*, 12 Colo. App. 264, 55 Pac. 195.

*Georgia*.—*Barron v. Walker*, 80 Ga. 121, 7 S. E. 272; *Summerour v. Felker*, 102 Ga. 254, 29 S. E. 448; *National Computing Scale Co. v. Eaves*, 116 Ga. 511, 42 S. E. 783. See *Coody v. Gress Lumb. Co.*, 82 Ga. 793, 10 S. E. 218.

*Kentucky*.—*Brashear v. Burton*, 4 Bibb 442. Compare *Cartmell v. Walton*, 4 Bibb 488.

*Maine*.—*Ayers v. Hewett*, 19 Me. 281. Compare *Pullen v. Hutchinson*, 25 Me. 249.

*Massachusetts*.—See *Spooner v. Holmes*, 102 Mass. 503, 3 Am. Rep. 491; *Skinner v. Brigham*, 126 Mass. 132; *Com. v. Castles*, 9 Gray 121, 69 Am. Dec. 278.

*Missouri*.—*Heege v. Fruin*, 18 Mo. App. 139.

*New Hampshire*.—*Rand v. Dodge*, 17 N. H. 343.

*New York*.—Compare *Jackson v. Sackett*, 7 Wend. 94.

*North Carolina*.—*Leavinger v. Smith*, 115 N. C. 385, 20 S. E. 446.

*Ohio*.—*Burnham v. Ayer*, 3 Ohio Dec. 327.

*Pennsylvania*.—*Wright v. Wood*, 23 Pa. St. 120; *Heckert v. Haine*, 6 Binn. 16; *Kitchen v. Smith*, 101 Pa. St. 452.

*Vermont*.—*Curtis v. Belknap*, 21 Vt. 433; *Chandler v. Caswell*, 17 Vt. 580.

*Ayers v. Hewett*, 19 Me. 281. In this case the writing was produced at the suggestion of the defendant as corroborative of his testimony or to enable the plaintiff to determine whether it was in conformity with the evidence contained in the writing, and it was held that the intro-

a subscribing witness thereto. He must physically subscribe his name or make his mark on the instrument.<sup>84</sup>

**c. Competency and Identity of Subscribing Witness.** — (1.) **Competency.** — (A.) **IN GENERAL.** — As a rule any disinterested witness is competent to testify as to the execution of an instrument even though many years have elapsed since its execution, during which time the maker's death has occurred.<sup>85</sup> It is not necessary that a subscribing witness to a signature see the party sign his name in

duction of it was merely collateral and incidental and was therefore not to be considered as within the reason of the rule requiring proof of its execution by the subscribing witness.

**When Note Need Not Be Proved by Subscribing Witness.** — The testimony of a subscribing witness is not necessary to prove the execution of a promissory note offered in evidence of the ownership of personal property for which it was given in part payment. It is not a muniment of title in such case, but a mere circumstance of the purchase,—merely incidental to the main issue. *Steiner v. Trantum*, 98 Ala. 315, 13 So. 365.

**Instrument Held Not Collaterally in Issue.** — In *Barron v. Walker*, 80 Ga. 121, 7 S. E. 272, an action upon an account for rent. When the case came on for trial an amendment to the declaration was allowed, the effect of which was to show the plaintiff claiming as transferee, and on the trial a written assignment of the account to the plaintiff was offered in evidence, the attesting witnesses thereto not being produced. It was insisted that the production of the attesting witnesses to prove the execution of the writing was not necessary because the writing was merely collaterally involved; but in holding otherwise the court said: "The writing was involved in the title of the plaintiff suing as transferee. Had he brought his action as transferee in the beginning he would have had to prove the assignment in order to recover—certainly so unless he declared upon it and set it forth. Without the assignment there is no privity between him and the defendant. The writing was not therefore merely incidentally involved as contemplated by sec. 3837 of the Code, but

was directly involved in making out plaintiff's title to recover against the defendant on the account, even if the action had been brought correctly."

**84. Physical Act Necessary.** — In *McFarland v. Bush*, 94 Tenn. 538, 29 S. W. 899, 45 Am. St. Rep. 760, 27 L. R. A. 662, it appeared in evidence that one of the subscribing witnesses to a will did not write his name, nor make his mark, nor touch the pen in the hand of the other subscribing witness who signed his name for him in his presence and at his request, and in the presence and at the request of the testatrix. *Held*, that he was not legally a subscribing witness.

Subscribing witnesses attest an instrument not merely by their eyes and ears, but testify by the act of making their signatures that they thus identify the instrument. *In re Last Will of Boyer Boyens*, 23 Iowa 354. To same effect *Horton v. Johnson*, 18 Ga. 396.

**The Fact Attested.** — *In re Ludwig's Estate* (Minn.), 81 N. W. 758, the court said: "We find the rule to be uniform, so far as our examination of the adjudged cases has extended, in all the states of this country having a statute similar to ours, and in England under the statute of frauds substantially the same, that to constitute a legal and valid attestation the testator must either sign the will in the presence of the witnesses, or acknowledge his signature to them, or in some other way clearly and unequivocally indicate to them that he has signed and executed the same. Otherwise, the witnesses attest nothing."

**85. Wyche v. Wyche**, 10 Mart. O. S. (La.) 408.

order that he may be a competent witness to testify to its execution. It is sufficient if the maker or obligor acknowledge it to be his signature and request or assent to the signature by the witness.<sup>86</sup> But the execution of an instrument cannot be proved by a witness who was not present when it was signed, and who afterwards affixed his signature thereto as an attesting witness, without the request or consent of the maker.<sup>87</sup>

(B.) INCOMPETENCY BY REASON OF INTEREST. — A subscribing witness who was an interested party at the time of the execution of the instrument is not a competent witness.<sup>88</sup>

(2.) Identity. — In Illinois it is provided by statute that when proof of a deed is made by a subscribing witness "the judge or officer shall ascertain that the person offering to prove the same is a subscribing witness, either from his own knowledge or from the testimony of a credible witness."<sup>89</sup>

d. *Competency of Witnesses To Prove Validity of Will or Other Instrument.* — (1.) General Rule. — Persons who have a certain and fixed interest in the establishment of a will are not competent to be subscribing witnesses thereto. Otherwise they are competent.<sup>90</sup>

86. *Pequawkett Bridge v. Mathes*, 7 N. H. 230, 26 Am. Dec. 737; *Munns v. DeNemours*, 3 Wash. C. C. 31, 17 Fed. Cas. No. 9,926.

**Attorney for a Mortgage Is a Competent Witness** to testify as to the execution of the mortgage, it appearing that he signed as an attesting witness in the mortgagor's presence, though not at his special request, assent being implied. *Chastain v. Porter*, 130 Ala. 410, 30 So. 492.

**Compare** *Archer v. United States*, 9 Okla. 569, 60 Pac. 268; *Arthur v. Arthur*, 39-Kan. 691, 17 Pac. 187.

87. *Schomaker v. Dean*, 201 Pa. St. 439, 50 Atl. 923; *Huston v. Ticknor*, 99 Pa. St. 231; *Henry v. Bishop*, 2 Wend. (N. Y.) 575.

88. President, etc. of *Amherst Bank v. Root*, 2 Met. (Mass.) 522.

89. *Reece v. Allen*, 10 Ill. 236, 48 Am. Dec. 336.

90. *Alabama.* — *Croft v. Thornton*, 125 Ala. 391, 28 So. 84.

*Connecticut.* — *Starr v. Starr*, 2 Root 303.

*Delaware.* — *Sutton v. Sutton*, 5 Har. 459.

*Illinois.* — *Crowley v. Crowley*, 80 Ill. 469.

*Kentucky.* — *Gill's Will*, 2 Dana 447.

*Maine.* — *In re Trinitarian Con. Church*, 91 Me. 416, 40 Atl. 325.

*Nebraska.* — *Child v. Baker*, 24 Neb. 188, 38 N. W. 725.

*New Hampshire.* — *Lord v. Lord*, 58 N. H. 7, 42 Am. Rep. 565.

*Pennsylvania.* — *Haus v. Palmer*, 21 Pa. St. 296; *Harding v. Harding*, 18 Pa. St. 340; *In re Kessler's Estate*, 221 Pa. St. 314, 70 Atl. 770.

*South Carolina.* — *Dickson, Exr. v. Bates*, 2 Bay 448.

*Virginia.* — *Bruce v. Shuler*, 108 Va. 670, 62 S. E. 973.

A donee or grantee in a conveyance of property is not competent as an attesting witness to it; and if he signs it as one of the attesting witnesses, its execution cannot be proved by him. *Coleman v. State*, 79 Ala. 49.

**"Credible" Synonymous With Competent.** — *Swanzy v. Kolb* (Miss.), 46 So. 549; *Hiatt v. McColley* (Ind.), 85 N. E. 772.

**Devisee Competent as to Part of Will.** — A devisee under a will may be a competent subscribing witness to a will, to the extent of sustaining other devises contained therein, but not competent as to the devise made to himself. *Clark v. Miller*, 65 Kan. 726, 68 Pac. 1071; *Swanzy v. Kolb* (Miss.), 46 So. 549.

(2.) **Who Are Competent.** — Under the rule stated the following named persons have been held competent as subscribing witnesses:

(A.) **EXECUTORS.** — An executor named in the will, if he takes no beneficial interest under it.<sup>81</sup> But the contrary has been held in

**Public Policy.** — A grantee in an instrument for the conveyance or incumbrance of real property is disqualified on grounds of public policy to be a subscribing witness to the execution of the instrument. *Amick v. Woodworth*, 58 Ohio St. 86, 50 N. E. 437.

**Mortgagee Not Competent.** — A mortgagee is not a competent subscribing witness to his own mortgage. *Donovan v. St. Anthony & D. E. Co.*, 8 N. D. 585, 80 N. W. 772, 46 L. R. A. 721. To same effect, *Seibold v. Rogers*, 110 Ala. 438, 18 So. 312.

**Witness to Codicil.** — In *Gass' Heirs v. Gass' Exrs.*, 3 Humph. (Tenn.) 278, it was held that a subscribing witness to a codicil of a will, who was a legatee under the will, was not competent to be examined in reference to the execution of the codicil, and the sanity of the testator at the time of making it.

**Interest Must Be Certain and Fixed.** — The interest which a subscribing witness has in the establishment of a will, in order to be sufficient to render him incompetent as such witness, must be certain and fixed, and not an uncertain and contingent interest. Whenever the interest is remote and of a doubtful nature, the objection goes to the credit and not to the competency of the witness. *Berry v. Hamilton*, 10 B. Mon. (Ky.) 129, 139.

**Trivial Legacy.** — One receiving a trivial legacy under a will, by which he is deprived of a larger estate as heir, is not to be regarded as beneficially interested under the will, and he may therefore be a competent subscribing witness thereto. *Smalley v. Smalley*, 70 Me. 545, 35 Am. Rep. 353.

**Brother of Testatrix.** — In *Sparhawk v. Sparhawk*, 10 Allen (Mass.) 155, it appeared in evidence that one of the attesting witnesses to a will was a brother and an heir at law of the testatrix, and that the will con-

tained no devise or bequest to him, but gave nearly all the property to his son. *Held*, that said attesting witness was competent as such.

**91. Connecticut.** — *Hawley v. Brown*, 1 Root 494.

**Georgia.** — *Baker v. Bancroft*, 79 Ga. 672, 5 S. E. 46.

**Illinois.** — *Standley v. Moss*, 114 Ill. App. 612.

**Indiana.** — *Hiatt v. McColley*, 85 N. E. 772.

**Louisiana.** — *Davenport v. Davenport*, 116 La. 1009, 41 So. 240.

**Maine.** — *Jones v. Larrabee*, 47 Me. 474; *Piper v. Moulton*, 72 Me. 155.

**Minnesota.** — *In re Tierney's Estate*, 103 Minn. 286, 114 N. W. 838.

**New Hampshire.** — *Stewart v. Harriman*, 56 N. H. 25, 22 Am. Rep. 408.

**New York.** — *In re Gagan's Will*, 21 N. Y. Supp. 350, 49 N. Y. St. 366.

**Pennsylvania.** — *Jordon's Estate*, 161 Pa. St. 393, 29 Atl. 3; *Snyder v. Bull*, 17 Pa. St. 54.

**Vermont.** — *Richardson v. Richardson*, 35 Vt. 238.

A subscribing witness to a will who is named therein as an executor thereof, is not disqualified as such witness by reason of his prospective compensation as such executor. *Standley v. Moss*, 114 Ill. App. 612.

One named as executor is a competent witness to prove a will, and is so in all cases unless he receive under the will other and greater interest than an ordinary trustee who receives a commission for his services. The possibility that he may abuse his trust will not disqualify him from proving the will. *Orndorff v. Hummer*, 12 B. Mon. (Ky.) 619.

A person named as executor of a will may be a competent subscribing witness to it, though by statute the fact of his being a subscribing witness renders his appointment as ex-

in some early cases in North Carolina and South Carolina.<sup>92</sup>

(B.) HUSBAND AND WIFE. — There is much conflict of authority as to whether a husband or wife may be a subscribing witness to an instrument to which the other is in anywise a party. It has been held that the wife of an executor,<sup>93</sup> or even the husband or wife of a legatee or devisee may be a subscribing witness to the will.<sup>94</sup> But it has been held by many authorities that neither husband nor wife is a competent subscribing witness to an instrument in which the other is interested.<sup>95</sup>

ecutor void. *Murphy v. Murphy*, 24 Mo. 526.

An executor or administrator with the will annexed, who signed the will as a subscribing witness, is competent to testify to the execution thereof. *Vester v. Collins*, 101 N. C. 114, 7 S. E. 687.

92. *Huie v. McConnell*, 47 N. C. (2 Jones L.) 455; *Morton v. Ingram*, 33 N. C. (11 Ired. L.) 368; *Workman v. Dominick*, 3 Strobb. (S. C.) 589.

93. *Piper v. Moulton*, 72 Me. 155; *Carter v. Jackson*, 58 N. H. 156; *Stewart v. Harriman*, 56 N. H. 25, 22 Am. Rep. 408.

The wife of an executor of a will not beneficially interested is a competent subscribing witness thereto. *In re Lyon's Will*, 96 Wis. 339, 71 N. W. 362, 65 Am. St. Rep. 52.

94. The fact that a husband is legatee under a will does not render his wife incompetent as a subscribing witness to such will. *Hawkins v. Hawkins*, 54 Iowa 443, 6 N. W. 699.

A husband or wife is a competent subscribing witness to a will even if the other be a legatee or devisee under the will. *In re Holt's Will*, 56 Minn. 33, 57 N. W. 219, 22 L. R. A. 481.

A husband is a competent subscribing witness to a will under which his wife takes as devisee. *Lippincott v. Wikoff*, 54 N. J. Eq. 107, 33 Atl. 305.

Where a husband is witness to a will containing a devise to his wife, such devise is void, and the husband is a competent witness. *Jackson v. Durland*, 2 Johns. Cas. (N. Y.) 314.

95. *Carter v. Champion*, 8 Conn. 549, 21 Am. Dec. 695; *Belledin v. Gooley*, 157 Ind. 49, 60 N. E. 706;

*Pease v. Allis*, 110 Mass. 157, 14 Am. Rep. 591; *Hodgman v. Kittredge*, 67 N. H. 254, 32 Atl. 158; *Smith v. Jones*, 68 Vt. 132, 34 Atl. 424; *Gump v. Gowans*, 226 Ill. 635, 80 N. E. 1086.

A wife is not a competent subscribing witness to a will by which property is devised to her husband. *Sullivan v. Sullivan*, 106 Mass. 474, 8 Am. Rep. 356.

A wife is not a competent subscribing witness to her husband's deed. *Bank v. O'Brien*, 94 Tenn. 38, 28 S. W. 293.

In *Sloan v. Sloan*, 184 Ill. 579, 56 N. E. 952, it appeared that Jerome Sloan was a legatee under the will of Henry A. Sloan deceased, and that if no will had been made, Jerome Sloan as heir at law of Henry A. Sloan would have received an amount from the estate of said Henry A. Sloan largely in excess of his legacy. One of the subscribing witnesses to the will was Charlotte Sloan, the wife of said Jerome Sloan. *Held*, that Charlotte Sloan was incompetent as a subscribing witness to the will.

In *Fisher v. Spence*, 150 Ill. 253, 262, 37 N. E. 314, 41 Am. St. Rep. 360, it appeared that John A. Fisher made his will disposing of all his real and personal property to divers persons, among whom were Georgia Ann Carson and Thomas W. Spence; that the subscribing witnesses to the will were J. J. Carson, the husband of Georgia Ann Carson, and Carrie F. Spence, the wife of Thomas W. Spence. *Held*, that both were incompetent as subscribing witnesses to the will.

In *Hardin v. Sparks*, 70 Tex. 429, 7 S. W. 769, it was held that a husband who was a subscribing witness



(C.) **OTHER PERSONS.** — The lessee of real estate from the executor of a will is a competent subscribing witness to the will.<sup>96</sup> So also are the following: A person named in a will as attorney for the executor.<sup>97</sup> The minor son of a legatee who is also named as executor of a will.<sup>98</sup> The grandfather of a legatee.<sup>99</sup> A legatee who renounces and releases the legacy given him.<sup>1</sup> An attorney of a testator.<sup>2</sup>

(D.) **MEMBERS OF CHURCHES, SOCIETIES, ETC.** — Where property is bequeathed to a church or society, a member thereof may be a competent subscribing witness to the will containing the bequest.<sup>3</sup>

to a deed made to his wife during the marriage, and who at the time of its execution was not a competent witness to establish it, cannot as such subscribing witness prove it up for registration.

A husband is not a competent subscribing witness to a deed executed during the marriage by which real estate is conveyed to his wife, either for the purpose of proving the due execution of the deed when called in question, or for the purpose of having it admitted to record. *Johnston v. Slater*, 11 Gratt. (Va.) 321.

**96. Lessee From Executor.** — In *Seguine v. Seguine*, 2 Barb. (N. Y.) 385, 396, it appeared that one of the subscribing witnesses to the will in controversy, after the death of the testator, took from the executor, who was also a devisee under the will, a lease both of real and personal property belonging to the estate. *Held*, that this did not disqualify him as a subscribing witness.

**97. Attorney for Executor.** — A person named in a will as attorney for the executor thereof is not thereby disqualified from being a subscribing witness to the will. *In re Pickett's Will*, 49 Or. 127, 89. Pac. 377.

**98.** A minor son of a legatee who is also named as executor of a will, may be a competent subscribing witness to such will. *Jones v. Tebbetts*, 57 Me. 572.

**99.** In *O'Brien v. Bonfield*, 213 Ill. 428, 72 N. E. 1090, it was held that a person was a competent subscribing witness to a will notwithstanding his grandson was a legatee under the will.

**1.** *Bruce v. Shuler*, 108 Va. 670, 62 S. E. 973, where a subscribing witness

to a will is incompetent as such because of his being a legatee, if he renounces and releases the legacy given him, he thereby becomes competent as such subscribing witness. *Grimm v. Tittman*, 113 Mo. 56, 20 S. W. 664.

**Legatee Competent as to Part of Will.** — In Kansas a devisee under a will may be a competent subscribing witness to a will, to the extent of sustaining other devises contained therein, but not competent as to the devise made to himself. *Clark v. Miller*, 65 Kan. 726, 68 Pac. 1071.

**Trustee for Legatee.** — In *Peralta v. Castro*, 6 Cal. 354, it appeared that a subscribing witness to a will held certain lands, which were devised in the will, in trust for a devisee of the will, having no beneficial personal interest therein. *Held*, that he was a competent subscribing witness.

**2.** An attorney who writes a will is a competent attesting witness to its execution. *Schieffelin v. Schieffelin*, 127 Ala. 14, 28 So. 687.

A subscribing witness to a will is not rendered incompetent as such by reason of the fact that he was the attorney of the testator. *In re Gagan's Will*, 21 N. Y. Supp. 350, 49 N. Y. St. 366.

**3.** *Cornwell v. Isham*, 1 Day (Conn.) 35, 2 Am. Dec. 50; *Warren v. Baxter*, 48 Me. 193; *Loring v. Park*, 7 Gray (Mass.) 42; *Haven v. Hilliard*, 23 Pick. (Mass.) 10; *Comb's & Hawkin's Appeal*, 105 Pa. St. 155.

**Trustees of College.** — In *Boyd v. McConnell*, 209 Ill. 396, 70 N. E. 649, it appeared that there was in the will of Mary A. Graham a bequest of \$500 to Monmouth college,

(E.) RESIDENTS OF TOWN.—An inhabitant of a town is a competent subscribing witness to a will containing a bequest of property to the town.<sup>4</sup>

(F.) PERSONS MADE COMPETENT BY STATUTE.—Under the statutes of Alabama, Georgia, Maryland, North Carolina, South Carolina, and Texas, devisees and legatees and their wives have been held competent as subscribing witnesses to wills.<sup>5</sup>

and also a bequest of \$500 to the Monmouth Hospital in case said hospital be in working condition at the time of testator's death, and if not, to Dr. E. J. Blair to hold in trust until the hospital should be actively at work. That the subscribing witnesses to the will were said Dr. Blair and W. T. Campbell, both of whom were members of the board of trustees of Monmouth college. The evidence further showed that Monmouth hospital was not in working condition at the time of the testator's death. It was contended that Blair and Campbell were not competent subscribing witnesses. They were held to be competent, the court saying: "We are unable to see that either of the witnesses will either profit or lose financially as the direct legal effect and operation of the admission of the will to probate, or the rejection thereof."

**Religious Order.**—In *In re Will's Estate*, the testatrix devised her property to a religious order incorporated under the laws of Minnesota for charitable purposes, and not for pecuniary profit to its members. The by-laws of the corporation provided that the members should give all their present and future property to the corporation, as well as their services without compensation. The testatrix was at the time of her death a member of said order and had been a member thereof for fourteen years, and her will was attested by two subscribing witnesses who were at the time members of said order. *Held*, that the witnesses could not have any present, certain or vested pecuniary interest in property devised by this will to the corporation, and they were therefore competent subscribing witnesses. *In re Will's Estate*, 67 Minn. 335, 69 N. W. 1090.

**Charitable Corporation.**—One of

the original corporators and continuing members of a charitable corporation was held to be a competent witness to a will whereby real and personal property was devised and bequeathed to the corporation, even though such witness had a contingent interest in the property of the corporation upon its possible dissolution. *Quinn v. Shields*, 62 Iowa 129, 17 N. W. 437.

**4. In Trust for the Poor.**—A tax paying inhabitant of a town is a competent subscribing witness to a will containing a devise to the town in trust for the worthy and unfortunate poor resident therein. *In re Marston*, 79 Me. 25, 47, 8 Atl. 87.

**Books for Library.**—In *Hitchcock v. Shaw*, 160 Mass. 140, 35 N. E. 671, one of the attesting witnesses to a will was a citizen and taxpayer in a town to which there was a bequest in the will to be used each year in the purchase of books for the town library. *Held*, that the witness was a competent subscribing witness to the will.

**Support of Schools.**—An inhabitant of a town to which a bequest is made for the support of schools therein, is a competent subscribing witness to the will containing such bequest. *Piper v. Moulton*, 72 Me. 155.

In *Eustis v. Parker*, 1 N. H. 273, it appeared that a testator by his will gave to the town of Durbin \$5,000 for the support of a Congregational minister, and also large real and personal estate for the support of schools, and that all the subscribing witnesses to the will were inhabitants of said town and members of the Congregational society, and were annually taxed for the support of schools in said town. *Held*, that they were competent subscribing witnesses.

**5. In Kumpe v. Coons**, 63 Ala.

(3.) **Competency as to Time.** — The competency of subscribing witnesses to a will is to be determined by the state of facts existing at the time of the execution of the will and their relation thereto.<sup>6</sup>

e. *Certainty and Sufficiency of Testimony.* — It is sufficient proof of the execution of an instrument that a subscribing witness testifies that he signed as an attesting witness and saw the instrument

448, 456, it was held that devisees and legatees were competent attesting witnesses of a will, under § 3058 of the Alabama Code of 1876, as construed by the court.

Under a statute of Georgia a legatee or devisee of a will was held to be a competent subscribing witness. *Jones v. Habersham*, 63 Ga. 146.

Under legislative act of 1864, parties who take an interest under a will are rendered competent to prove it. *Estep v. Morris*, 38 Md. 417, 425.

A subscribing witness to a will, though he may be a devisee or legatee, may testify to the execution of the will. *Vester v. Collins*, 101 N. C. 114, 7 S. E. 687.

If a witness to a will is interested as a legatee thereunder, he is a competent witness to prove the will, the effect of the statute being to deprive him of the legacy. *McLean, Exr. v. Elliott*, 72 N. C. 70.

Every beneficial devise or legacy to a subscribing witness to a will disposing of both real and personal property being utterly null and void by statute 25, Geo. 2, c. 6, in force in South Carolina (1853), such witness is competent under the act of 1824, and his attestation will be held good when the will is propounded in the Court of Ordinary. *Cannon v. Setzler*, 6 Rich. (S. C.) 471.

Under the revised statutes of Texas, articles 2246, 2247 and 2248, and articles 4859 and 4872, the wife of a legatee is competent as a subscribing witness to testify to the execution of the will in a proceeding for its probate. Neither her relationship nor interest affects her competency. *Gamble v. Butcher*, 87 Tex. 643, 30 S. W. 861.

Where there are but two subscribing witnesses to a will, one of whom is by its terms a devisee under it, such party by the very act of sub-

scribing it as a witness avoids the bequest; his competency and credibility as a witness to establish the will is the result of the nullity of the bequest to him. *Fowler v. Stagner*, 55 Tex. 393.

6. *Alabama.* — *Varter v. Corley*, 23 Ala. 612.

*Georgia.* — *Hall v. Hall*, 18 Ga. 40.

*Illinois.* — *Sloan v. Sloan*, 184 Ill. 579, 56 N. E. 952; *Slingloff v. Bruner*, 174 Ill. 561, 51 N. E. 772; *Fisher v. Spence*, 150 Ill. 253, 37 N. E. 314, 41 Am. St. Rep. 360; *Standley v. Moss*, 114 Ill. App. 612.

*Maine.* — *Shepard v. Parker*, 97 Me. 86, 53 Atl. 879; *Jones v. Larabee*, 47 Me. 474.

*Massachusetts.* — *Jenkins v. Dawes*, 115 Mass. 599; *Hawes v. Humphrey*, 9 Pick. 350, 20 Am. Dec. 481.

*Minnesota.* — *In re Holt's Will*, 56 Minn. 33, 57 N. W. 219, 22 L. R. A. 481.

*Mississippi.* — *Rucker v. Lambdin*, 12 Smed. & M. 230.

*Montana.* — *In re Klein's Estate*, 35 Mont. 185, 88 Pac. 798.

*New Hampshire.* — *Frink v. Pond*, 46 N. H. 125; *Carlton v. Carlton*, 40 N. H. 14.

*Pennsylvania.* — *In re Kessler's Estate*, 221 Pa. St. 314, 70 Atl. 770.

*South Carolina.* — *Taylor v. Taylor*, 1 Rich. 531; *Workman v. Dominick*, 3 Strobb. 589.

*Tennessee.* — *Haynes Walker, Exr. v. Skeene*, 3 Head 1.

*Texas.* — *Nixon v. Armstrong*, 38 Tex. 297.

*Vermont.* — *Giddings v. Turgeon*, 58 Vt. 106, 4 Atl. 711.

*Virginia.* — *Bruce v. Shuler*, 108 Va. 670, 62 S. E. 973.

In *Gillis v. Gillis*, 96 Ga. 1, 23 S. E. 107, 30 L. R. A. 143, 51 Am. St. Rep. 121, the court said: "The competency of witnesses like that of the testator is tested by one's status at the time when the will was executed.

executed, or that the same was acknowledged by the maker to have been executed by him.<sup>7</sup> It is not necessary that the maker should have expressly requested him to sign as such; it is sufficient if he was present when the instrument was executed and subscribed his

If therefore a sufficient number of witnesses attest and subscribe properly, who at that date are competent, the will remains valid, although death or supervening disability may render any or all of them incapable in fact of testifying by the time the will is offered for probate."

The word "credible" as used in the statute relating to subscribing witnesses to wills, means competent. It means a witness who at the time of attesting a will would be legally competent to testify in a court of justice to the facts which he attests by subscribing his name to the will. *O'Brien v. Bonfield*, 213 Ill. 428, 72 N. E. 1090.

The competency of subscribing witnesses to a will is to be tested by the state of facts existing at the time of the attestation. If in a proceeding to set aside a will one of the subscribing witnesses is impeached, the impeachment does not extend back to the date of the execution of the will so as to make it a will with only one subscribing witness instead of two. *Johnson v. Johnson*, 187 Ill. 86, 95, 58 N. E. 237.

A subscribing witness to a will, who is competent as such at the time the will is made, may testify to the execution of it, although he may have acquired an interest therein. *Vester v. Collins*, 101 N. C. 114, 7 S. E. 687.

In *Fisher v. Porter*, 11 S. D. 311, 77 N. W. 112, the court in construing § 5260 Comp. Laws, said: "It seems entirely consistent with the legislative aim to hold that a person who would be a competent witness in an action involving the subject-matter of a deed or mortgage, has the legal capacity to become a subscribing witness thereto; and under statutes measurably less compatible with the doctrine than our own."

7. *Hale v. Stone*, 14 Ala. 803; *Mosely v. Gordon*, 16 Ga. 384; *Dawson v. Callaway*, 18 Ga. 573; *Goodhue v. Berrien*, 2 Sandf. Ch. (N. Y.)

630. See also *Bullitt v. Overfield*, 2 Mo. 4.

**Attestation by One Who Did Not See Party Sign.**—A writing may be validly attested by one who did not see the parties executing it sign the writing if the parties appeared before him and acknowledged that the signatures thereto are their own and request him to sign in attestation of that fact; and this is true although the signature of one of the parties to the instrument was made by his name being written for him and he affixed his mark thereto. *Elston v. Roop*, 133 Ala. 331, 32 So. 129.

**Not Necessary That Witness Should Remember Delivery** of the instrument attested by the maker, or that any other person was present at the time. *In re Miller's Estate*, 3 Rawle (Pa.) 312, 24 Am. Dec. 345.

**Proof Need Not Show Mortgagor's Knowledge of Contents of Instrument.**—Proof of execution of mortgage must be shown by subscribing witnesses but it is not necessary that it should be shown that mortgagor was acquainted with contents of instrument. *Coe v. New Jersey M. R. Co.*, 31 N. J. Eq. 105.

**Testimony Insufficient To Show Signature.**—The mere testimony of a subscribing witness that he witnessed a certain party's name on an instrument is insufficient to prove the signature, in the absence of proof that he saw the party sign or was present at that time. *Schaffer v. Emmons*, 103 App. Div. 393, 92 N. Y. Supp. 993. Where one of the subscribing witnesses of a deed testified that he wrote his name to the paper at the request of the grantee, without seeing anything else written on the paper, and the other witness testified that he wrote the grantor's name either at his request or with his assent, but that he recollected but one mark then made, which was to the receipt, such evidence was not sufficient to admit the deed in evidence, where it was proven that the

name as a witness with the assent of the party who executed it.<sup>8</sup> Nor is it necessary that a subscribing witness should remember the execution of the instrument; if he states that his signature is genuine and that it would not be placed there unless he had been called to witness it, this is sufficient to render the instrument admissible.<sup>9</sup>

grantor had been a lunatic for forty years with occasional lucid intervals. *Hays v. Hays*, 6 Pa. St. 368. The testimony of an attesting witness to an instrument that the maker thereof seated herself at a table; that he did not see her write her name; that he did not know whether at the time of signing his name as a witness she had signed her name; that he could not say that it was her handwriting; that the instrument was not to his knowledge ever read to or by her,—is not sufficient proof of execution. *Edelen v. Gough*, 5 Gill (Md.) 103, 106.

8. *Smith v. Soper*, 12 Colo. App. 264, 55 Pac. 195.

9. *Alabama*.—*Hale v. Stone*, 14 Ala. 803; *Graham v. Lockhart*, 8 Ala. 9.

*Kentucky*.—*Allen v. Trimble*, 4 Bibb 21, 7 Am. Dec. 726.

*Maine*.—*Wheeler v. Hatch*, 12 Me. 389.

*Maryland*.—*Miller v. Honey*, 1 Har. & J. 241.

*Massachusetts*.—*Robinson v. Brennan*, 115 Mass. 582; *Crittenden v. Rogers*, 8 Gray 452.

*Nebraska*.—*Cheston v. Wilson*, 89 N. W. 764.

*New Jersey*.—*Gaston v. Mason*, 1 N. J. L. 10.

*New York*.—*Hall v. Luther*, 13 Wend. 491.

*South Carolina*.—*Collins v. Lemasters*, 2 Bailey 141; *Pearson v. Wightman*, 1 Mill Const. 336, 12 Am. Dec. 636.

Where the making of the lease in suit is admitted by the defendant in his answer and the subscribing witness proves his own signature although he does not remember who signed the defendant's name thereto, the objection to the lease that it was not identified so as to be admissible in evidence is without merit. *Hall v. Beston*, 26 App. Div. 105, 49 N. Y. Supp. 811, *affirmed*, 165 N. Y. 632, 59 N. E. 1123.

In *Dawson v. Callaway*, 18 Ga. 573, it was held that testimony of a witness that "I did sign the said bill of sale as an attesting witness; I saw said ——— execute said bill of sale to said ——— (as I supposed) for the purposes therein mentioned" was sufficient to justify the admission of the bill of sale. The court said: "If this statement be true the most obvious if not the necessary inference from it is that the witness saw the bill of sale signed and delivered; that he was present when that was done and that he attested the doing of it. A statement from which such an inference may be drawn is certainly sufficient to carry the instrument to which it relates to the jury. Any objection to the word 'execute' on the score that it expresses a conclusion rather than a fact would equally lie to any of the words sign, seal, deliver."

In *Robinson v. Brennan*, 115 Mass. 582, where the mortgage in controversy had been signed by the mark of the mortgagor, the attesting witness, an attorney, who had drafted the mortgage, testified that he witnessed the execution of it by the mortgagor at a certain date but that his recollection of the transaction was general; that he could not say whether the mortgagor asked him to attest the mortgage and could not state from his recollection whether or not the defendant knew that he had signed his name as attesting witness, but that he had made and witnessed the paper in the usual course of business; and it was held that his testimony was sufficient to prove the execution of the mortgage.

See *Hamsher v. Kline*, 57 Pa. St. 397, *holding* evidence sufficient to entitle deed to go to jury where subscribing witness identifies his own signature as such but is unable to testify as to whether plaintiff was the person who signed the deed in his presence.

**Instrument Must Be Before Witness When Deposing.** — A subscribing witness to an instrument cannot prove its execution without having the instrument before him when testifying.<sup>10</sup>

**Dates Need Not Be Shown.** — A subscribing witness is not required to testify to the date of the instrument, or that of his signature.<sup>11</sup>

**f. Number of Witnesses Necessary.** — The execution of an attested instrument may ordinarily be proved by one of two or more subscribing witnesses,<sup>12</sup> especially where the witness states that he and the other witnesses were present and saw the execution and subscribed their names as such.<sup>13</sup> And it has been held that the testimony of one of two subscribing witnesses as to the genuineness of his signature and that of the other who is out of the jurisdiction amounts to *prima facie* evidence of due execution, though the witness does not remember having witnessed it.<sup>14</sup>

10. *Neale v. McKinstry*, 7 Mo. 128.

11. *Ballard v. Perry*, 28 Tex. 347. But see *Schaffer v. Emmons*, 103 App. Div. 399, 92 N. Y. Supp. 993.

12. *Connecticut*. — *O'Sullivan v. Overton*, 56 Conn. 102, 14 Atl. 300. *Georgia*. — *Cooper v. O'Brien*, 98 Ga. 773, 26 S. E. 470.

*Louisiana*. — *Collins v. McElroy*, 15 La. Ann. 639.

*Maine*. — See *Jackson v. Sheldon*, 22 Me. 569.

*Massachusetts*. — *Burke v. Miller*, 7 Cush. 547; *White v. Wood*, 8 Cush. 413.

*Mississippi*. — *Dancy v. Sugg*, 46 Miss. 606.

*Pennsylvania*. — *McAdams' Exrs. v. Stilwell*, 13 Pa. St. 90; *Jordan v. Stewart*, 23 Pa. St. 244.

*Texas*. — *Allen v. Hoxey's Admr.*, 37 Tex. 320; *Tevis v. Collier*, 84 Tex. 638, 19 S. W. 801.

But see *Martin v. Bowie*, 37 S. C. 102, 15 S. E. 736, where plaintiff claimed title to land under a sheriff's deed holding that proof by one of the subscribing witnesses of his own signature and that of the other subscribing witness, accompanied by his statement that the deed "seems to be" the deed of the sheriff, is not sufficient proof of the execution of the deed.

**Court May Require Production of Other Witnesses.** — *Burke v. Miller*, 7 Cush. (Mass.) 547.

**Interested Subscribing Witness Incompetent To Testify** in the absence of proof that other subscrib-

ing witnesses have been diligently sought for. *Whittemore v. Brooks*, 1 Greenl. (Me.) 57. But see R. S. (1903) c. 84, § 107.

**Proof of Execution Held Insufficient.** — Under Act of 1715 requiring that a deed shall be proved by two witnesses who were present at its execution, proof of an office copy by one subscribing witness and proof of a schedule indorsed on the deed by the grantor, referring to such deed, is insufficient to prove the execution of the original deed. *Vickroy v. McKnight*, 4 Binn. (Pa.) 204.

13. *Melcher v. Flanders*, 40 N. H. 139; *Martin v. Bowie*, 37 S. C. 102, 15 S. E. 736. See also *Little v. White*, 29 S. C. 170, 7 S. E. 72.

14. *Hemphill v. Dixon*, 1 Hempst. 235, 11 Fed. Cas. No. 6346a; *Russell v. Coffin*, 8 Pick. (Mass.) 143. But see *Martin v. Bowie*, 37 S. C. 102, 15 S. E. 736, and *Russell v. Tunno*, 11 Rich. L. (S. C.) 303, where the two subscribing witnesses to an assignment were out of the jurisdiction. One was examined by commission and testified that he remembered nothing, but recognized his own signature and believed the other signature to be that of the other witness although he did not know the assignor. It was held that the proof of the assignment was insufficient, though the signature of the other witness was otherwise proved. The court was of the opinion that it was necessary to prove the identity of the assignor in some

**Proof of Wills.** — It is not necessary to call and examine all the witnesses to a will to prove its execution; one,<sup>15</sup> or two<sup>16</sup> have been held sufficient providing they are able to testify as to the facts and circumstances attending execution.<sup>17</sup>

**g. Instruments Signed or Attested by Mark.** — (1.) **Signed by Mark.** — It is of course lawful for the maker of an instrument to sign by mark,<sup>18</sup> and a writing signed by mark may be validly attested by one who did not see the parties to it sign, where they appear before him and acknowledge the signatures as their own and request him to sign in attestation of the fact.<sup>19</sup> Where an instrument is signed by mark which is attested by subscribing witnesses, its execution must be proved by the testimony of at least one of the witnesses,<sup>20</sup> unless some excuse, sufficient in law, can be shown for not producing them.<sup>21</sup>

**An Acknowledged Instrument** signed by mark is sometimes held to be admissible, though unattested;<sup>22</sup> and an instrument signed by

manner if not possible through the witness.

15. *Howell v. House*, 2 Mill Const. (S. C.) 80.

16. *Jackson v. Vandyke*, 1 N. J. L. 28.

17. In *Jackson v. LeGrange*, 19 Johns. (N. Y.) 386, 10 Am. Dec. 237, a will was offered in evidence subscribed by three witnesses. One only was present and he had lost all recollection of the facts and circumstances attending its execution and could not state whether the testator signed it in the presence of the witnesses, or acknowledged his signature to them, or that the other witnesses subscribed in the presence of the testator. It was held that the will was not sufficiently proved to be admissible in evidence, as the party producing it should have produced the other witnesses, if possible, or have proved their handwriting.

**Number of Witnesses Required To Prove Execution of Will Propounded for Probate.** — See article "WILLS."

18. *Ballow v. Collins*, 139 Ala. 543, 36 So. 712.

19. *Elston v. Roop*, 133 Ala. 331, 32 So. 129.

20. *Houston v. State*, 114 Ala. 15, 21 So. 813; *Hays v. Hays*, 6 Pa. St. 368; *Hess v. Griggs*, 43 Mich. 397, 5 N. W. 427; *Sanborn v. Cole*, 63 Vt. 590, 22 Atl. 716, 14 L. R. A. 208.

In *Ballow v. Collins*, 139 Ala. 543,

36 So. 712, it was held that a mortgage signed by mark was not sufficiently identified by the mortgagor who testified that the way he identified the mortgage was because the mortgagee told him that it was the mortgage he had signed and that he had made his mark by way of signature to but one mortgage.

In *Missouri* it is held that where a deed is both signed and attested by mark, it cannot be proved in court by a certificate of proof under Act March 25, 1845, requiring witnesses proving the execution of a deed in order that it may be recorded, to state on oath that they well knew the signature of the party whose name is subscribed to the deed and that they personally knew the person whose name is subscribed as a witness and knew well his signature. *Allen v. Moss*, 27 Mo. 354.

21. *Houston v. State*, 114 Ala. 15, 21 So. 813.

22. In *Alabama*, though Code 1896, § 982, requires attestation of a deed by two witnesses where the grantor signs by mark, and though § 998 requires deeds admitted to record on proof to be attested by two witnesses, § 984 further provides that the acknowledgment thereafter provided for operates as a compliance with the requisitions of § 982, and a deed signed by the grantor's mark and unattested is not inadmissible in

mark may be admitted in evidence, though unattested contrary to law, if it appears that such instrument is fully described in another instrument duly acknowledged and recorded.<sup>23</sup> An instrument signed by mark, attested and acknowledged, may be proved by the acknowledging officer as well as by one of the witnesses.<sup>24</sup>

If the Witnesses Are Dead, proof of their signatures to the mark is sufficient to show the authenticity of the instrument.<sup>25</sup>

In Alabama both the mark of the illiterate maker and the signature of an attesting witness must be proved.<sup>26</sup>

(2.) **Attested by Mark.** — While it is usual for subscribing witnesses to write their names as such it is not absolutely necessary. If it appears that a subscribing witness made his mark in such a way as to identify himself with the execution of the instrument as a witness, it is sufficient.<sup>27</sup> But the courts do not seem to look

evidence where a justice has taken the separate acknowledgment of each of the grantors, as prescribed by §§ 996 and 997. *Russell v. Holman* (Ala.), 47 So. 205.

23. In *Goodman v. Pareira*, 70 Ark. 49, 66 S. W. 147, it was held that though notes given to secure a trust deed which are signed by mark are not attested as required by law, it is sufficient proof of their execution that the deed contained a full description of the notes and was duly acknowledged and filed for record.

24. Where a power of attorney is signed by mark, attested by two witnesses and acknowledged before a justice of the peace, the testimony of the justice or of one of the subscribing witnesses is requisite to prove the identity of the principal and the execution of the instrument. *Eichelberger v. Sifford*, 27 Md. 320.

25. *In re Succession of Romero*, 43 La. Ann. 975, 9 So. 919.

By Proving Signatures and Good Character of deceased subscribing witnesses to a private act signed by mark, the same may be proved. *Togiasco v. Molinari's Heirs*, 9 La. 512.

In South Carolina it is held that where the subscribing witnesses and the parties to a deed signed by mark are dead, no proof is essential that the grantor made the mark as his signature. *Lyons v. Holmes*, 4 S. C. 429.

26. "Where the maker cannot write his name to the paper, its

execution is effected by his setting his mark against his name as written for him, and by the attestation of a witness who can and does write his name. When this is done, the signature of the maker is not merely his name thus written, with his mark set against it, but an essential and inherent part of his signature is the signature of the other person as a witness. It requires all of this to constitute the signature of such illiterate maker, and all of it must be proved before it can be said that the execution of the paper is proved." *Ballow v. Collins*, 139 Ala. 543, 36 So. 712.

27. *England.* — *Harrison v. Harrison*, 8 Ves. 185; *Addy v. Grix*, 8 Ves. 504; *Harrison v. Elvin*, 3 Ad. & El. 117, 43 E. C. L. 658.

*United States.* — *Adams v. Norris*, 64 U. S. 353, 367.

*Georgia.* — *Gillis & Gillis*, 96 Ga. 1, 23 S. E. 107, 51 Am. St. Rep. 121, 30 L. R. A. 143.

*New Jersey.* — *Den v. Milton*, 12 N. J. L. 70.

*New York.* — *Mock v. Kaufman*, 82 N. Y. Supp. 310; *Morris v. Kniffin*, 37 Barb. 336; *Jackson v. Van Dusen*, 5 Johns. 144, 4 Am. Dec. 330.

*North Carolina.* — *Tatom v. White*, 95 N. C. 453; *State v. Byrd*, 93 N. C. 624; *Pridgen, Exr. v. Pridgen's Heirs*, 35 N. C. (13 Ired. L.) 259.

*Tennessee.* — *Ford v. Ford*, 7 Humph. 92.

*Virginia.* — *Jesse v. Parker's Admr.*, 6 Gratt. 57, 52 Am. Dec. 102.



with favor upon attestation by mark. It has been held that if a subscribing witness merely makes his mark, proof of the handwriting of the party executing the instrument will be received without any attempt to prove the witness' mark.<sup>28</sup>

**In the Event of the Witness' Death, Absence or Incapacity,** execution of the instrument can only be shown by adducing proof of the handwriting of the maker.<sup>29</sup>

**Preliminary to the Introduction of Such Proof** it has been held necessary to prove that the witness used to make his mark in the manner appearing in the instrument.<sup>30</sup>

**h. Secondary Evidence of Execution.** — (1.) **Grounds for Secondary Evidence.** — (A.) **ABSENCE OF WITNESS.** — Where it appears that an attesting witness' residence is not within the court's jurisdiction,<sup>31</sup>

In *Garrett v. Heflin*, 98 Ala. 615, 13 So. 326, 39 Am. St. Rep. 89, the court said: "It is contended that the will was not executed according to law, in that only one subscribing witness wrote his name, while the other witnesses only subscribed by making their marks. We are of opinion that this was a sufficient attestation of the will. Our statute in this respect is substantially the same as the English Statute of Wills, 29 Car. 2, ch. 3."

A person can become an attesting witness to a will by making his mark, even when the person who signs the name of such witness fails to sign his name as witness of that fact. *Davis v. Semmes*, 51 Ark. 48, 9 S. W. 434.

When it appears that another person wrote the name of a subscribing witness to a will for him, and the latter put his mark to the name which was so written, it is deemed in law his signature as fully as if he had subscribed his name. *Appeal of Reaver's Exrs.*, 96 Md. 735, 54 Atl. 875.

Where it is shown that a subscribing witness to a will held the pen while his entire name was written *animo testandi*, at the request of the testator and in his presence, he is an effectual subscribing witness, even though he was at the time able to write his own name. *In re Pope's Will*, 139 N. C. 484, 52 S. E. 235.

A person who cannot write his name may be a competent subscribing witness to a deed. *Devereux v. McMahon*, 102 N. C. 284, 9 S. E. 635.

**Failure to Make Mark.** — In *Horton v. Johnson*, 18 Ga. 396, it appeared that one of the witnesses to a will not being able to write his name, another of the witnesses wrote it for him, and at his request. He was about to make his mark when the testator said it was unnecessary, if the witness was present, saw it done, and assented to it. *Held*, not sufficient to constitute the person a subscribing witness.

28. *Watts v. Kilburn*, 7 Ga. 356; *Gilliam v. Perkinson*, 4 Rand. (Va.) 325.

In *Alabama* it is necessary that a subscribing witness to a chattel mortgage should write "his own name as a witness," where the mortgage has subscribed by mark. *Houston v. State*, 114 Ala. 15, 21 So. 813.

29. *Carrier v. Hampton*, 33 N. C. (11 Ired. L.) 307.

30. *Nelius v. Brickell's Admrs.*, 2 N. C. 19.

31. *England.* — Anonymous, 12 Mod. 607, 88 Eng. Reprint 1,552; *Barnes v. Trompowsky*, 7 Durnf. & E. 265; *Banks v. Farquharson*, Dick. 167; *Cooper v. Marsden*, 1 Esp. 1; *Prince v. Blackburn*, 2 East 250.

*United States.* — *Hanrick v. Patrick*, 119 U. S. 156; *Stebbins v. Duncan*, 108 U. S. 32.

*Alabama.* — *Guice v. Thornton*, 76 Ala. 466; *Sharpe v. Orme*, 61 Ala. 263; *Caldwell v. Pollak*, 91 Ala. 353, 8 So. 546; *Barringer v. Sneed*, 3 Stew. 201, 18 Am. Dec. 39. *Arkansas.* — *Wilson v. Royston*, 2 Ark. 315; *Tatum v. Mohr*, 21

Ark. 349; Nicks' Heirs *v.* Rector, 4 Ark. 251.

*California.*—McMinn *v.* Whelan, 27 Cal. 300.

*Florida.*—Groover *v.* Coffee, 19 Fla. 61.

*Georgia.*—Ellis *v.* Smith, 10 Ga. 253; Watts *v.* Kilburn, 7 Ga. 356; McVicker *v.* Conkle, 96 Ga. 584, 24 S. E. 23; Harris *v.* Cannon, 6 Ga. 382.

*Illinois.*—Wiley *v.* Bean, 6 Ill. 302; Mariner *v.* Saunders, 10 Ill. 113.

*Indiana.*—Jones *v.* Coopridge, 1 Blackf. 47; State *v.* Bodly, 7 Blackf. 355; Jordon *v.* Miller, 1 Ind. 531.

*Iowa.*—Ballinger *v.* Davis, 29 Iowa 512.

*Louisiana.*—Carpenter *v.* Featherston, 15 La. Ann. 235.

*Maine.*—Emery *v.* Twombly, 17 Me. 65.

*Maryland.*—Dorsey *v.* Smith, 7 Har. & J. 345.

*Massachusetts.*—Trustees of Smith Charities *v.* Connolly, 157 Mass. 272, 31 N. E. 1058; Homer *v.* Wallis, 11 Mass. 309, 6 Am. Dec. 169; Troeder *v.* Hyams, 153 Mass. 536, 27 N. E. 775; Valentine *v.* Piper, 22 Pick. 85, 33 Am. Dec. 715.

*Nebraska.*—Buchanan *v.* Wise, 34 Neb. 695, 52 N. W. 163; Jewell *v.* Chamberlain, 41 Neb. 254, 59 N. W. 784.

*New Hampshire.*—Dunbar *v.* Marden, 13 N. H. 311.

*New Jersey.*—VanDoren *v.* VanDoren, 3 N. J. L. 1022; Lorillard *v.* VanHouten, 10 N. J. L. 270; New Jersey Zinc & Iron Co. *v.* Lehigh Z. & I. Co., 59 N. J. L. 189, 35 Atl. 915.

*New York.*—Fox *v.* Reil, 3 Johns. 477; Teall *v.* Van Wyck, 10 Barb. 376.

*North Carolina.*—Irving *v.* Irving, 3 N. C. 183; Tulloch's Exrs. *v.* Nichols, 1 N. C. 4.

*Ohio.*—Richards *v.* Skiff, 8 Ohio St. 586.

*Pennsylvania.*—Gallagher *v.* London Assur. Corp. 149 Pa. St. 25, 24 Atl. 115. See Taylor *v.* Meekly, 4 Yeates 79.

*South Carolina.*—Swancey *v.* Parrish, 62 S. C. 240, 40 S. E. 554; Oliphant *v.* Taggart, 1 Bay 255.

*Texas.*—Smith *v.* Gillum, 80 Tex. 120, 15 S. W. 794; Frazier *v.* Moore, 11 Tex. 755; Lapowski *v.* Taylor, 13 Tex. Civ. App. 624, 35 S. W. 934; Teal *v.* Sevier, 26 Tex. 516.

**Statement of Rule.**—"The rule now is, that if the subscribing witness is beyond the jurisdiction of the court, so far as his testimony is concerned, he may be treated as though he were dead. The reasonableness of this rule is so clear, it is a matter of surprise that its correctness should ever have been questioned. For why should a party be deprived of his rights for the want of the testimony of a witness, when the forum afforded him no means of commanding such testimony, and while there were other means of proving the same facts as fully and satisfactorily to the mind as if the subscribing witness himself were present, and occupied the stand?" Barringer *v.* Sneed, 3 Stew. (Ala.) 201, 20 Am. Dec. 74.

**Absence of Over Four Years on Sea Voyage** of subscribing witness is sufficient to warrant introduction of secondary evidence of execution of attested instrument. Spring *v.* South Carolina Ins. Co., 8 Wheat. (U. S.) 268; Gaither *v.* Martin, 3 Md. 146.

**Attester's Testimony Cannot Be Dispensed With** in an action in the circuit court for the District of Columbia, where it appears that his residence is in Massachusetts. Whann *v.* Hall, 2 Cranch C. C. 4, 29 Fed. Cas. No. 17,478.

**Diligence in Attempting To Get Deposition of Departing Witness Not Necessary.**—In Jackson *v.* Feather River & G. Water Co., 14 Cal. 18, it appeared that the subscribing witness was in the state after the institution of the suit and near the time of trial, but departed the state at about that time. It was held that secondary evidence was not to be excluded on the ground of want of diligence in getting the proof of the subscribing witness before he departed the state.

**Absence From County** does not put the witness beyond jurisdiction of

or that he cannot be found after reasonable efforts therefor,<sup>32</sup> it is

the court. *Baker v. Massengale*, 83 Ga. 137, 10 S. E. 347.

**Attester Out of State on Public Duty.**—Where a subscribing witness is out of the jurisdiction on public duty, as a member of Congress, secondary evidence as to the execution of the attested instrument is admissible. *Selby v. Clark*, 11 N. C. (4 Hawks) 265.

**Mere Absence in Foreign State Not Sufficient;** it must be shown that residence in foreign state is of permanent character. *Harrel v. Ward*, 2 Sneed (Tenn.) 610.

**32. England.**—*Coghlan v. Williamson*, 1 Doug. 93; *Cunliffe v. Sefton*, 2 East 183; *Call v. Dunning*, 5 Esp. 16, 4 East 53; *Crosby v. Percy*, 1 Taunt. 364; *Anonymous*, 12 Mod. 607, 88 Eng. Reprint 1,552; *Wardell v. Fermor*, 2 Campb. 282; *Parker v. Hoskins*, 2 Taunt. 223.

**Georgia.**—*Standback v. Thornton*, 106 Ga. 81, 31 S. E. 805.

**Kentucky.**—*Kemper v. Fryor*, 1 J. J. Marsh. 598.

**Louisiana.**—*Dismukes v. Musgrove*, 8 Mart. (N. S.) 375.

**Maryland.**—See *Gaither v. Martin*, 3 Md. 146.

**Massachusetts.**—*Trustees v. Connolly*, 157 Mass. 272, 31 N. E. 1058.

**New York.**—*Willson v. Betts*, 4 Denio 201; *Edwards v. Perry*, 21 Barb. 600.

**North Carolina.**—*Baker v. Blount*, 3 N. C. 610.

**South Carolina.**—*Manigault v. Hampton*, 1 Brev. 394.

**Texas.**—*Teal v. Sevier*, 26 Tex. 516.

In *Mills v. Twist*, 2 Johns. (N. Y.) 121, the plaintiff on the day before the sitting of the court called upon the defendant and inquired after his sons, who were the subscribing witnesses, and was falsely told by him that they were gone on a journey, and this was held insufficient to justify the admission of secondary evidence, due diligence not having been used.

In *Cooke v. Woodrow*, 5 Cranch (U. S.) 13, the witness a year previously had left the District of Columbia, declaring his intention to go to Philadelphia; he went instead to

Norfolk and said he should go further south and he was not heard of for twelve months. A subpoena had issued to the marshal who could not find him in the District. The court said that it did not appear that the witness would not have been produced if proper diligence had been used, no inquiry having been made for him at Norfolk, and consequently secondary evidence was properly excluded.

**On the Return of a Non Est Inventus** to an attachment against an instrumentary witness, the party will be allowed to introduce secondary evidence. *Jerman v. Hudson*, 2 Har. (Del.) 134.

**Where Witnesses Reside in the State** a sufficient predicate is not laid for the introduction of secondary evidence as to the execution of the instrument by showing that an unsuccessful effort had been made to reach by telegraph the only witness accessible by that means after an objection had been made to the introduction of secondary evidence, it appearing that the residences of the witnesses were known but that no attempt had been made to take their depositions or to secure their attendance except in the instance noted. *Johnson v. Franklin* (Tex. Civ. App.), 76 S. W. 611.

**Due Diligence Not Used To Obtain Witness.**—*Whitemore v. Brooks*, 1 Greenl. (Me.) 57. In this case it appeared that the deed had two subscribing witnesses, one of whom was incompetent to testify because of interest. As to the other witness counsel stated that he believed the witness was at sea, and a witness testified that some months previously he was in town under the control or power or living in a house with a certain person, but he did not know where the witness then was. It did not appear that any subpoena had been taken out for him, that no inquiries had been made for him at any place, and there was no evidence that the witness was not then in town and had not been from the time he was last known to have been there, and it was held that sec-

generally held that secondary evidence is admissible to prove execution of the instrument. It has been said that even though a witness' residence is known, secondary evidence is admissible; if he lives without the jurisdiction it is not necessary to subpoena or take the deposition of the witness.<sup>33</sup>

But the Mere Temporary Absence of a subscribing witness from the jurisdiction of the court will not justify secondary evidence as to the execution of the instrument,<sup>34</sup> especially where he has been summoned to attend the trial.<sup>35</sup>

(B.) DEATH OF WITNESS. — Where a subscribing witness to an instrument offered in evidence is dead, or there is a presumption of his death, secondary evidence of the execution of the instrument is admissible.<sup>36</sup>

ondary evidence was improperly admitted.

33. *Emery v. Twombly*, 17 Me. 65; *Dunbar v. Marden*, 13 N. H. 311; *Price v. McGee*, 1 Brev. (S. C.) 373. But see *Rich v. Trimble*, 2 Tyler (Vt.) 349, holding that the signature of a party to a release cannot be proved by comparison of handwriting, if there be a subscribing witness, though the witness reside without the state, if the place of his residence be known and he lives within a reasonable distance from the place of trial, since in such case his deposition should be taken. See also *Brown v. Hicks*, 1 Ark. 232.

34. *Gaither v. Martin*, 3 Md. 146; *Harrel v. Ward*, 2 Sneed (Tenn.) 610; *Gordon v. Paynes*, 3 N. C. 74 (witness absent in another state and ill).

Where a subscribing witness is absent temporarily on business and no attempt is made to take his deposition, secondary evidence as to the execution of the subscribed instrument is not admissible. *Brown v. Hicks*, 1 Ark. 232.

In Massachusetts a deed cannot be proved by a subscribing witness upon its being shown that the grantor was absent from the state, it appearing that his absence was but for a particular purpose and that his permanent residence was within the state. *In re Sacket*, 1 Mass. 58.

35. *Creighton v. Johnson*, Litt. Sel. Cas. (Ky.) 240; *McCord v. Johnson*, 4 Bibb (Ky.) 531. But see *Baker v. Blount*, 3 N. C. 610, where the subscribing witness to a

bond had loaned money to the obligor under such circumstances as raised a presumption that a company of which the witness was a member was to pay this debt when recovered. The witness was summoned but did not attend, whereupon a commission was issued before the commissioners, he refused to depose, alleging that his papers were not in his possession. At the next court he did not attend, and the court issued an attachment against him. Hearing of this he removed into another county. It was held that under such circumstances proof of the witness' handwriting was admissible.

36. *England*. — Anonymous, 12 Mod. 607, 88 Eng. Reprint 1,552; *Barnes v. Trompowsky*, 7 Durnf. & E. 265; *Adam v. Kers*, 1 B. & P. 360; *Banks v. Farquharson*, Dick. 167.

*United States*. — *Stebbins v. Duncan*, 108 U. S. 32.

*Alabama*. — *Allred v. Elliott*, 71 Ala. 224; *Mardis' Admr. v. Shackelford*, 4 Ala. 493.

*Florida*. — *Groover v. Coffee*, 19 Fla. 61.

*Georgia*. — *Howard v. Snelling*, 32 Ga. 195; *McVicker v. Conkle*, 96 Ga. 584, 24 S. E. 23; *Standback v. Thornton*, 106 Ga. 81, 31 S. E. 805.

*Missouri*. — *Waldo v. Russell*, 5 Mo. 387.

*New Hampshire*. — *Foye v. Leighton*, 24 N. H. 29.

*New Jersey*. — *Van Doren v. Van Doren*, 3 N. J. L. 1,022.

*North Carolina*. — *Jones' Admr. v. Blount's Exrs.*, 2 N. C. 238.

(C.) INTEREST OR INCOMPETENCY OF WITNESS. — Before the enactment of modern statutes relating to the competency of witnesses it was held that where a subscribing witness was interested in the event of the suit, secondary evidence was admissible to prove execution of the instrument,<sup>37</sup> and it is always true that where a witness is incompetent to testify as to the execution of an instrument for any other reason, secondary evidence is admissible;<sup>38</sup> but it has been held that if the witness becomes interested or incompetent by the act of the party calling him, and he is objected to on the ground of such interest, the party calling him cannot use secondary evi-

*Rhode Island.* — *Kinney v. Flynn*, 2 R. I. 319.

*South Carolina.* — *Martin v. Bowie*, 37 S. C. 102, 15 S. E. 736.

*Texas.* — *Timmony v. Burns* (Tex. Civ. App.), 42 S. W. 133; *Cairrell v. Higgs*, 1 Posey Unrep. Cas. 56.

*Vermont.* — *Sanborn v. Cole*, 63 Vt. 590, 22 Atl. 716, 14 L. R. A. 208.

*West Virginia.* — *Thompson v. Halstead*, 44 W. Va. 390, 29 S. E. 991.

37. *England.* — *Swire v. Bell*, 5 Durnf. & E. 371; *Cunliffe v. Sexton*, 2 East 183; *Goss v. Tracy*, 1 P. Wms. 287, 24 Eng. Reprint 392; *Godfrey v. Norris*, 1 Stra. 34; *Bulkley v. Smith*, 2 Esp. 697 (witness married to plaintiff).

*Alabama.* — *Robertson's Exrs. v. Allen*, 16 Ala. 106.

*Georgia.* — *Ellis v. Smith*, 10 Ga. 253.

*Louisiana.* — *Buard v. Buard*, 5 Mart. (N. S.) 132 (witness ascendant of one of parties).

*Maine.* — See *Wittmore v. Brooks*, 1 Greenl. 57.

*Maryland.* — *Keefer v. Zimmerman*, 22 Md. 274.

*Massachusetts.* — *Haynes v. Rutter*, 24 Pick. 242; *Packard v. Dunsmore*, 11 Cush. 282; *President, etc. of Amherst Bank v. Root*, 2 Met. 522; *Jourdain v. Sherman*, 6 Cush. 139.

*Mississippi.* — *Tinnin v. Price*, 31 Miss. 422.

*North Carolina.* — *Blackwelder v. Fisher*, 20 N. C. (4 Dev. & B.) 204; *Saunders v. Ferrill*, 23 N. C. (1 Ired. L.) 97.

*Pennsylvania.* — *Hamilton v. Marsden*, 6 Binn. 45; *Davison's Lessee v. Bloomer*, 1 Dall. 123 (witness married to plaintiff's lessor);

*Bell v. Cowgell*, 1 Ashm. 7; *In re Truitt's Estate*, 10 Phila. 16.

*Rhode Island.* — *Kinney v. Flynn*, 2 R. I. 319.

**Where Witness by Voluntary Act Incapacitates Himself** from proving execution of instrument by becoming interested, secondary evidence is not admissible. *McKinley v. Irvine*, 13 Ala. 681.

38. *Wood v. Drury*, 1 Ld. Raym. (Eng.) 734 (witness blind); *Bennett v. Taylor*, 9 Ves. Jr. 381, 32 Eng. Reprint 649 (witness insane); *Jones v. Mason*, 2 Str. 833 (witness convicted of infamous crime); *Ellis v. Smith*, 10 Ga. 253 (witness insane).

In *McKay v. Lasher*, 121 N. Y. 477, 24 N. E. 711, affirming 50 Hun 383, 3 N. Y. Supp. 352, an action of trespass upon lands, defendants claimed title. They gave in evidence a deed which purported to have been executed in 1875, and proved by the affidavit of L., a subscribing witness, sworn to in 1885. Plaintiff offered evidence showing that at the time of making the affidavit L. was of unsound mind. This was objected to by the defendant on the ground that the evidence of mental imbecility should be directed to the time when L. became subscribing witness to the deed, not to the time when he proved its execution. The objection was overruled. It was held, that there was no error; that as it was by virtue of the affidavit that the deed was made *prima facie* admissible as evidence, if at that time L. was an incompetent witness by reason of mental imbecility the deed was inadmissible until otherwise proved. (Code Civ. Pro. §§ 935, 936).

dence.<sup>39</sup> Under the old rule, however, if subscribing witnesses became interested by act of the party seeking to call them, upon an offer being made by such party to remove the interest he was entitled to introduce secondary evidence if such offer was refused.<sup>40</sup>

(D.) WITNESS DENYING OR NOT RECOLLECTING ATTESTATION. — If the subscribing witness to an instrument denies or forgets his attestation, other evidence may be resorted to for proof of its execution.<sup>41</sup>

(2.) Proof Necessary Before Admission of Secondary Evidence. — (A.) IN GENERAL. — Before secondary evidence as to the execution of an attested instrument will be received it must be shown that all of the witnesses are either dead<sup>42</sup> or beyond the jurisdiction of the

39. President, etc. of Amherst Bank *v.* Root, 2 Met. (Mass.) 522; Jourdain *v.* Sherman, 6 Cush. (Mass.) 139; Edwards *v.* Perry, 21 Barb. 600; Hovill *v.* Stephenson, 5 Bingh. 493, 15 E. C. L. 515.

Suit Brought Before Justice Who Was Subscribing Witness. — In case suit is brought before a justice of the peace who was a subscribing witness to the instrument sought to be proved, secondary evidence is inadmissible since the witness' incompetency is the result of the folly of the party bringing suit. If such justice were the only one before whom suit could have been brought another question would be presented. Paterson *v.* Schenck, 15 N. J. L. 434; Jones *v.* Phelps, 5 Mich. 218.

40. In Haynes *v.* Rutter, 24 Pick. (Mass.) 242, which was a replevin suit, plaintiff produced a bill of sale to him from the former owner, and called the subscribing witnesses to prove its execution. Defendant objected to their testimony on the ground that they had signed the replevin bond as plaintiff's sureties, and so were interested in the event of the suit. Whereupon plaintiff offered to procure new sureties. It was held that in such case plaintiff was entitled to introduce other evidence to prove the execution of the bill of sale, the taking of the attesting witnesses as sureties being doubtless a mere inadvertence.

41. England. — Abbot *v.* Plumble, 1 Doug. 216; Fitzgerald *v.* Elsee, 2 Campb. 625; McCraw *v.* Gentry, 3 Campb. 232.

Delaware. — Layton *v.* Hastings, 2 Har. 147.

Georgia. — Buchanan *v.* Simpson

Groc. Co., 105 Ga. 393, 31 S. E. 105. Indiana. — Booker *v.* Bowles, 2 Blackf. 90.

Maine. — Crabtree *v.* Clark, 20 Me. 337; Quimby *v.* Buzzell, 16 Me. 470.

Massachusetts. — Whitaker *v.* Salisbury, 15 Pick. 534.

New Jersey. — Patterson *v.* Tucker, 9 N. J. L. 322, 17 Am. Dec. 472; Ketchum *v.* Johnson, 4 N. J. Eq. 370.

New York. — Hall *v.* Phelps, 2 Johns. 451.

North Carolina. — Colvord *v.* Monroe, 63 N. C. 288.

Ohio. — Duckwall *v.* Weaver, 2 Ohio 13.

Pennsylvania. — Hamsher *v.* Kline, 57 Pa. St. 397; Fritz *v.* Commissioners, 17 Pa. St. 130.

South Carolina. — Pearson *v.* Wightman, 1 Mill. Const. 336, 12 Am. Dec. 636.

42. Spring *v.* South Carolina Ins. Co., 8 Wheat. (U. S.) 268; Job *v.* Tebbetts, 9 Ill. 143; Jackson *v.* Gager, 5 Cow. (N. Y.) 383; Jackson *v.* Cody, 9 Cow. (N. Y.) 140; Kelsey *v.* Hanmer, 18 Conn. 311. See Shepherd *v.* Goss, 1 Overt. (Tenn.) 487.

In the case of an instrument attested by two subscribing witnesses, one of whom is called and denies his signature, the case stands as if his name was not attached, and before the party desiring to use the paper may introduce testimony of an inferior character it is his duty to use the same diligence to procure the attendance of the other subscribing witness as if there had been originally but one witness to

court,<sup>43</sup> or that due search has been made for them.<sup>44</sup> Inquiry

the instrument, and the other party failing to attend after such diligence has been used the party may prove the execution of the bond by secondary evidence. *Booker v. Bowles*, 2 Blackf. (Ind.) 90.

**Mere Rumors** that a subscribing witness is in the army or dead is not sufficient proof to let in evidence of the witness' handwriting. *Hart's Exrs. v. Coram*, 3 Bibb (Ky.) 26. See also *Delony v. Delony*, 24 Ark. 7.

**Affidavit of Party To Prove Death.** The affidavit of a party to a cause may be received to prove death of one subscribing witness to a bill of sale so that secondary evidence of execution of instrument may be received. *M'Dowell v. Hall*, 2 Bibb (Ky.) 610.

**43. United States.**—*Spring v. South Carolina Ins. Co.*, 8 Wheat. (U. S.) 268.

*California.*—*Powell's Heirs v. Hendricks*, 3 Cal. 427 (absence from jurisdiction inferable from failure to find with diligent inquiry).

*Connecticut.*—*Kelsey v. Hanmer*, 18 Conn. 311.

*Georgia.*—*Howard v. Russell*, 104 Ga. 230, 30 S. E. 802.

*Illinois.*—*Job v. Tebbetts*, 9 Ill. 143; *Skinner v. Fulton*, 39 Ill. 484 (evidence that a witness was absent from the state and had not been heard of for forty years, sufficient to show that such witness cannot be had).

*New York.*—*Jackson v. Gager*, 5 Cow. 383; *Jackson v. Cody*, 9 Cow. 140.

**Testimony of Old Residents** who resided in the place where the instrument was executed before and subsequent thereto, that they never knew or heard of any such persons in the state as those purporting to be the subscribing witnesses is *prima facie* sufficient at least to show that the witnesses were not within the jurisdiction of the court and to authorize secondary evidence, especially in a case where the execution of the bond is not directly controverted, where there has been

a possession of rights thereunder for more than 20 years and the bond itself is more than 20 years old at the time the secondary evidence is taken. *Holman v. Bank of Norfolk*, 12 Ala. 369.

**Testimony of One Well Acquainted With Witness** that he was living out of the state when last heard from is sufficient *prima facie* proof of his absence to render admissible proof of the witness' handwriting. *Gordon v. Miller*, 1 Ind. 531.

**Declarations of Plaintiff** that attestors resided in another county are sufficient evidence of non-residence to authorize the introduction of other evidence of the execution of the attested instrument. *Cook v. Husted*, 12 Johns. (N. Y.) 188.

**Declarations of a Subscribing Witness** are competent to show his non-residence. *People v. Rowland*, 5 Barb. (N. Y.) 449.

**Any Competent Evidence** admissible to show non-residence of attesting witness, and it is not necessary that a subpoena should have been issued for the absent witness. *Clark v. Boyd*, 2 Ohio 56.

**Affidavit of the absence** from the state of the subscribing witnesses to a note is inadmissible to let in other proof of the note. *Harper v. Solomon*, 1 Brev. (S. C.) 3. *Compare Waters v. Spofford*, 58 Tex. 115, holding that the grantee in a deed properly certified for record by proof of the handwriting of the grantor and subscribing witnesses is competent to make the affidavit required by Hart. Dig. art. 2792, that the grantor and witnesses were dead, or that they were non-residents or their residences unknown.

**Facts Sufficient From Which Presumption of Absence Arises.**—The absence of attesting witnesses may be established like any other fact. It is sufficient to prove facts from which a presumption will arise that they are absent from the jurisdiction. *Buchanan v. Wise*, 34 Neb. 695, 52 N. W. 163, affirming judgment, 28 Neb. 312, 44 N. W. 458.

**44. Spring v. South Carolina**

should be made at the place where the witness was last heard of.<sup>45</sup> But what constitutes due diligence in seeking to find a subscribing witness is a question which depends largely upon the facts and circumstances of the particular case.<sup>46</sup>

(B.) NECESSITY OF EFFORT TO PROVE WITNESS' HANDWRITING. — In jurisdictions where it is held that proof of the witness' handwriting is next in degree to the witness' testimony, in order to let in proof

Ins. Co., 8 Wheat. (U. S.) 268; *Cooke v. Woodrow*, 5 Cranch (U. S.) 13, *affirming* judgment, 1 Cranch C. C. 437, 6 Fed. Cas. No. 3,181; *Powell's Heirs v. Hendricks*, 3 Cal. 427; *Jackson v. Gager*, 5 Cow. (N. Y.) 383; *Jackson v. Cody*, 9 Cow. (N. Y.) 140; *Silverman v. Blake*, 17 Wis. 213.

Where Witness Is in Country diligent search to find him is not sufficient to dispense with his testimony. *Broadwell v. McClish*, 1 Cranch C. C. 4, 4 Fed. Cas. No. 1,911.

45. *Cooke v. Woodrow*, 5 Cranch (U. S.) 13, *affirming* judgment, 1 Cranch C. C. 437, 6 Fed. Cas. No. 3,181.

In order that proof of the handwriting of a subscribing witness may be dispensed with, his removal from the state must be shown by the evidence of one residing at the place of his former residence, or by information thence derived. *VanDyne v. Thayre*, 19 Wend. (N. Y.) 162.

In *Tams v. Hitner*, 9 Pa. St. 441, it appeared that a subscribing witness, three weeks before inquiry for him, had been at his mother's residence within the state, and about twenty miles distant. It was held that in failing to inquire for him there, there was a want of due diligence to find him.

46. *Conrad v. Farrow*, 5 Watts (Pa.) 536; *Gallagher v. London Assur. Corp.* 149 Pa. St. 25, 24 Atl. 115. And see cases cited in preceding notes.

Proof that an attesting witness to a note, when last seen, was practicing law in California, coupled with a return *non est inventus* upon a subpoena by a constable of Boston, in which city the witness had lived before he went to Califor-

nia, is sufficient to let in secondary evidence that the signature was his. *Troeder v. Hyams*, 153 Mass. 536, 27 N. E. 775.

In *Jackson v. Chamberlain*, 8 Wend. (N. Y.) 620, the evidence showed that one of two subscribing witnesses to a deed removed from the state thirty years before the trial and that the other had not been heard of for thirty-seven years. It was held that proof of the handwriting of one of the witnesses and of the grantor was sufficient to allow the deed to be read in evidence.

In *Jones v. Roberts*, 65 Me. 273, where the deed in question was executed out of the state, a witness who had received and recorded it testified that he did not know the whereabouts of the subscribing witnesses or that they were within the state, and it was held proper to permit proof of the handwriting of the grantor and thereupon admit in evidence the deed.

In *Groover v. Coffee*, 19 Fla. 61, it was held that in all cases there should be strict, diligent and honest inquiry made for the subscribing witnesses satisfactory to the court under the circumstances of the case before proof of their handwriting will be received.

"The degree of proof, that the necessary search was made for the attesting witnesses, must be left in some measure to the discretion of the Judge at the trial; and it would be unreasonable to require so full evidence, while there was little or no reason to suppose, that the witnesses had a residence in the state, as when there was no suggestion, that they were out of the jurisdiction of the court. The proof, that the witnesses to the deed were not to be found within the reach of the process of the court, was as full as



of the maker's signature to an attested instrument in proof of the same, it is necessary to show that an effort has been made to procure proof of the witness' handwriting,<sup>47</sup> but no greater efforts or diligence should be exacted in endeavoring to prove the handwriting of the witness than is required to find and procure the witnesses themselves.<sup>48</sup>

(C.) PRESUMPTIONS ARISING FROM FACT OF EXECUTION WITHOUT JURISDICTION. — Where execution and attestation occur out of the court's jurisdiction, the *prima facie* presumption is that the witnesses are out of the jurisdiction at the time of trial and secondary evidence is therefore admissible to prove the execution of the attested instrument, without accounting for the absence of the witnesses.<sup>49</sup> The presumption also arises from the fact of execution and attestation without the jurisdiction that proof of the witnesses' handwriting is unobtainable in the jurisdiction and so, in such case, the party offering the instrument is not obliged to show otherwise that diligent and unsuccessful search has been made for proof of such witnesses' handwriting.<sup>50</sup> These presumptions are clearly reasonable, especially where it does not appear that the subscribing witnesses ever resided within the jurisdiction.<sup>51</sup>

(3.) Character and Sufficiency of Secondary Evidence. — As secondary evidence of the execution of an attested instrument, testimony of

could be required." *Woodman v. Segar*, 25 Me. 90.

47. The execution of an instrument is sufficiently shown by proving the handwriting of a party thereto, where it appears that an ineffectual effort has been made to prove the handwriting of the witness by his brother. *McPherson v. Rathbone*, 11 Wend. (N. Y.) 96.

48. *Landers v. Bolton*, 26 Cal. 393.

49. *United States v. Wilcox v. Hunt*, 13 Pet. 378; *Manchester v. Milne*, Abb. Adm. 115, 16 Fed. Cas. No. 9,006.

*Alabama*. — *Elliott v. Dyche*, 80 Ala. 376.

*California*. — *Landers v. Bolton*, 26 Cal. 393; *McMinn v. O'Connor*, 27 Cal. 238.

*Louisiana*. — *Crouse v. Duffield*, 12 Mart. (O. S.) 539; *Barfield v. Hewlett*, 4 La. 118.

*Massachusetts*. — *Catlin v. Ware*, 9 Mass. 218, 6 Am. Dec. 56; *Tyng v. Boston & M. R. Co.*, 12 Cush. 277.

*Wyoming*. — *Boswell v. First Nat. Bank*, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661.

**Evidence Insufficient To Show**

**Execution Out of Jurisdiction.** — The mere description of the parties to a deed as residents of foreign jurisdictions is not sufficient to show that the deed was executed out of the state, and in such case no presumption arises as to the non-residence of the attesting witnesses. *Tyng v. Boston & M. R. Co.*, 12 Cush. (Mass.) 277.

50. *Boswell v. First Nat. Bank*, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661; *Newsom v. Luster*, 13 Ill. 175. See *McMinn v. O'Connor*, 27 Cal. 238.

51. *Boswell v. First Nat. Bank*, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661; *Landers v. Bolton*, 26 Cal. 393; *Newsom v. Luster*, 13 Ill. 175. See *Sherman v. The Champlain Trans. Co.*, 31 Vt. 162, holding that the execution of an instrument may be proved by other evidence than that of the subscribing witnesses, when there is no proof that they were ever in this state, and the only evidence of their absence consists in the fact that the deed purports to have been executed out of the state, and in the testimony of the party relying upon

the parties is admissible,<sup>52</sup> as well as their declarations.<sup>53</sup> It is generally held that declarations of deceased attesting witnesses to a will are not admissible to prove the execution of the will or mental condition of the testator.<sup>54</sup>

**Contra.**—In Maryland, declarations of subscribing witnesses to a will have been held competent to rebut the *prima facie* effect of their attestation.<sup>55</sup> Where, however, the validity of a will is contested upon the ground of fraud or forgery, declarations of deceased subscribing witnesses relevant thereto are admissible to

the deed, that he never knew of their being in the state.

52. *Sloan v. Thompson*, 4 Tex. Civ. App. 419, 23 S. W. 613.

53. *Adams v. Norris*, 23 How. (U. S.) 353.

54. *Gaither v. Gaither*, 3 Md. Ch. 158; *Stocksdale v. Cullison*, 35 Md. 322; *Collins v. Nicols*, 1 Har. & J. (Md.) 399; *Baxter v. Abbott*, 7 Gray (Mass.) 71, 82; *Boylan v. Meeker*, 28 N. J. L. 274.

The declarations of a deceased subscribing witness to a will, as to the mental capacity of the testator to make a will, are not admissible as evidence. *Sewall v. Robbins*, 139 Mass. 164, 29 N. E. 650.

In *Farleigh v. Kelley*, 28 Mont. 421, 72 Pac. 756, 63 L. R. A. 319, the issue involved was the validity of an alleged will upon a petition for its probate. The petitioner sought to prove by a witness certain declarations made by a subscribing witness to the will, relating to its execution, and the conduct and language of the testator at the time. *Held*, incompetent, the court saying: "To permit declarations of the absent subscribing witnesses in support of the validity of the will, to be received in evidence for any purpose whatever, would be to reverse the rule of evidence, which has long ago become well settled,—that extra-judicial declarations not under oath, corroborating testimony given in court, cannot be received."

Declarations of deceased subscribing witnesses to a will, in relation to the sanity of the testator, are inadmissible in evidence. *Boardman v. Woodman*, 47 N. H. 120, 135.

On the trial of an issue *devisavit vel non*, the evidence of the declarations of a deceased subscribing wit-

ness that the testator was of unsound mind at the time of the execution of the will, is not admissible. *Sellers v. Sellers*, Exr., 2 Heisk. (Tenn.) 430.

55. *Colvin v. Warford*, 20 Md. 357, 387. In *Townshend v. Townshend*, 9 Gill (Md.) 506, an attesting witness to a will declared on the same day that the will was executed that he did not believe the testator to be at the time he executed the will, a sane person, and that he signed the will as a witness merely to gratify the testator. *Held*, that these declarations (the witness being dead), were properly admissible in evidence.

#### Declarations of Living Witness.

In the contest of a will, one of the subscribing witnesses swore that he had no recollection of having signed the attestation in the presence or at the request of the testator. *Held*, that an affidavit made by him before the judge of probate containing statements contrary to his testimony, was admissible in evidence to impeach his testimony after his attention was called to it. *Spoonemore v. Cables*, 66 Mo. 579.

**Discrediting Witness.**—In *Stirling v. Stirling*, 64 Md. 138, 150, 21 Atl. 273, a subscribing witness to a will, produced on the part of the caveatee, testified at the trial that in his opinion the testatrix was capable of making a valid will, and denied having previously expressed a different opinion. The caveators then offered proof that the subscribing witness had before the trial expressed a different opinion. *Held*, that the evidence so offered by the caveators was only admissible for the purpose of discrediting the evidence of the subscribing witness.

establish fraud or forgery.<sup>56</sup> Proof may also be received of the handwriting of the parties,<sup>57</sup> though no effort has been made to prove the handwriting of the witnesses.<sup>58</sup> Proof of the handwriting of one of the subscribing witnesses is sufficient to allow the introduction of the instrument in evidence.<sup>59</sup> But where a subscribing witness has become interested in the event of the suit after attestation, proof of his handwriting is not sufficient to allow the instrument to be given in evidence; it must be shown that the instrument existed before the witness' interest accrued.<sup>60</sup>

**Handwriting.—How Proved.**—In proving the handwriting of a subscribing witness whose testimony cannot be obtained, or of the maker of an instrument, a witness familiar with such signatures may testify,<sup>61</sup> or the testimony of one who saw the maker and sub-

56. In *Bott v. Wood*, 56 Miss. 136, the court said: "The evidence of the handwriting of a deceased attesting witness, is to establish the execution of the instrument, and not its character or contents. The only instances in which declarations of a deceased subscribing witness have been admitted were where they tended to prove fraud or forgery; in other words, where they related to the circumstances of the execution of the instrument. The purpose for which such declarations have been admitted, was to contradict the import of the attestation of such witness. But the attestation imports nothing relative to the contents or character of the instrument,—as being a will, or deed, or other instrument. Therefore declarations of a deceased subscribing witness are not admissible to show the nature or contents of the paper he subscribed."

*In re Will of Hesdra*, 119 N. Y. 615, 23 N. E. 555, the probate of the will was contested upon the ground that the instrument was fabricated after the death of the testator by one Onderdonk one of the subscribing witnesses, who had died prior to the trial. It was held competent for the contestants to introduce evidence of declarations of Onderdonk tending to show that he had fabricated the will, and that Hesdra had died intestate.

On the charge of fraud or forgery in the execution of a sealed instrument, the declarations and bad character of a deceased subscribing witness are admissible in evidence to

impugn the presumption arising from the witness' attestation and signature, but standing alone and unsupported are not sufficient to overcome such presumptions. *Boylan v. Meeker*, 28 N. J. L. 274.

57. *Adams v. Norris*, 23 How. (U. S.) 353; *Slona v. Thompson*, 4 Tex. Civ. App. 419, 23 S. W. 613.

Where one of the subscribing witnesses to a mortgage has been called and has testified and it appears that the other is absent from the state, proof of the signatures of the mortgagors is competent. The fact that the party adverse to the one offering such evidence has taken the evidence of the other subscribing witness by commission and that he had been cross-examined by the offering party under written interrogatories appended to the commission does not affect the competency of the evidence. *Clark v. Houghton*, 12 Gray (Mass.) 38.

58. *Adams v. Norris*, 23 How. (U. S.) 353; *Jackson v. Lewis*, 13 Johns. (N. Y.) 504.

59. *Hanrick v. Patrick*, 119 U. S. 156; *Smith v. Keyser*, 115 Ala. 455, 22 So. 149; *Gelott v. Goodspeed*, 8 Cush. (Mass.) 411; *Davis v. Higgins*, 91 N. C. 382; *Mapes v. Leal's Heirs*, 27 Tex. 345; *Dudley v. Sumner*, 5 Mass. 438.

60. *Lever v. Lever*, 1 Hill Eq. (S. C.) 62.

61. *Tatum v. Mohr*, 21 Ark. 349; *Chator v. Brunswick-Balke-Collender Co.*, 71 Tex. 588, 10 S. W. 250.

In *Snider v. Burks*, 84 Ala. 53, 4 So. 255, it appeared that two of the

scribing witnesses sign is competent to establish the execution of the instrument,<sup>62</sup> or handwriting may be proved by a comparison with an authenticated signature.<sup>63</sup>

**Proof Preferable to That of Handwriting.**—It has been held that the testimony of one who was present when an instrument was executed, together with that of a justice of the peace before whom it was acknowledged by the maker for the purpose of registration, is much more satisfactory proof of its execution than proof of the handwriting of an absent subscribing witness and is sufficient proof thereof.<sup>64</sup> And it has also been held that the solemn probate of a deed by a witness upon oath before a magistrate, for the purpose of recordation, and the certificate of the magistrate of its due probate upon such testimony, are entitled to more weight as evidence than the mere unexplained proof of the handwriting of a witness after his death.<sup>65</sup>

**(4.) Proof of Handwriting.**—(A.) OF WITNESSES.—(a.) *In General.* As a rule where it appears that a subscribing witness is deceased, incapacitated, or beyond the court's jurisdiction, the execution of the attested instrument may be proved by showing the genuineness of his signature.<sup>66</sup> This rule applies where a will is offered for

three subscribing witnesses to a will were dead. *Held*, that the trial court properly permitted their signatures to be proved by persons who knew their handwriting.

62. *Miller v. Hahn*, 84 N. C. 226; *Unger v. Wiggins*, 1 Rawle (Pa.) 331; *Ungles v. Graves*, 2 Blackf. (Ind.) 191; *Standback v. Thornton*, 106 Ga. 81, 31 S. E. 805.

63. *Davis v. Police Jury*, 19 La. 533.

**Compare** *Snider v. Burks*, 84 Ala. 53, 4 So. 225. Which was a proceeding to probate a will. It appeared that one of the subscribing witnesses was dead, and a witness was called to prove the signature of the deceased subscribing witness. *Held*, that such witness could not be permitted to compare the signatures of other papers purporting to have been made by such subscribing witness, not in evidence in the case, with the alleged signature of the subscribing witness on the will, and testify as to its genuineness from such comparison.

As to comparison of handwriting in general see article "HANDWRITING," Vol. VI.

64. *Lazarus v. Lewis*, 5 Ala. 457.

65. The one affords only a presumption of the due execution of the

deed from the mere fact that the signature of the witness is to the attestation clause; the other is a deliberate affirmation by the witness upon oath before a competent tribunal of the material facts to prove the execution. *Crane v. Morris*, 6 Pet. (U. S.) 598.

66. *United States*.—*Murdock v. Hunter*, 1 Brock 135, 17 Fed. Cas. No. 9,941.

*Alabama*.—*Thomas v. Wallace*, 5 Ala. 268; *Footte v. Cobb*, 18 Ala. 585; *Guice v. Thornton*, 76 Ala. 466; *Snider v. Burks*, 84 Ala. 53, 4 So. 225.

*Florida*.—*Groover v. Coffee*, 19 Fla. 61.

*Georgia*.—*Howard v. Snelling*, 32 Ga. 195.

*Indiana*.—*Jones v. Coopridge*, 1 Blackf. 47; *State v. Bodly*, 7 Blackf. 355.

*Kentucky*.—*McMurtry v. Frank*, 2 T. B. Mon. 113; *Ford v. Hale*, 1 T. B. Mon. 23; *Miller v. Dillon*, 2 T. B. Mon. 73.

*Maryland*.—*Dorsey v. Smith*, 7 Har. & J. 345.

*Missouri*.—*Little's Admr. v. Chauvin*, 1 Mo. 626.

*New Jersey*.—*Glover v. Armstrong*, 15 N. J. L. 186.

probate.<sup>67</sup> In a great many cases it has been held that such evidence is *prima facie* sufficient in itself, without proof of the maker or grantor's signature.<sup>68</sup>

*New York.*—Kimball *v.* Davis, 19 Wend. 437; Cook *v.* Husted, 12 Johns. 188; People *v.* McHenry, 19 Wend. 482; Borst *v.* Empie, 5 N. Y. 33; Mott *v.* Doughty, 1 Johns. Cas. 230.

*North Carolina.*—Angier *v.* Howard, 94 N. C. 27; Jones *v.* Brinkley, 2 N. C. 20; Edwards *v.* Sullivan, 30 N. C. (8 Ired. L.) 302.

*Pennsylvania.*—Powers *v.* McFerran, 2 Serg. & R. 44; Kelly *v.* Dunlap, 3 Pen. & W. 136; Unger *v.* Wiggins, 1 Rawle 331.

*South Carolina.*—Price *v.* McGee, 1 Brev. 373.

*Wisconsin.*—Garrison *v.* Owens, 1 Pinn. 544.

In Pelletreau *v.* Jackson, 11 Wend. 110, it is said: "The same diligence should be exacted in endeavoring to prove the handwriting that is required in the endeavor to find and procure the personal attendance of the witness, at least before the third degree of evidence is admitted, to wit, the handwriting of the party."

**Statement of Rule.**—The order of proof of a sealed instrument, to which there is a subscribing witness, is as follows: 1. The witness must be produced, if practicable; 2. If he cannot be found, or his testimony cannot be used, his handwriting must be proved; 3. If his handwriting cannot be proved, after diligent exertions for that purpose, proof of the handwriting of the party executing the instrument is admissible. But evidence that a subscribing witness cannot be found will not warrant the inference that his handwriting cannot be proved; the party seeking to avail himself of such testimony must show due diligence to obtain as well proof of the handwriting as the attendance of the witness. Where a sealed instrument is proved by showing the handwriting of the witness, it is proper to superadd proof of the handwriting of the party. Jackson *v.* Waldron, 13 Wend. (N. Y.) 178.

<sup>67</sup> *United States.*—Adams *v.* Norris, 23 How. 353, 357.

*Alabama.*—Barnewall *v.* Murrell, 108 Ala. 366, 18 So. 831.

*Arkansas.*—Janes *v.* Williams, 31 Ark. 175.

*Delaware.*—Sutton *v.* Sutton, 5 Har. 459.

*Georgia.*—Terry *v.* Broadhurst, 127 Ga. 212, 56 S. E. 282.

*Illinois.*—Calkins *v.* Calkins, 215 Ill. 458, 75 N. E. 182, 1 L. R. A. 393.

*Iowa.*—Scott *v.* Hawk, 107 Iowa 723, 77 N. W. 467, 70 Am. St. Rep. 228; *In re* Allison's Estate, 104 Iowa 130, 73 N. W. 489.

*Kentucky.*—Pate's Adm'r. *v.* Joe, 3 J. J. Marsh. 114.

*Maryland.*—Collins *v.* Nicols, 1 Har. & J. 399; Stocksdales *v.* Cullison, 35 M. l. 322.

*Massachusetts.*—Ela *v.* Edwards, 16 Gray 91.

*Michigan.*—*In re* Sullivan's Will, 114 Mich. 189, 72 N. W. 135.

*New York.*—*In re* Brigg's Will, 47 App. Div. 47, 62 N. Y. Supp. 294; Brinckerhoof *v.* Remsen, 8 Paige 488.

*North Carolina.*—Bethell *v.* Moore, 19 N. C. (2 Dev. & B.) 311.

*Pennsylvania.*—Engles *v.* Bruington, 4 Yeates 345, 2 Am. Dec. 411.

*Rhode Island.*—Christopher Fry's Will, 2 R. I. 88.

*South Carolina.*—Verdier, Exrx. *v.* Verdier, 8 Rich. 135; Sampson *v.* White, Admr., 1 McCord 74; Pearson *v.* Wightman, 1 Mill 336, 12 Am. Dec. 636.

*South Dakota.*—Mississippi, L. & C. Co. *v.* Kelly, 19 S. D. 577, 104 N. W. 265.

*Tennessee.*—Crockett *v.* Crockett, 19 Tenn. 95.

*Vermont.*—Dean *v.* Heirs of Dean, 27 Vt. 746.

<sup>68</sup> *England.*—Cunliffe *v.* Sefton, 2 East 183; Adam *v.* Kers, 1 B. & P. 360; Mitchell *v.* Johnson, 1 Moo. & M. 176, 22 E. C. L. 283; Page *v.* Mann, 1 Moo. & M. 79, 22 E. C. L. 256. See also Doe *v.* Paul, 3 Car. & P. 613, 14 E. C. L. 483.

*Canada.*—Crane *v.* Ayre, 7 N. Bruns. 577; Rogers *v.* Shortis, 10 Grant Ch. 243.

**Attester Non-Resident.** — Where subscribing witness resides in another state, proof of his handwriting is sufficient;<sup>69</sup> but in others it is said to be necessary to prove not only the genuineness of the attestors' signatures but also the genuineness of that of the maker of the instrument,<sup>70</sup> unless proof of the maker's handwriting is unobtainable, in which case proof of the witness' handwriting is sufficient.<sup>71</sup> Still other courts have held it necessary to produce

*United States.* — *Hanrick v. Patrick*, 119 U. S. 156; *Stebbins v. Duncan*, 108 U. S. 32.

*Alabama.* — *Smith v. Keyser*, 115 Ala. 455, 22 So. 149.

*Georgia.* — *McVicker v. Conkle*, 96 Ga. 584, 24 S. E. 23.

*Maryland.* — *Parker v. Fassitt*, 1 Har. & J. 337.

*New York.* — *Brown v. Kimball*, 25 Wend. 259; *Jackson v. Lewis*, 13 Johns. 504; *Sluby v. Champlin*, 4 Johns. 461; *People v. Rowland*, 5 Barb. 449; *Borst v. Empie*, 5 N. Y. 33.

*North Carolina.* — *Jones v. Blount*, 2 N. C. 238; *Black v. Wright*, 31 N. C. (9 Ired. L.) 447; *Ratliff v. Ratliff*, 131 N. C. 425, 42 S. E. 887, 63 L. R. A. 963.

*Ohio.* — *Clark v. Boyd*, 2 Ohio 56.

*Pennsylvania.* — *Hamilton v. Marsden*, 6 Binn. 45; *Powers v. McFerran*, 2 Serg. & R. 44. *Compare Clark v. Sanderson*, 3 Binn. 192, 5 Am. Dec. 368.

*Vermont.* — *Sanborn v. Cole*, 63 Vt. 590, 22 Atl. 716, 14 L. R. A. 208.

<sup>69.</sup> *Foot v. Cobb*, 18 Ala. 585; *Guice v. Thornton*, 76 Ala. 466; *Dorsey v. Smith*, 7 Har. & J. (Md.) 345; *Little's Admr. v. Chauvin*, 1 Mo. 626; *Glover v. Armstrong*, 15 N. J. L. 186; *Jones v. Brinckley*, 2 N. C. 20; *Edwards v. Sullivan*, 30 N. C. (8 Ired. L.) 302.

**Usual to Prove Signatures of Parties.** — In proving the execution of an instrument, the attesting witness to which is dead, proof of the signature of the witness is *prima facie* proof of the due execution of the instrument, but it is not conclusive; and it is usual to give evidence that the signatures of the parties to the instrument are also genuine. *Servis v. Nelson*, 14 N. J. Eq. 94.

**Where Witness and Signer Are**

**Both Dead**, proof of the genuineness of the witness' signature is sufficient to make the instrument admissible in evidence. *Howard v. Snelling*, 32 Ga. 195.

**Proof of Witness' Handwriting Not Prima Facie Sufficient.** — Proof of the handwriting of a deceased subscribing witness to a bond is not, strictly, *prima facie* evidence of the execution of the bond, though it will authorize the reading of the instrument to the jury. But the jury must weigh this together with the other circumstances given in evidence, and from the whole determine whether the alleged instrument was executed or not. *Black v. Wright*, 31 N. C. (9 Ired. L.) 447.

**Under Suspicious Circumstances Further Evidence Necessary.** — *Thompson v. Halstead*, 44 W. Va. 390, 29 S. E. 991; *Hamilton v. Marsden*, 6 Binn. (Pa.) 45; *Brown v. Kimball*, 25 Wend. (N. Y.) 259.

<sup>70.</sup> *California.* — *Jackson v. Feather River & G. Water Co.*, 14 Cal. 18.

*Illinois.* — *Wiley v. Bean*, 6 Ill. 302.

*Louisiana.* — *Lynch v. Postlethwaite*, 7 Mart. (O. S.) 69, 12 Am. Dec. 495; *Harris v. Patten*, 2 La. Ann. 217.

*New Jersey.* — *Van Doren v. Van Doren's Admr.*, 3 N. J. L. 1022.

*South Carolina.* — *Sims v. DeGraffenreid*, 4 McCord 253; *Cornneil v. Bickley*, 1 McCord 466. *Compare Martin v. Bowie*, 37 S. C. 102, 15 S. E. 736.

**Where the Subscribing Witnesses to a Bond Reside Abroad**, evidence of the handwriting of the obligor and subscribing witnesses is *prima facie*, but not conclusive evidence upon the issue of *non est factum*. *Davies v. Davies*, 2 Cranch C. C. 105, 7 Fed. Cas. No. 3,612.

<sup>71.</sup> Where the only subscribing

evidence showing the identity of the maker and connecting him with the instrument, as well as proof of the witness' handwriting.<sup>72</sup>

(b.) *Of Part of Witnesses.* — Where there are several attesting witnesses, it is usually sufficient to prove the handwriting of one.<sup>73</sup>

(c.) *Of Incompetent Witnesses.* — Where the subscribing witnesses to an instrument upon which an action is brought have become disqualified by interest since its execution, proof of the handwriting of such witnesses is competent to prove the due execution of the instrument.<sup>74</sup> But in respect to an instrument not required by law to be attested, if an attesting witness was incompetent to testify at the time of the execution of the instrument and is likewise incompetent at the time of trial, the handwriting of the parties thereto may be proved, as if there were no subscribing witness.<sup>75</sup>

(B.) *OF THE MAKER OR GRANTOR.* — The courts are not in harmony as to what constitutes the best evidence of the execution of an attested instrument, where the witness' testimony is unobtainable. In some jurisdictions it is held that proof of the handwriting of the maker of the attested instrument is only admissible in case evidence as to the witness' handwriting is unobtainable;<sup>76</sup> while in others

witness to an act of sale is dead, and after diligent search and inquiry no one can be found who is acquainted with the signature or place of residence of the vendor, proof of the genuineness of the signature of the subscribing witness will be sufficient proof of the execution of the instrument. *McGowan v. Laughlan*, 12 La. Ann. 242.

<sup>72.</sup> *Russell v. Tunno*, 11 Rich. (S. C.) 303; *Whitelocke v. Musgrove*, 1 C. & M. (Eng.) 511, 3 Tyr. 541, 2 L. J., Ex. 210. And see *Gallagher v. Delargy*, 57 Mo. 29; *Harrell v. Ward*, 2 Sneed (Tenn.) 210.

<sup>73.</sup> *United States.* — *Stebbins v. Duncan*, 108 U. S. 32; *Hanrick v. Patrick*, 119 U. S. 156.

*Alabama.* — *Smith v. Keyser*, 115 Ala. 455, 22 So. 149; *Caldwell v. Pollak*, 91 Ala. 353, 8 So. 546; *Thomas v. Wallace*, 5 Ala. 268.

*Georgia.* — *McVicker v. Conkle*, 96 Ga. 584, 24 S. E. 23.

*Kentucky.* — *Fitzhugh v. Croghan*, 2 J. J. Marsh. 429, 19 Am. Dec. 139.

*Massachusetts.* — *Gelott v. Goodspeed*, 8 Cush. 411.

*New York.* — *Van Rensselaer v. Jones*, 2 Barb. 643; *Sluby v. Champ-lin*, 4 Johns. 461; *Jackson v. Burton*, 11 Johns. 64.

*North Carolina.* — *Burnett v.*

*Thompson*, 35 N. C. (8 Ired. L.) 379; *Davis v. Higgins*, 91 N. C. 382.

*Texas.* — *Mapes v. Leal's Heirs*, 27 Tex. 345.

**One Witness' Signature Together With That of Grantor Sufficient.**

*Gibbs v. Cook*, 4 Bibb (Ky.) 535; *Thomas v. Turnley*, 3 Rob. 206; *Gelott v. Goodspeed*, 8 Cush. (Mass.) 411; *Turner v. Moore*, 1 Brev. (S. C.) 236. *Compare* *Manigault v. Hampton*, 1 Brev. (S. C.) 394, holding proof of handwriting of two witnesses in addition to that of grantor sufficient.

<sup>74.</sup> *Godfrey v. Norris*, 1 Stra. (Eng.) 34; *Buard v. Buard*, 5 Mart. N. S. (La.) 132; *Keefer v. Zimmerman*, 22 Md. 274; *Tinnin v. Price*, 31 Miss. 422; *Blackwelder v. Fisher*, 20 N. C. (3 Dev. & B. L.) 204.

<sup>75.</sup> *Swire v. Bell*, 5 Durnf. & E. (Eng.) 371; *Packard v. Dunsmore*, 11 Cush. (Mass.) 282; *President, etc. of Amherst Bank v. Root*, 2 Met. (Mass.) 522; *Nelius v. Brickell's Admr.*, 2 N. C. 19; *Mackrell v. Wolf*, 104 Pa. St. 421.

<sup>76.</sup> *United States.* — *Wellford v. Eakin*, 1 Cranch C. C. 264, 29 Fed. Cas. No. 17,379.

*Alabama.* — *Cox v. Davis*, 17 Ala. 714, 52 Am. Dec. 199.

the rule is laid down that proof of the maker's handwriting is admissible directly upon its appearing that the subscribing witness' testimony cannot be had."<sup>77</sup>

**But in the Absence of Proof of the Attester's Handwriting, proof of**

*Kentucky*.—Yocum v. Barnes, 8 B. Mon. 496.

*Maine*.—Jones v. Roberts, 65 Me. 273.

*Massachusetts*.—Gelott v. Goodspeed, 8 Cush. 411; Valentine v. Piper, 22 Pick. 85, 33 Am. Dec. 715. See also Homer v. Wallis, 11 Mass. 309, 6 Am. Dec. 169.

*Texas*.—Sloan v. Thompson, 4 Tex. Civ. App. 419, 23 S. W. 613; Lapowski v. Taylor, 13 Tex. Civ. App. 624, 35 S. W. 934.

*Vermont*.—Sanborn v. Cole, 63 Vt. 590, 22 Atl. 716; Sherman v. Champlain Transp. Co., 31 Vt. 162.

A deed with subscribing witnesses is not admissible in evidence on proof of the grantor's handwriting, unless the absence of the witnesses be accounted for and due diligence has been used without effect to procure proof of their handwriting. Bowser v. Warren, 4 Blackf. (Ind.) 522.

**Evidence Not Sufficient To Let in Proof of Obligor's Handwriting.**

Where it appears that the subscribing witness to a bond had been clerk of the county court of a large, populous and wealthy county, and had been dead only twenty-five years, it was held not to be sufficient for admitting testimony of the obligor's handwriting, to show, by one witness only, that he did not know the subscribing witness' handwriting and did not know of any person who did have such knowledge. McKinder v. Littlejohn, 23 N. C. (1 Ired. L.) 66.

77. *Alabama*.—Snider v. Burks, 84 Ala. 53, 4 So. 225; Cox v. Davis, 17 Ala. 714, 52 Am. Dec. 199; Mar-dis' Admrs. v. Shackleford, 4 Ala. 493; Lee v. Shivers, 70 Ala. 288.

*California*.—McMinn v. Whelan, 27 Cal. 300.

*Kentucky*.—McClain v. Gregg, 2 A. K. Marsh. 454; Yocum v. Barnes, 8 B. Mon. 496; Sentney v. Overton, 4 Bibb 445.

*Maine*.—Jones v. Roberts, 65 Me. 273; Woodman v. Segar, 25 Me. 90.

*Massachusetts*.—Homer v. Wallis, 11 Mass. 309, 6 Am. Dec. 169; Valentine v. Piper, 22 Pick. 85, 33 Am. Dec. 715; Trustees v. Connolly, 157 Mass. 272, 31 N. E. 1058.

*Ohio*.—Clark v. Boyd, 2 Ohio 56.

*South Carolina*.—Brown v. Edgar, 4 McCord 91.

*Texas*.—Sloan v. Thompson, 4 Tex. Civ. App. 419, 23 S. W. 613; Chator v. Brunswick-Balke-Collender Co., 71 Tex. 588, 10 S. W. 250.

**Proof of Grantor's Handwriting Admissible** where instrument not required to be attested. Landers v. Bolton, 26 Cal. 393; Sherman v. Champlain Transp. Co., 31 Vt. 162.

**Signature by Mark.**—Where the maker of a written instrument cannot write his name and the writing is executed by his setting his mark against his name as written for him, in order to prove the execution of the instrument it is necessary not only to prove that the maker made his mark against his name as written, but also to prove the signing by the attesting witness who must have written his name. Ballow v. Collins, 139 Ala. 543, 36 So. 712. The court said: "To prove the execution of a writing the *signature* of the maker must, of course, be proved. Where the maker cannot write his name to the paper its execution is effected by his setting his mark against his name as written for him, and by the attestation of a witness who can and does write his name. When this is done the *signature* of the maker is not merely his name thus written with his mark set against it, but an essential and inherent part of his signature is the signature of the other person as a witness. It requires all of this to constitute the signature of such illiterate maker, and all of it must



the maker's handwriting is always admissible to prove execution of the instrument.<sup>78</sup>

be proved before it can be said that the execution of the paper is proved."

**If the Subscribing Witness Merely Makes His Mark**, proof of the handwriting of the party executing the instrument may be adduced. It is presumed that the mark cannot be proved or identified like the handwriting of an attesting witness. *Delony v. Delony*, 24 Ark. 7. See also *Watts v. Kilburn*, 7 Ga. 356.

**Proof of Maker's Handwriting Sufficient.**—If the testimony of the subscribing witness cannot be had, evidence may be given of his handwriting and that of the maker of the instrument; and it is not necessary that the jury should be satisfied by the evidence of the handwriting of the subscribing witness, if they are satisfied as to that of the maker. *Leonard v. Neale*, 1 Cranch C. C. 493, 15 Fed. Cas. No. 8,259.

**78. England.**—See *Barnes v. Trompowsky*, 7 Durnf. & E. 265.

**United States.**—*Morgan v. Curtenius*, 4 McLean 366, 17 Fed. Cas. No. 9,799.

**Arkansas.**—*Wilson v. Royston*, 2 Ark. 315.

**Illinois.**—*Newsom v. Luster*, 13 Ill. 175.

**Missouri.**—*Clardy v. Richardson*, 24 Mo. 295.

**New York.**—*Jackson v. Waldron*, 13 Wend. 178; *M'Pherson v. Rathbone*, 11 Wend. 96.

**Virginia.**—*Raines v. Philips*, 1 Leigh 483.

In *Woodman v. Segar*, 25 Me. 90, it was shown that it could not be ascertained that either of the subscribing witnesses to the deed ever resided in Maine, and there was nothing to show that any one living in the state had knowledge of their handwriting, and it was held proper to permit proof of the handwriting of the grantor, the court saying: "It would often, if not generally, be a fruitless attempt to prove nega-

tively, that there was not evidence to be found within the jurisdiction, of the handwriting of attesting witnesses, who it appears, never lived within the State."

In *Clark v. Sanderson*, 3 Binn. (Pa.) 192, 5 Am. Dec. 368, it was held to be a sufficient reason for failing to prove the handwriting of a subscribing witness that search had been made without effect for some person who could prove that fact in the county in Pennsylvania where she had formerly resided, but without any effort to procure such evidence from Baltimore, where she subsequently lived; and the obligation was admitted in evidence upon proof of the handwriting of the obligor."

In *Clark v. Houghton*, 12 Gray (Mass.) 38, the court said: "The testimony of Faxon, one of the mortgagors, to the genuineness of his own signature and those of the other mortgagors was, under the circumstances proved at the trial, clearly competent. One of the subscribing witnesses had already been called and testified. It was proved that the other was absent from the commonwealth. This fact was sufficient reason for not producing his testimony, and rendered other evidence of the execution of the mortgage admissible. This point was distinctly adjudicated in *Valentine v. Piper*, 22 Pick. (Mass.) 90, 33 Am. Dec. 715.

**Proof of Will.**—In *Jones v. Arteburn*, 11 Humph. (Tenn.) 97, the court said: "In all cases of contested wills, where there are subscribing witnesses, they must be produced, if to be found, within the meaning of the act of 1789. If not, evidence of their handwriting must next be resorted to. Where from the efflux of time or other circumstances, it is shown upon diligent inquiry, that the handwriting of one, or more subscribing witnesses cannot be proved, that proof of

As **Corroborating Evidence** proof of the handwriting of the maker is likewise always admissible to prove execution of the attested instrument.<sup>79</sup>

i. **Rebuttal or Impeachment of Proof of Execution.**—(1.) **In General.**—It may be shown by a subscribing witness that the instrument was not delivered.<sup>80</sup> And it may be shown by the purported subscribing witness that the signature purporting to be his is not genuine,<sup>81</sup> but the testimony of an alleged subscribing witness that on the day when the deed purported to have been executed she was not in the county, and did not on that day witness a deed from such grantors to such grantee, is not a denial of the genuineness of her signature on such deed.<sup>82</sup>

**Presumption of Execution Arising From Proof of Attester's Handwriting Rebuttable.**—The presumption of the execution of an instrument, arising from proof of the handwriting of a deceased subscribing witness, may be rebutted by evidence that the signature is not in the maker's handwriting.<sup>83</sup>

(2.) **Character of Witness.**—When an instrument is introduced in evidence upon proof of the handwriting of a deceased subscribing witness, the bad character of the witness at the time of the attestation may be shown;<sup>84</sup> but the fact that a subscribing witness was

the signature of one witness, and that of the testator, and lastly upon failure of proof of the signatures of all of the witnesses, proof of the handwriting of the testator by two witnesses, will authorize the paper to be submitted to the jury, upon which they may find the fact of execution."

79. *United States*.—Clarke v. Courtney, 5 Pet. 319; Adams v. Norris, 23 How. 353.

*Arkansas*.—Tatum v. Mohr, 21 Ark. 349.

*California*.—Jackson v. Feather River Water Co., 14 Cal. 18.

*Illinois*.—Wiley v. Bean, 6 Ill. 302.

*Indiana*.—Ungles v. Graves, 2 Blackf. 191.

*Kentucky*.—Gibbs v. Cook, 4 Bibb 535.

*Louisiana*.—Lynch v. Postlethwaite, 7 Mart. (O. S.) 69, 12 Am. Dec. 495.

*Massachusetts*.—Gelott v. Goodspeed, 8 Cush. 411.

*New Hampshire*.—Dunbar v. Marden, 13 N. H. 311.

*New Jersey*.—VanDoren v. Van-

Doren, 3 N. J. L. 1022; Servis v. Nelson, 14 N. J. Eq. 94.

*North Carolina*.—Miller v. Hahn, 84 N. C. 226.

*Pennsylvania*.—Irwin v. Patchen, 164 Pa. St. 51, 30 Atl. 436.

*Tennessee*.—Stump v. Hughes, 5 Hayw. 93.

80. Jackson v. Ivabinit, Riley Eq. (S. C.) 9.

81. Jones v. Garza, 11 Tex. 186. **Testimony Held Insufficient.**

Where one whose name appears as a subscribing witness to a deed testifies that he has no recollection of ever having seen and attested the deed, and believes he never did, such testimony is not sufficient to show the deed to be spurious, in opposition to one witness who testifies to its execution by the parties, and of others who state corroborating facts. Juzan v. Toulmin, 9 Ala. 662, 44 Am. Dec. 448.

82. Sutherland v. Ross, 160 Pa. St. 29, 28 Atl. 437.

83. People v. McHenry, 19 Wend. (N. Y.) 482.

84. Losee v. Losee, 2 Hill (N. Y.) 609.

A witness to a deed who has

of bad character does not render inadmissible the attested instrument, though it may influence the jury in determining whether the writing was the act of the person purporting to have executed it.<sup>85</sup>

(3.) **Contradictory Declarations.** — So too, in such case, evidence of contradictory statements by the witness touching the fact of execution of the instrument may be received,<sup>86</sup> although it has been held that such evidence standing alone and unsupported is not sufficient to overcome the presumption that a witness would not have subscribed his name in attestation of that which did not take place.<sup>87</sup>

3. **Time for Authenticating.** — An instrument should properly be authenticated at the time it is offered in evidence,<sup>88</sup> but the court in its discretion may allow it to be introduced on the promise of a party to authenticate it later,<sup>89</sup> and any error in admitting an instrument without proof of its genuineness is cured where the proof is supplied by subsequent evidence.<sup>90</sup>

4. **Nature of Objection Necessary.** — A general objection that written instruments are incompetent, irrelevant and immaterial is not sufficient, on appeal, to raise the question of their execution.<sup>91</sup>

5. **Sufficiency of Evidence.** — A. IN GENERAL. — Slight evidence of authenticity is ordinarily sufficient to authorize the admission of evidence.<sup>92</sup>

proved it in court may be impeached though he be not a witness generally in the cause. *Vandyke v. Thompson*, 1 Har. (Del.) 109. The court said that probate is an *ex parte* proceeding; that the doctrine refusing the right to so impeach the witness would lead to the worst of consequences. "A felon convict, or insane man might go before the prothonotary and prove a deed which though forged, might not be invalidated unless you could attack the witness's character."

85. *Lawless v. Guelbreth*, 8 Mo. 139.

86. *McElwee v. Sutton*, 2 Bailey (S. C.) 128; *Boylan v. Meeker*, 28 N. J. L. 274, 294, 295; *Losee v. Losee*, 2 Hill (N. Y.) 609; *Smith v. Aspell*, 2 Strobb. (S. C.) 141. *Contra*, *Stobart v. Dryden*, 1 Mees. & W. (Eng.) 615; *United States v. Boyd*, 8 App. Cas. (D. C.) 440, citing 1 Greenl. Ev. § 126.

87. *Boylan v. Meeker*, 28 N. J. L. 274; *Curtis v. Hall*, 4 N. J. L. 361.

88. In Louisiana under art. 2245, Rev. Civ. Code, the authenticity of a writing must always be established before it is admitted. *Calhoun v.*

*Pierson*, 44 La. Ann. 584, 10 So. 880.

By Statute in some states it is provided that a document must be formally put in evidence and read to the jury before the close of the direct examination of the proving witness or the witness must be recalled. *Arkansas Stat.* 1894, § 2966; *California C. C. P.* 1872, § 2054; *Idaho Rev. Stat.* 1887, § 6085; *Oregon C. C. P.* 1892, § 843.

89. *Allen v. State*, 61 Ind. 268, 28 Am. Rep. 673; *Dupree v. Virginia Ins. Co.*, 92 N. C. 417; *Washington Co. Supr's. v. Dunn*, 27 Gratt. (Va.) 608.

90. *Bulen v. Granger*, 63 Mich. 311, 29 N. W. 718; *Houck v. Linn*, 48 Neb. 227, 66 N. W. 1103.

91. *Brown v. Schintz*, 203 Ill. 136, 67 N. E. 767; *London & N. W. Co. v. St. Paul P. I. Co.*, 84 Minn. 144, 86 N. W. 872; *Thompson v. Ellenz*, 58 Minn. 301, 59 N. W. 1023. And see article "OBJECTIONS," Vol. IX, p. 82.

92. *Patton v. Bank of Lafayette* 124 Ga. 965, 53 S. E. 664; *Grady v. American Cent. Ins. Co.*, 60 Mo. 116.

**Proof of Letters Need Not Be Beyond a Reasonable Doubt.** — Ap-

**B. QUESTION FOR COURT.**—The question of whether a written instrument has been sufficiently authenticated to be admissible in evidence is a question directed solely to the court and as to which it has a large discretion;<sup>93</sup> but the final question as to the due execution of the instrument admitted is for the jury to determine.<sup>94</sup>

## V. WEIGHT AND EFFECT.

**1. In General.**—The superior weight given to written instruments as evidence and the reasons for this are treated elsewhere in this work.<sup>95</sup> The courts do not, however, go to the extent of regarding written instruments as conclusive proof of the facts which they evidence.<sup>96</sup>

**2. Corporate Records.**—The records kept by a corporation of its business and organization are usually *prima facie* evidence only of the matters recorded.<sup>97</sup>

peal of Deep River Nat. Bank, 73 Conn. 341, 47 Atl. 675.

The testimony of a witness, who testified that he was not acquainted with the handwriting of the alleged author of a letter, but that the signature to the letter and the handwriting in the body of it was like other handwriting he had seen, which purported to be the signature of the alleged author, is insufficient as preliminary proof of the alleged author's handwriting, looking to the admission of the letter in evidence. *White v. Tolliver*, 110 Ala. 300, 20 So. 97.

<sup>93.</sup> *Patton v. Bank of Lafayette*, 124 Ga. 965, 53 S. E. 664; *Dixon v. New England R. Co.*, 179 Mass. 242, 60 N. E. 581 (conclusive unless all the evidence is reported and the finding is unwarranted by it); *Carri-co v. McGee*, 1 Dana (Ky.) 5; *Gorton v. Hadsell*, 9 Cush. (Mass.) 508; *Ortmann v. Merchants' Bank*, 41 Mich. 482, 2 N. W. 677.

"The true rule, we think, upon this subject, is this: The party offering a paper must make out a *prima facie* case; he must show apparently, that the fact is as he contends. If the evidence wholly fails to show the execution, the Judge ought to reject the deed. It is not worth while to burden the case with such a paper. It is irrelevant. But if there be a reasonable probability established that the paper is what it purports to be, even though there may be grave doubts as to what the

truth is, it is then a question of fact for the jury, and the paper ought to go before them, with instructions as to their duty. The execution of the paper will then be a part of the matter they are called on to try, and they must consider it in the making of their verdict." *Granniss v. Irvin*, 39 Ga. 22.

<sup>94.</sup> *Campbell v. Bates*, 143 Ala. 338, 39 So. 144; *Davis v. Wood*, 161 Mo. 17, 61 S. W. 695; *Skow v. Locke*, 3 Neb. (Unof.) 176, 91 N. W. 204; *Grady v. American Cent. Ins. Co.*, 60 Mo. 116; *First Nat. Bank v. Erickson*, 20 Neb. 580, 31 N. W. 387.

The admission in evidence of a deed by the court on preliminary proof of its execution does not relieve the party from proving its execution and delivery to the jury. *Scott v. Delany*, 87 Ill. 146.

<sup>95.</sup> See article "WEIGHT AND EFFECT OF EVIDENCE." And see *Llado v. Tritone*, 15 Fed. Cas. No. 8,427; *Foster v. Ohio*, etc. Min. Co., 17 Fed. 130; *Warren v. Booth*, 51 Iowa 215, 1 N. W. 502.

<sup>96.</sup> *Watkins v. Dupuy*, 87 Va. 87, 12 S. E. 204; *Kimball v. Lincoln*, 99 Ill. 578; *Church v. Melville*, 17 Or. 413, 21 Pac. 387.

**Ancient Documents.**—A code provision allowing their introduction without proof of authenticity does not import verity to their recitals. *Gwin v. Calegaris*, 139 Cal. 384, 73 Pac. 851.

<sup>97.</sup> A statement in the minutes

**3. Use by Adverse Party.**—A party who has introduced documents in evidence, cannot complain or object to their use by his opponent.<sup>88</sup>

**4. Introducing Part of Document.**—Where a party introduces only a portion of a document or record<sup>89</sup> his opponent is entitled to offer the remainder of it<sup>1</sup> and to have it treated as evidence com-

of a corporation meeting that a certain director was present and voted is not overcome by his testimony that he did not vote. *Metropolitan El. R. Co. v. Manhattan R. Co.*, 14 Abb. N. C. (N. Y.) 103, 11 Daly 373.

**98. United States.**—*Blanchard v. Commercial Bank*, 75 Fed. 249, 21 C. C. A. 319.

*Connecticut.*—*Bristol v. Warner*, 19 Conn. 7.

*Illinois.*—*Boudinot v. Winter*, 190 Ill. 394, 60 N. E. 553, *affirming* 91 Ill. App. 106.

*Kansas.*—*Kingman v. Conway*, 61 Kan. 859, 59 Pac. 1084.

*Kentucky.*—*Orr v. Foote*, 10 B. Mon. 387.

*Mississippi.*—*Shotwell v. Hamblin*, 1 Cushm. 156, 55 Am. Dec. 83.

*Missouri.*—*Beach v. Curle's Admr.*, 15 Mo. 105.

*Virginia.*—*Fechheimer v. Bank of Norfolk*, 31 Gratt. 651; *Freeland v. Cocke*, 3 Munf. 352.

A written instrument which was proved by the writer but was not introduced at the time, may be introduced in rebuttal by the other party without further authentication. *Matoushek v. Dutcher & Sons*, 67 Neb. 627, 93 N. W. 1049.

**Letters.**—*Zimmerman v. Huber*, 29 Ala. 379.

**Letters Once Proved** may be used by any party to the record without further proof. *Haskit v. Elliott*, 58 Ind. 493.

**99. Party Need Introduce Only so Much of an Instrument as he Desires.**—*Imperial Hotel Co. v. Claffin Co.*, 55 Ill. App. 337; *Fouche v. Merchants Nat. Bank*, 110 Ga. 827, 36 S. E. 256.

Where a party offers in evidence a portion of a letter written to him by his adversary, such adversary may, when he comes to his case, read the whole of the letter, but he can not compel the other party to offer as his evidence the whole of the letter in order that he may have

the benefit of any admission contained in it. *Raphael v. Hartman*, 87 Ill. App. 634.

**1. United States.**—*Butler v. The Arrow*, 6 McLean 470, 4 Fed. Cas. No. 2,237.

*California.*—*Spanagel v. Dellinger*, 38 Cal. 278; *English v. Johnson*, 17 Cal. 107, 76 Am. Dec. 574.

*Georgia.*—*Vischer v. Talbotton Br. R. Co.*, 34 Ga. 536; *Fouche v. Merchants' Nat. Bank*, 110 Ga. 827, 36 S. E. 256 (minutes of stockholders' meeting).

*Illinois.*—*Imperial Hotel Co. v. Claffin Co.*, 55 Ill. App. 337; *Cramer v. Gregg*, 40 Ill. App. 442; *Heinsen v. Lamb*, 117 Ill. 549, 7 N. E. 75; *Piano Mfg. Co. v. Parmenter*, 30 Ill. App. 569; *Phillips v. Scales Mound*, 195 Ill. 353, 63 N. E. 180.

*Indiana.*—*State v. Hawkins*, 81 Ind. 486; *Glover v. Stevenson*, 126 Ind. 532, 26 N. E. 486.

*Iowa.*—*Jackson v. Adams*, 100 Iowa 163, 69 N. W. 427.

*Kentucky.*—*Phillips v. Green*, 5 T. B. Mon. 344.

*Louisiana.*—*Lapice v. Clifton*, 17 La. 152.

*Massachusetts.*—*Burgess v. Davis Sulphur Ore Co.*, 165 Mass. 71, 42 N. E. 501; *Noble v. Fagnant*, 162 Mass. 275, 38 N. E. 507.

*Michigan.*—*Pinkham v. Cockell*, 77 Mich. 265, 43 N. W. 921; *Thayer v. McGee*, 20 Mich. 195.

*Missouri.*—*Korte v. Hoffman*, 97 Mo. 284, 10 S. W. 390.

*New York.*—*Ames v. Manhattan L. Ins. Co.*, 167 N. Y. 584, 60 N. E. 1106, *affirming* 31 App. Div. 180, 52 N. Y. Supp. 759.

*North Carolina.*—*University v. Harrison*, 93 N. C. 84.

*South Carolina.*—*Conroy v. Mordecai*, 2 Rich. L. 518.

*South Dakota.*—*Reynolds v. Hinrichs*, 16 S. D. 602, 94 N. W. 694.

*Tennessee.*—*Duncan v. Gibb*, 1 Yerg. 256.

*Texas.*—*Missouri, etc. R. Co. v.*

ing from the first party.<sup>2</sup> A document the foundation of the suit must be introduced as a whole.<sup>3</sup>

## VI. CONSTRUCTION.

The construction of written instruments is a matter for the court,<sup>4</sup> but no judicial construction will be placed upon written instruments, alone, when they themselves refer to oral conversations between the parties as to which there is a dispute.<sup>5</sup>

## VII. USE ON APPEAL.

Written instruments are ordinarily not carried before the appellate court, as originals, though copies of them are customarily inserted in the transcript.<sup>6</sup>

Criswell, 34 Tex. Civ. App. 278, 78 S. W. 388.

*West Virginia*. — Rowan v. Chenoweth, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. Rep. 796.

*Wyoming*. — Bosler v. Cole, 14 Wyo. 423, 84 Pac. 895.

**Letters.** — Walker v. Griggs, 28 Ga. 552; Glover v. Stevenson, 126 Ind. 532, 26 N. E. 486; Lester v. Piedmont & A. Ins. Co., 55 Ga. 475.

2. This principle is clearly illustrated in the case of Waller v. State, 102 Ga. 684, 28 S. E. 284, where the court says the situation is analogous to that in which a living witness is subject to cross-examination by the adverse party, or to the reading of interrogatories in a civil case, where the party offering the answers is not bound to read both the direct and cross-examination.

3. Wallace v. Dorris, 218 Pa. St. 534, 67 Atl. 858 (indorsement on

lease must be offered); Cary v. Cary, 189 Pa. St. 65, 42 Atl. 19.

**Indorsement on Instruments.** Where a written instrument is offered in evidence, all the memoranda or indorsements upon it are also put in evidence and may be read to the jury by the other party. Isbell v. Brinkman, 70 Ind. 118.

4. The legal effect and construction of a written instrument is to be determined by the court from the instrument itself. Wilder v. Moffat, 33 Misc. 777, 67 N. Y. Supp. 1001.

5. Beach v. Travelers' Ins. Co., 73 Conn. 118, 46 Atl. 867; Rankin v. Fidelity, etc. Co., 189 U. S. 242.

**Rules Governing Construction,** see article "PAROL EVIDENCE," Vol. IX.

6. "Original documents have no place in the record unless expressly ordered by the trial court to be incorporated in it and sent to this court," but the transcript usually contains copies of them. Brown v. Schintz, 203 Ill. 136, 67 N. E. 767.

# GENERAL INDEX

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Volumes I to XIV.

## EXPLANATORY NOTE.

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Analyses prefixed to articles are not duplicated in this index and should therefore always be examined in connection with the index matter. Topics which are also the subjects of articles are distinguished from those constituting mere index heads, by a distinctive type (thus, **ABDUCTION**). The same distinction has been made in the cross-references (thus, ABDUCTION). The words *supra* or *infra* are used where reference is made to other matter appearing under the same general index head. The letter *n* following the volume and page reference indicates that the matter referred to is in the notes.



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